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PEOPLE v. WALKER. (Cr. 1275.)

(District Court of Appeal, Second District, Division 2, California. Jan. 12, 1926. Hearing Denied by Supreme Court March 11, 1926.)

1. Criminal law ⚖574—Statute as to dismissal of prosecution on failure to find indictment or file information or bring defendant to trial within time prescribed held statutory construction of constitutional guaranty of speedy trial (Pen. Code, § 1382; Const. art. 1, § 13).

Pen. Code, § 1382, as to dismissal of prosecution on failure to find indictment or file information within 30 days after defendant is committed to answer, or on failure to bring defendant to trial within 60 days after finding of indictment, is a statutory construction of Const. art. 1, § 13, guaranteeing defendant in criminal prosecution speedy trial, so far as to indicate what is a reasonable time within which to take steps referred to by statute.

2. Criminal law ⚖576(3)—Remittitur issued from District Court of Appeal 60 days after pronouncement of judgment and retrial, set 37 days thereafter, held not to deprive defendant of constitutional right to speedy trial (Supreme Court rule 34; Const. art. 6, § 4; Const. art. 1, § 13; Pen. Code, § 1382).

Where remittitur was issued from District Court of Appeal 60 days after pronouncement of judgment reversing a conviction, in accordance with Supreme Court rule 34, providing that remittitur shall not issue until 30 days after judgment of District Court of Appeal becomes final therein, which, under Const. art. 6, § 4, is 30 days after pronouncement of judgment, and retrial was set 37 days after issuance of remittitur, defendant thereby received the full meas-

ure of the guaranty of speedy trial, under Const. art. 1, § 13, as defined by Pen. Code, § 1382, if latter statute is applicable to a second trial after judgment of reversal.

3. Courts $\S$ 85(1)—Supreme Court held to have power to make rules of practice having force of positive law as between parties (Const. art. 6, § 3).

Supreme Court, under its power to make and adopt rules for itself and District Court of Appeal, granted by Const. art. 6, § 3, has authority to make rules of practice, with force of positive law, so far as rights of parties are concerned, provided rules do not conflict with lawful legislative acts.

4. Criminal law $\S$ 1192—Supreme Court rule, providing that remittitur shall not issue until 30 days after judgment of District Court of Appeal becomes final therein, held valid (Supreme Court rule 34).

Supreme Court rule 34, providing that when judgment of District Court of Appeal becomes final therein remittitur shall not be issued until 30 days thereafter, is a valid rule, having all sanction of positive law.

5. Criminal law $\S$ 1191—Judgment of District Court of Appeal becomes final 30 days after "pronounced" therein, but does not conclude rights of parties until 60 days after pronouncement (Const. art. 6, § 4).

Under Const. art. 6, § 4, judgment of District Court of Appeal is "pronounced" when court directs entry of judgment, and after 30 days it becomes final in that court, but does not conclude rights of parties until 60 days after pronouncement, in view of Supreme Court's power to review judgment within 30 days after it becomes final in District Court of Appeal.

[Ed. Note.—For other definitions, see Words and Phrases, Pronounce.]

6. Criminal law $\S$ 1192—Supreme Court rule, providing that remittitur shall not issue until 30 days after judgment of District Court of Appeal becomes final therein, held not in conflict with Code providing for remittitur immediately after judgment of appellate court is "given" (Supreme Court rule 34; Const. art. 6, § 4; Pen. Code, § 1264).

Supreme Court rule 34, providing that remittitur shall not issue until 30 days after judgment of District Court of Appeal becomes final therein in accordance with Const. art. 6, § 4, under which judgment of District Court of Appeal does not conclude rights of parties until 60 days after pronouncement, is not in conflict with Pen. Code, § 1264, providing that judgment of appellate court when given must forthwith be remitted to trial court, since word "given" refers to judgment when conclusive on rights of parties, and not when pronounced.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Given.]

7. Criminal law $\S$ 1180—Determination of District Court of Appeal that information is sufficient against demurrer is conclusive on second appeal.

Determination of District Court of Appeal that information was sufficient as against de-

murrer is conclusive when same question is again presented on appeal from retrial, though additional points are for first time raised in support of demurrer.

8. Criminal law $\S$ 1180—Doctrine of law of case applies to every point presented by record necessarily involved in prior decision.

Doctrine of law of case applies, not only to points which court actually considered, but to every point presented by record which was necessarily involved in prior decision.

9. False pretenses $\S$ 38—Proof of only one of several false pretenses charged, if a material inducement to part with property, sustains conviction.

Where information charges several false pretenses, conviction may be sustained by proof of only one of such pretenses, if material in inducing complaining witness to part with money or property.

10. False pretenses $\S$ 7(5), 49(3)—Representation that defendant, selling interest in business, had enough patients to fill an 11-room house held one of fact, and sufficiently proved by evidence.

In prosecution for obtaining money by false pretenses in sale of "divine healing" business, representation that defendant had patients sufficient to fill an 11-room house was one of fact, and was sufficiently proved by evidence to have been made and to have been false.

11. Criminal law $\S$ 1159(2)—Sufficiency of testimony may not be tested, on appeal, by weight which court might have given it, if a juror.

Sufficiency of evidence to prove false pretenses may not be tested, on appeal, by weight which members of appellate court might have given evidence, had they been sitting as trial jurors; it being the province of trial jury to weigh and consider testimony and reject all or part as false.

12. False pretenses $\S$ 49(1)—Testimony by complaining witness that he paid money on representation that he could make large profits held not to show him solely influenced by such representation, where other representations led defendant to expect large profits.

Testimony by complaining witness, in prosecution for obtaining money by false pretenses, that he paid defendant for one-half interest in "divine healing" business on representation that defendant could make him a large profit, does not show that complaining witness was influenced solely by such representation, where defendant's representation as to number and character of patients she then had was material in leading witness to believe he would make large profits.

13. False pretenses $\S$ 7(5)—Representation as to monthly profit to be realized from interest in business held not indictable.

Representation that purchaser of interest in "divine healing" business could and would realize \$1,000 per month or more profit is not indictable however false it may be.

14. False pretenses — 7(5).

Representation to be indictable must be of past event or existing fact, and not of future event, whether in form of promise or opinion.

15. False pretenses — 52—Instruction that conviction for false pretenses may be had on only one of several false pretenses charged is proper, but not where one of false pretenses alleged is insufficient.

Generally, where information charges several false pretenses, it is proper to instruct jury that conviction may be had on only one of them, if a material inducement to parting with property, but not where one of false pretenses charged is but an expression of an opinion of a future possibility.

16. Criminal law — 144(16) — Instructing conviction might be had on any one of false pretenses charged, where one pretense was insufficient, held harmless, where no evidence supported insufficient pretense; jury being presumed not to base verdict on such pretense.

Where one of several false pretenses charged in information was insufficient for conviction, error in instruction that conviction might be returned, if jury believed any one of pretenses charged, was harmless, where defendant admitted that there was not a scintilla of evidence to support the insufficient pretense, and therefore it could not be made the basis of verdict, as jurors are presumed to possess ordinary intelligence and have regard for sanctity of their oath.

Appeal from Superior Court, San Diego County; L. D. Jennings, Judge.

Vivian Walker was convicted of obtaining money by false pretenses, and she appeals. Affirmed.

See, also, 231 P. 572.

Edward J. Kelly, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. Defendant was charged with the crime of obtaining money by false pretenses. She was convicted of the charge, and now appeals from the judgment and from an order denying her motion for a new trial.

On August 3, 1922, at the city of San Diego, defendant, who claimed to be a "divine healer," sold to the complaining witnesses G. W. Elgin and Mary E. Elgin, husband and wife, a half interest in the "divine healing business" then being conducted by defendant at San Diego. The parties entered into a written contract, whereby it was agreed that the profits of the business should be divided equally between defendant, as the party of the first part, and the Elgins, as the parties of the second part. At the same time G. W. Elgin paid defendant the sum of \$1,500 for the one-half interest so purchased by him

and his wife. It is charged in the information that the payment of this sum was induced by seven false pretenses, alleged to have been made by defendant to the Elgins. These pretenses, as set out in the information, are as follows: (1) That defendant was then and there a "divine healer"; (2) that she then and there had patients, suffering from confining illnesses, maladies, and diseases, sufficient to more than fill an 11-room sanitarium or house; (3) that she then and there was seeking to lease a sanitarium or house sufficient to accommodate that number of patients; (4) that she then and there had a patient with whom she had an agreement to pay her the sum of \$1,500 for treatments; (5) that she then and there had another patient with whom she had an agreement to pay her the sum of \$2,000 for treatments; (6) that she then and there had sufficient patients and business to bring in an income in excess of \$1,000 per month; and (7) that if the Elgins would purchase from her a one-half interest in the divine healing business the former "could and would realize therefrom an income of \$1,000 per month or more."

This is the second appeal taken by defendant. The first appeal (231 P. 572) resulted in a reversal of the judgment for errors committed in the admission of certain evidence educed by the prosecution. Our judgment on the first appeal was pronounced by us on October 30, 1924. Immediately upon the expiration of 60 days thereafter, i. e., on December 30, 1924, the remittitur was issued by the clerk of this court and was filed on the next day in the court below. On January 22, 1925, the case was called in the superior court for retrial. Thereupon defendant objected to the cause being set for trial, and moved to dismiss the prosecution on the ground "that more than 60 days had expired since the time when," so it was claimed, "the remittitur should have been filed." The motion was denied. Thereupon the cause was set for trial on February 5, 1925, which was but 37 days after the issuance of the remittitur. The trial was commenced on that date and was concluded on February 10, 1925.

Appellant's first point is that the court erred in denying her motion to dismiss the prosecution. She contends that there was unreasonable delay between the pronouncement of our judgment on the first appeal and the date for which the cause was set for retrial; the time between those two dates being 97 days. The claim is entirely lacking in merit. Had the point not been pressed with such fervent zeal and with such evident good faith, we should have contented ourselves, in meeting it, with a mere reference to *Noel v. Smith*, 2 Cal. App. 158, 83 P. 167, and *People v. District Court of Appeal*, 193 Cal. 19, 222 P. 353. The earnestness with which the

point is urged prompts us to point out its fallacy with some degree of particularity.

[1] The defendant in a criminal prosecution is guaranteed a speedy trial alike by the Constitution and by statute. By section 13 of article 1 of the Constitution every accused person is guaranteed "the right to a speedy and public trial." The statute, in order to prescribe with definiteness what should constitute a reasonable time, under the constitutional mandate, for the taking of certain steps in the prosecution of a criminal action, declares that, unless good cause be shown to the contrary, a prosecution must be dismissed against a defendant when an indictment has not been found or an information has not been filed against him within 30 days after he was committed to answer, or when he "is not brought to trial within sixty days after the finding of the indictment, or filing of the information," and the trial has not been postponed on his application. Pen. Code, § 1382. This statutory provision is a construction of the constitutional mandate so far as to indicate what is a reasonable time within which the steps specifically referred to in the statute should be taken in order that the constitutional guaranty may be kept. In re Begerow, 133 Cal. 349, 65 P. 828, 56 L. R. A. 513, 85 Am. St. Rep. 178; *Id.*, 136 Cal. 293, 68 P. 773, 56 L. R. A. 528.

It is manifest that nothing in section 1382 warranted a dismissal of the prosecution against appellant, even if we were to concede, which we do not, that the issuance of the remittitur was unreasonably delayed. Whether section 1382 can have any possible application after there has been a judgment of reversal and a second trial has been ordered is a question respecting which there possibly may be some room for doubt under the language of some of the decisions of our Supreme Court. In the Matter of Begerow, *supra*, the court says that, regarded as a provision to enforce the constitutional guaranty, the effect of this Code section must be held to be:

"That an unexcused delay of sixty days, at any time, to try a defendant will entitle him to have the prosecution dismissed." 133 Cal. 355, 65 P. 830.

On the other hand, in *People v. Lundin*, 120 Cal. 308, 52 P. 807, it was definitely stated and specifically held that—

"This provision of the statute does not apply to cases where a defendant has appealed to this court and had his case sent back for a second trial."

To the same effect is *People v. Giesea*, 63 Cal. 345. See, also, *Ex parte Newell*, 188 Cal. 508, 206 P. 61.

However, if it should be assumed, for the purpose of this decision only, that the statute should be so interpreted as to entitle the accused to a dismissal of the prosecution in all

cases where the superior court, having acquired jurisdiction to order a trial, fails to set the cause for trial for more than 60 days after it became vested with jurisdiction to do so, still the fact remains that here appellant was brought to trial within less than 60 days after the superior court had acquired jurisdiction to try her a second time. In other words, if the requirement of section 1382 that a nonconsenting defendant must be brought to trial "within sixty days after the finding of the indictments or filing of the information" may be construed as applying to the case of one who has successfully appealed from a judgment of conviction, so as to entitle such a person to be brought to trial a second time within 60 days after the remittitur has come down, appellant still would fail to bring herself within even that latitudinous construction of the statute.

[2] If, now, we turn to the Constitution and consider its broad and comprehensive pledge of a speedy trial, we shall find nothing there to justify appellant's claim. The language of the organic law is most general. It simply declares that in criminal prosecutions the party accused "shall have the right to a speedy * * * trial." We think appellant received the full measure of this constitutional guaranty. The fallacy of her position lies in her erroneous assumption that the remittitur should have issued out of this court immediately upon the pronouncement of our judgment of reversal.

By the constitutional guaranty of a "speedy trial," says the court, in *Nixon v. State*, 2 Smedes & M. (Miss.) 497, 41 Am. Dec. 601, is intended:

"A trial conducted according to fixed rules, regulations, and proceedings of law, free from vexatious, capricious, and oppressive delays, manufactured by the ministers of justice."

Appellant's second trial was had according to, and within the time contemplated by, fixed rules and lawful regulations.

The remittitur issued out of this court on the former appeal without any vexatious or oppressive delay, and within the time prescribed by a rule promulgated by the Supreme Court for the government of this court, *viz.* rule XXXIV, which reads:

"When a judgment of a District Court of Appeal becomes final therein, the remittitur shall not be issued until after the lapse of 30 days thereafter, unless otherwise ordered."

[3] The Constitution expressly declares that the Supreme Court shall have power "to make and adopt rules, not inconsistent with law," for the government of itself and of the District Courts of Appeal. Section 4, art. 6. By virtue of the power thus conferred, the Supreme Court has authority to make rules of practice which have the force of positive law, so far as the rights of parties are concerned, provided such rules do not conflict

with any lawful act of the Legislature. *Brooks v. Union Trust, etc., Co.*, 146 Cal. 138, 79 P. 843.

[4, 5] Rule XXXIV is a valid rule, having all the sanction of positive law. It is provided by section 4 of article 6 of the Constitution:

That "judgments of the District Courts of Appeal shall become final *therein* upon the expiration of 30 days after the same shall have been pronounced."

Also:

That the Supreme Court shall have power "to order any cause pending before a District Court of Appeal to be heard and determined by the Supreme Court."

And:

That such order "may be made before judgment has been pronounced by a District Court of Appeal, or within 30 days after such judgment shall have become final *therein*." (Italics ours.)

The judgment of a District Court of Appeal is "pronounced" by it when it directs the entry of judgment, which ordinarily is at the time when its opinion is filed. Upon the expiration of 30 days after the judgment has been so pronounced by the District Court of Appeal the judgment becomes "final therein"; i. e., it then, and not before, becomes final *in that court*. But it does not then become a "final judgment," in the sense that it is conclusive of the rights of the parties. The effect of the constitutional provision that the judgment of a District Court of Appeal shall become final "therein" upon the expiration of 30 days after it shall have been "pronounced" by that court is to take from that court any further power to set aside or modify its judgment; but under the preceding sentence of section 6 of article 6, the Supreme Court, at any time within 30 days after the judgment shall have become final in the District Court of Appeal, may still order the cause to be heard and determined by it. From this it follows that the judgment of a District Court of Appeal does not become final, in the sense that it is conclusive of the rights of the parties, until the expiration of 60 days after it shall have been pronounced by that court. It was for the purpose of carrying these provisions of the Constitution into effect, and to afford litigants an opportunity to obtain a judgment of the Supreme Court after decision by a District Court of Appeal, that rule XXXIV was adopted. These views are but restatements of what was said in *Noel v. Smith*, supra, and *People v. District Court of Appeal*, supra.

It follows from what we have said that rule XXXIV is a valid rule, and that the remittitur issued out of this court within due time, unless there be some valid statutory enactment with which the rule is in conflict.

[6] Appellant claims that the rule conflicts

with section 1264 of the Penal Code. That section reads:

"When the judgment of the appellate court is given, it must be entered in the minutes, and a certified copy of the entry, with a copy of the opinion of the court attached thereto, *forthwith* remitted to the clerk of the court from which the appeal was taken." (Italics ours.)

It is earnestly urged by appellant that under this statutory enactment it was the duty of the clerk of this court to issue the remittitur immediately upon the pronouncement of our judgment of reversal on October 30, 1924. The contention is based upon the erroneous assumption that a judgment is "given" when it is pronounced. As the word is used in section 1264, the judgment of the appellate court is "given" when, and only when, it becomes conclusive upon the right of the parties. In *Young v. Wright*, 52 Cal. 410, the court says:

"A judgment is duly 'rendered' when it is duly pronounced and ordered to be entered. [Citing authorities.] But a judgment duly 'made or given' is a complete judgment, properly entered in the judgment book, so that it may be pleaded in bar of another action."

As we already have shown, our judgment on the first appeal did not become conclusive of the rights of the parties, and therefore was not "given," in the sense in which that word is used in section 1264, until the expiration of 30 days after it became final in this court, or 60 days after its pronouncement by us; in other words, it was not "given" until December 29, 1924, the day before that on which the remittitur was issued. Any other construction of section 1264 would throw it out of harmony with those provisions of the Constitution, found in section 4 of article 6, which we have quoted supra. It follows from the foregoing that the remittitur was issued in due time, and that appellant was not deprived of her constitutional privilege of a "speedy trial."

[7] It next is contended that the court below erred in overruling appellant's demurrer to the information. This ruling was made prior to the former appeal, and was presented to this court on that appeal as error entitling appellant to a reversal. We, at that time, decided the question adversely to appellant. It therefore has now become the settled law of the case that the information is sufficient as against the demurrer interposed thereto, and we are concluded by our former decision from any further review of the questions presented by the demurrer. It is immaterial that appellant now advances additional points in support of her demurrer. Every point which might have been advanced by her against the ruling of the lower court on the demurrer was necessarily involved when that ruling was presented to us on the former appeal as a ground for reversal.

[8] It is well established that the doctrine of the law of the case applies not only to the points which the court actually considered, but to every point presented by the record and which was necessarily involved in the prior decision. *Thompson v. Louisville Banking Co.*, 55 S. W. 1080, 21 Ky. Law Rep. 1611. Accordingly, it is held that where the sufficiency of a pleading, challenged by demurrer, is determined on one appeal, the determination is conclusive when the same question again is presented in any subsequent stage of the cause, although the specific reasons subsequently urged in support of the demurrer were not presented on the former appeal. *McCowen v. Pew*, 18 Cal. App. 302, 312 et seq., 123 P. 191; *Thompson v. Louisville Banking Co.*, supra; *Ohio Valley Trust Co. v. Wernke*, 179 Ind. 49, 99 N. E. 734; 4 C. J. 1108. This is the rule in civil cases; and there is no reason in the nature of things why it should not be equally applicable to criminal causes. See *People v. Bennett*, 5 Cal. Unrep. 824, 50 P. 703; *People v. Thompson*, 115 Cal. 160, 46 P. 912; and *People v. Hatch*, 163 Cal. 372, 125 P. 907, where the applicability of the doctrine of the law of the case to criminal causes was assumed by the court as a matter of course.

[9, 10] It is urged with much earnestness that the evidence is insufficient to sustain the verdict. Where, as here, the information charges several false pretenses, a conviction may be had, and will be sustained, by proof of only one of such pretenses, provided it be established to the satisfaction of the jury that the particular pretense which is so proved was material in inducing the complaining witness to part with his money or property. 12 Cal. Jur. 469, 470. At least one of the pretenses charged in the information was sufficiently proved; namely, the representation to the effect that appellant "had patients, suffering from confining illnesses, maladies, and diseases, sufficient to more than fill an 11-room sanitarium or house." The gist of this representation is not the size of the house, nor the particular location or character of any specific house, but the possession by appellant of patients to the number and of the character mentioned in the representation. Speaking of this pretense, we said on the former appeal that it "was one of fact," and that by it appellant meant "to convey the idea that she had at least 11 patients of the character referred to in the representation, or, if not that, it surely conveyed the idea, considering that the alleged patients were said to be suffering from confining illnesses, maladies, and diseases, that appellant was engaged in the conduct of a business of some magnitude, and it was to that extent a material representation."

The making of this pretense was proved by the testimony of two witnesses. Mrs. Elgin testified that on August 3, 1922, prior to

the payment of the money, in the presence of herself and of her husband, appellant said that she had patients "enough to fill any sized house; that they would come and fill every room that we could get"; that she had enough "to fill a 14-room house," and "that they were sick; that they were bedridden, some of them were." "Q. Did Mrs. Walker, before you signed the contract [the contract by which the Elgins purchased a half interest in appellant's devine healing business], tell you that she had patients in a number, no matter what the number may be, but in a number which would actually more than fill an 11-room house? A. Yes, sir." Mr. Elgin testified that before he paid the money appellant told him and his wife, each in the presence of the other, that she "had patients enough to fill any sized house she could get in San Diego"; that she "had lots of patients that she could put into a hospital if she had the room"; and that "there was no question but what she could make us lots of money." He further testified that before he paid the money he, his wife, and appellant looked at a 14-room house in San Diego; that upon this occasion he asked appellant if she could get enough patients to fill that 14-room house, and that appellant replied, "There will be no question about that. I have got them all promised; enough to fill it." He also testified that upon this occasion appellant said they could turn the large billiard room in the 14-room house into a ward and "put in several beds." It is a fair inference from these statements of appellant, made by her to Mr. and Mrs. Elgin before the money was paid, that she intended to convey the idea, and that she did convey the idea to each of the complaining witnesses; that she had at that time enough patients, of the character described in the charge, to more than fill an 11-room house—even a 14-room house. The falsity of this representation and its fraudulent character may well be inferred from all the evidence, considered in its entirety.

[11] Our attention is called to what are claimed to be inconsistencies or disparities in the testimony of each of the complaining witnesses. The sufficiency of this testimony may not be tested on appeal by the weight which the members of this court might have given it, had they been sitting as jurors on the trial of the case. It is the province of the jurors to weigh and consider such testimony. They may reject all of it as false, or they may determine to accept as true one or the other of such contradictory asseverations. *People v. Durrant*, 116 Cal. 200, 48 P. 75; *People v. Mooney*, 177 Cal. 650, 171 P. 690; 8 Cal. Jur. 587.

[12] On cross-examination, Mr. Elgin testified that his reason for paying the money to appellant was her statement to him that she could make him "a large profit out of the investment." Wherefore it is argued that he

was influenced solely by the representation that he could make "a large profit," and not by appellant's representation as to the number of patients which she claimed to have had. This conclusion obviously is non sequitur. Undoubtedly the making of profit was the ultimate reason prompting Elgin to part with his money; but appellant's representation as to the number and character of patients she then had was a material factor in leading him to believe that he would make large profits if he accepted appellant's offer to take him and his wife into partnership.

[13] One other point remains to be considered. The fourth and fifth false pretenses alleged in the information were conceded by appellant on the former appeal to be representations of fact and not mere statements of opinion. The first, second, third, and sixth alleged false pretenses were held by us on that appeal to be indictable representations of past or present facts. The seventh and last pretense set forth in the information, the one to the effect that if the Elgins would purchase from appellant a half interest in the divine healing business they (the Elgins) "could and would realize therefrom an income of \$1,000 per month or more," is not mentioned in the opinion which we handed down on that appeal. This pretense clearly is not an indictable representation, however false it may have been. The amount of profit which could or would subsequently be realized by the Elgins from the business, if they should conclude to purchase a half interest therein, necessarily was a matter of opinion, relating to something which possibly might happen in the future.

[14] It is well settled that to be indictable the representation must be of a past event or of an existing fact. No representation of a future event, whether in the form of a promise or of an opinion, can be a criminal pretense. *People v. Jordan*, 66 Cal. 10, 14, 4 P. 773, 56 Am. Rep. 73; *People v. Wasservogle*, 77 Cal. 173, 19 P. 270; *People v. Gibbs*, 98 Cal. 661, 33 P. 630; *People v. Green*, 22 Cal. App. 45, 48, 133 P. 334; 11 R. C. L. p. 831; note to *Barton v. People*, 25 Am. St. Rep. 379.

[15] Notwithstanding the seventh false pretense charged in the information was but the expression of an opinion, based upon expectation and hope, and therefore not a sufficient basis for a conviction thereon, the court instructed the jurors to the effect that they might convict appellant if they believed that "any one" of the pretenses set out in the information was proven beyond a reasonable doubt. Considered as an abstract proposition of law, it may be said, generally speaking,

that where an information charges several false pretenses it is proper to instruct the jury that a conviction may be had on only one of them, if it was material in inducing the prosecuting witness to part with his money. *People v. Griesheimer*, 176 Cal. 44, 167 P. 521. But, obviously, such an instruction should not be given where, as here, one of the false pretenses charged in the information is but the expression of an opinion having reference to an expected future possibility.

[16] In the course of his argument in support of his contention that the evidence is insufficient to support the verdict, appellant's counsel makes the point that, because the jurors were instructed that a conviction might be had upon "any one" of the pretenses set forth in the instruction, it necessarily follows that "the verdict is an uncertainty" and that the uncertainty "nullifies" the verdict. The reason assigned for this contention is that it cannot possibly be known whether the verdict was or was not based upon the seventh alleged false pretense. The argument is, in effect, but an indirect way of saying that the giving of the instruction, under the circumstances of this case, was error. We think it was error to give the instruction. But the vital question is, Was it harmful error? We do not think the instruction could possibly have injured appellant. She admits that there was not a scintilla of evidence tending to support the charge that she made the seventh alleged false pretense. In the brief filed on her behalf her counsel says:

"As to the sixth specification [the sixth alleged false pretense] * * * the record is entirely silent as to anything tending to support the charge. The same may be said of specification No. 7 to the effect that the defendant falsely represented that if the Elgins would purchase a half interest from the defendant they would realize therefrom an income of \$1,000, or more."

Jurors must be presumed to possess at least ordinary intelligence and to have an honest regard for the sanctity of their oaths. If, therefore, it be a fact, as appellant concedes it to be, that no evidence was educed which tends to support the seventh alleged false pretense, then that representation could not possibly have been made the basis of the verdict of any one of the jurors. For this reason we think that the error in giving the instruction was harmless and not ground for reversal.

The judgment and the order denying a new trial are affirmed.

We concur: WORKS, J.; CRAIG, J.

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PEOPLE v. JONES. (Cr. 1258; Cr. 2887.)

(District Court of Appeal, Second District, Division 2, California. Jan. 4, 1926. Hearing Denied by Supreme Court March 3, 1926.)

1. Rape $\hookrightarrow$ 52(1).

Testimony of 15 year old prosecutrix, who was accused's stepdaughter, *held* to warrant conviction for rape.

2. Rape $\hookrightarrow$ 54(1).

Accused may be convicted of rape on uncorroborated testimony of prosecutrix.

3. Criminal law $\hookrightarrow$ 742(1).

Credibility of witnesses, prosecutrix, and accused in rape prosecution *held* for jury.

4. Criminal law $\hookrightarrow$ 371(9)—Evidence as to previous lascivious conduct and intercourse by accused with prosecutrix held properly admitted.

In prosecution for rape of accused's 15 year old stepdaughter, testimony by prosecutrix as to previous lascivious conduct by accused toward her, and as to alleged act of sexual intercourse in preceding year, *held* properly admitted, even if such act was merely one of numerous indecent familiarities to which she had previously testified.

5. Witnesses $\hookrightarrow$ 270(1).

Cross-examination of prosecution in rape case may not extend indefinitely into incompetent and collateral matters

6. Criminal law $\hookrightarrow$ 1170½(2)—In prosecution for statutory rape, permitting prosecution to attempt to impeach prosecutrix's mother by questions as to quarrel with prosecutrix held not error, where testimony was excluded.

In prosecution for rape of accused's 15 year old stepdaughter, *held*, that it was not error to permit prosecution to attempt to impeach prosecutrix's mother by questions concerning her alleged quarrel with prosecutrix, because of refusal to drop charge, where mother positively denied any such conversation, and prosecutrix's testimony relating thereto was excluded.

7. Rape $\hookrightarrow$ 59(12)—Refusal to charge that, as respects prosecutrix's credibility, law required her to make complaint at first opportunity to one in whom she had confidence held not error.

Where, in prosecution for rape on accused's 15 year old stepdaughter, prosecutrix testified that her previous complaints of accused's conduct were ignored by her mother, refusal to charge that, as respects credibility of prosecutrix, law required her to make complaint at first opportunity to one in whom she had confidence, and that it would be presumed that an innocent woman would complain at earliest practical moment, *held* not error.

8. Rape $\hookrightarrow$ 52(3)—That prosecutrix under 16 made no outcry held immaterial on issue whether rape occurred.

That prosecutrix under 16 made no outcry, but concealed alleged offense from others, is immaterial, if jury is satisfied on sufficient evidence of accused's guilt of rape as charged.

9. Criminal law $\hookrightarrow$ 889—Requiring jury in rape case to amend verdict to state place of imprisonment held not error (Pen. Code, §§ 264, 1097, inapplicable).

Where jury in rape case were provided with forms of verdict, it was not error to require them to amend verdict of guilty by stating place of imprisonment, as required by Pen. Code, § 264, and, as they had been instructed to do; section 1097 not being applicable.

10. Criminal law $\hookrightarrow$ 829(1).

Refusal to give accused's requested instruction as to matters fully covered by instructions given is not error.

11. Indictment and information $\hookrightarrow$ 176 — Instruction that date of alleged rape charged in information was immaterial, and that date need not be specifically proved, held not erroneous.

Instruction in rape prosecution that date alleged in information on which offense charged was alleged to have occurred was immaterial, and that any date on or about such date prior to filing information was sufficient, and that date need not be specifically proved, *held* not erroneous.

On Hearing in Supreme Court.

12. Criminal law $\hookrightarrow$ 1170(4)—Rape $\hookrightarrow$ 38(2)—Refusal to permit cross-examination of 15 year old prosecutrix as to consent and resistance to show circumstances of rape, held error, but was not prejudicial, in view of her practical admission that no force or threats were used.

In prosecution for rape on accused's 15 year old stepdaughter, court should have permitted accused to cross-examine prosecutrix respecting her consent and resistance to show circumstances of offense, and its exclusion because prosecutrix was under statutory age was error, but was not prejudicial, in view of prosecutrix's practical admission that no force or threats were used.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

William J. Jones was convicted of rape, and he appeals. Affirmed.

Thomas C. Whitlock, of Banning, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

CRAIG, J. The appellant in this case was charged by information with having committed rape upon a girl 15 years old, at Banning, in Riverside county, whom the evidence disclosed to have been his own stepdaughter. A jury found him guilty, a motion for new trial was presented and overruled, and he appeals from the judgment and ruling upon said motion.

One of the principal grounds of this appeal consists of a description in minute detail of lascivious practices of appellant

against the person of the prosecutrix, a mere child, testified to by her and supported by other evidence, as having commenced at Wardner, Idaho, when she was but 10 years of age, continuing thence to Portland, Or., and terminating in statutory rape at Banning, from all of which it is argued that the verdict of the jury was a result of passion and prejudice. It is but natural that jurors, as well as appellant, should be struck with the heinous character of such an offense, when it has been shown that his corrupt approaches toward one with whose protection he was charged had extended over a period of some 5 years, but we fail to find anything in the record to justify the assumption that the jury in any way deviated from a dispassionate, fair, and deliberate consideration of the case.

[1] It appeared by the testimony of the prosecutrix that she lived with her parents and a younger sister in the state of Idaho, where her father died when she was about 7 years of age; that at or about that time the defendant became acquainted with her family; that when she was about 10 years old her mother removed to Oregon with the two daughters; and that the defendant followed them. The mother of the prosecutrix conducted a small boarding house, and appellant took meals with her, and in Oregon resided in the same house at least a portion of the time. In the late fall or winter of 1922 Jones went to Banning, Cal., where he bought a restaurant, and, in response to his entreaties, the mother and two daughters joined him there on April 9, 1923, whereupon appellant and the woman immediately intermarried. He and his wife continued the restaurant business, and were assisted by the prosecutrix before and after school hours, and all three would return home together at night.

The prosecutrix testified that during the time that they lived in Idaho the defendant commenced to show undue affection toward her; that he would fondle her, kiss her, raise her garments, and resort to indecent familiarities with her person; that he continued to assert his passionate advances toward her in Oregon, and in the restaurant and elsewhere at Banning, "whenever he could get a chance." She also testified that during all this period of time, if she attempted to remonstrate with appellant, he would tell her that there was "nothing wrong in it," and to "keep quiet"; that upon one occasion, when she threatened to inform the officers, appellant "replied that if I did he would knock my head off," and that at that time "he was getting a drink, and he took the water and threw it all at me." She swore that she spoke to her mother of appellant's indecent attentions, but that her mother ignored her; that she ventured on several occasions to "hint" about it, but that her mother "turned her down completely," and conducted herself as though nothing had happened.

The direct testimony of the prosecutrix was that on or about the 5th of May, 1924, at 6:30 or 7 o'clock in the evening she returned home from her duties at the restaurant with her mother and stepfather, and at once undressed and went to bed; that she lay there studying her lessons, and her mother sat in an adjoining room talking with a Mrs. Samuels, the wife of a deputy sheriff, who occupied a part of the same house. It was admitted that appellant's bedroom and that of the prosecutrix each communicated with a common bathroom, which latter room had a door on either side; and the prosecutrix testified that shortly after she had retired she heard the defendant enter his room; that he passed through the bathroom into her room and sat down on her bed; that she consulted him about a problem which she was studying, but that he asked her to lay it down; that he did not know anything about it; and, to use her language, "then he threw the covers back, and just picked up my gown, and just got under the covers with me, and had sexual intercourse with me."

[2] Counsel for appellant have quite fully and accurately stated the facts as they appear in the record, but, rather than concurring in their assertion that the complainant's story was inherently so improbable and devoid of corroboration that the jury could not have voted for conviction except through bias and prejudice, we are impelled to the conclusion that an acquittal would have constituted a serious miscarriage of justice. It is true that no eyewitness corroborated the prosecutrix' statement as to the specific act with which appellant was charged, but ocular proof of the truth or falsity of testimony as to secret acts occurring between two persons of opposite sexes is seldom, if ever, available.

"It is well settled that one may be convicted of rape upon the uncorroborated testimony of the prosecutrix, if the jury believes her story. *People v. Mayes*, 66 Cal. 597, 6 P. 691, 56 Am. Rep. 126; *People v. Logan*, 123 Cal. 414, 56 P. 56; *People v. Benc*, 130 Cal. 159, 62 P. 404; *People v. Preston*, 19 Cal. App. 675, 127 P. 660; *People v. Bernon*, 29 Cal. App. 424, 155 P. 1021; *People v. Akey*, 163 Cal. 54, 124 P. 718." *People v. Sylvis* (Cal. App.) 237 P. 802.

[3] And, in view of the vast difference in the ages of the parties here concerned, the apparent domination by one over the other, the nature of the relation, admonitions of the stepfather that, if complainant told, he would "knock her head off," and the persistent disregard of her mother of reported acts which tended to contribute to her delinquency, it is not surprising that the testimony of a third person was unobtainable. The prosecutrix was as effectively sworn to secrecy as suggestion and threats could render the most truthful witness of her years until finally her advancing age and wisdom prevailed upon her to rebel. She told the court and jury that the crime was committed as charged in the

information, and the defendant unqualifiedly denied each of her incriminating statements. As to the latter's guilt a conflict then arose, and it lay within the exclusive province of the jury to determine from the testimony and from other evidence—such as the appearance and demeanor of the witnesses, the fact that the prosecutrix withstood searching cross-examination and recross-examination, without faltering or contradiction as to essentials, that her mother's testimony was conflicting in itself, and was noticeably partial to the defendant, and that the latter departed from home following the alleged offense, and was located and arrested at San Diego—as to the credibility of each witness. This they did, and it is not for an appellate court to say as a matter of law from the sordid state of mind and conduct exhibited by the defendant that the jury could not fairly have decided that he was guilty. Citation for such a conclusion is unnecessary.

[4] It is next contended that the trial court erred in permitting the complainant to testify as to alleged other lascivious conduct of the defendant toward her during preceding years, and to an alleged act of "intercourse" which she said occurred in the year 1923. It is argued that such evidence was so "palpably false," and so prejudicial, that its admission was allowed in contravention of established rules of evidence, and that the judgment must for that reason be reversed.

The argument for appellant is in part predicated upon a question of the district attorney which, at most, was indefinite. The prosecutrix was asked: "Q. During the time that you were in Banning, Cal., that is from April 9, 1923, to on or about May 5, 1924, did an act of intercourse occur between you and Mr. Jones at any time prior to, on or about, May 5, 1924?" After objection by the defendant's counsel that no proper foundation had been laid, that the question was incompetent, improper, and immaterial, inadmissible until the parties should be shown to have lived in continuous and uninterrupted illicit relationship, that no time had been fixed, and that it did not appear whether the alleged act was near or remote, which objection was overruled, the witness answered, "Yes sir." It is insisted that the objection was well taken, and that at all events there was no proof either by the answer or by other evidence in the record that a previous act of sexual intercourse was committed. But whether the act to which she testified was that of the most serious character contemplated by the statute, or merely one of a series of indecent familiarities to which the complainant had already testified, as having continued for about five years, is of small consequence. The evidence was clearly admissible, whether the witness intended by her answer to infer one or the other. As was said in *People v. Koller*, 142 Cal. 621, 76 P. 500:

"It is now the settled rule in this state that evidence of prior acts of incestuous intercourse are admissible. *People v. Stratton*, 141 Cal. 604, [75 P. 166]. And while we recognize that there is a conflict in the authorities as to the admissibility of evidence of subsequent acts, we are of the opinion that the better rule, and the one sanctioned by the weight of authority, is, that acts of improper familiarity, or illicit intimacy, or relations between the parties, subsequent as well as prior to the act charged in the information relied on by the prosecution for a conviction, are admissible as corroborative evidence, where they tend to show a continuous, illicit relationship. They are never admissible as independent substantive offenses, upon any of which a conviction can be had, and evidence of them is only admissible after the prosecution has selected some particular act of a date certain, and has elected to rely on proof of such act for a conviction of the defendant, and has introduced evidence tending to support the selection."

In *People v. Wademan*, 38 Cal. App. 116, 175 P. 791, the same question arose wherein it was said:

"In view of the question taken by the learned trial judge was that it being conceded that prior and subsequent acts of sexual intercourse were admissible as showing an adulterous disposition, any lascivious or other acts of familiarity tending to awaken or promote sexual desires were alike admissible. Logically, this seems to be sound reasoning."

To the same effect are *People v. Johnson*, 51 Cal. App. 464, 197 P. 135; *People v. Slaughter*, 33 Cal. App. 365, 165 P. 44; *People v. Elgar*, 36 Cal. App. 114, 171 P. 697; *People v. McDonald*, 167 Cal. 545, 140 P. 256.

The complainant had previously testified in detail to the commission of the act charged in the information, as we have heretofore related, and it is therefore obvious that the evidence here complained of was properly admitted.

[5] Another contention of appellant is that the cross-examination of the prosecutrix was erroneously restricted, and that he was not allowed that wide latitude of interrogation compatible with our technical rules of evidence to which a defendant is entitled in cases of this nature. *People v. Baldwin*, 117 Cal. 244, 49 P. 186, and other authorities are cited which hold that he should be given such latitude, but none of them go to the extent of holding that the cross-examination in a statutory rape case may extend indefinitely into the field of incompetent, immaterial or collateral matters. Counsel for appellant subjected the prosecutrix to a most searching cross-examination upon all questions relating to her past life, including her education, her work, and family conditions, as related by her direct testimony and that of other witnesses. Counsel questioned her as to whether she worked at the cannery with or without her mother's consent, and as to

where her mother was then working, whereupon the question was asked her:

"Q. (by Mr. Whitlock): I will ask you a question, and I will apologize for asking it, but my duties as counsel compel me to. I will ask you if the act that you complained of was committed by your consent, or was it committed by force and against your will?"

Objection of the district attorney upon the ground that the question was improper under the law was sustained, and the following question was asked:

"Q. (by Mr. Whitlock): I will ask you this question: Did you, at the time of the act complained of, protest in a mad voice against it?"

Objection was also sustained to this latter question, whereupon appellant's counsel and the court made the following statements:

"Mr. Whitlock: As I understand the law, your honor, we are given the privilege of showing the circumstances under which the act complained of took place, inasmuch as the law, as I understand it, says that is the only defense open to us.

"The Court: In law, she need not have cried out. She need not have consented; and, if she did consent, the law says it was still unlawful."

Nothing further appears to have been said upon the subject, and the cross-examination immediately turned to another subject. The ruling of the trial court was clearly proper under the statutes and the decisions of this state. In *People v. Roach*, 129 Cal. 33, 61 P. 574, it was held that, in a case of this character, "neither the element of force nor the question of consent has any application. The prosecutrix could not consent, and the law resists for her. *People v. Verdegren*, 106 Cal. 211 [39 P. 607, 46 Am. St. Rep. 234]. We must judge of the defendant's intent by his conduct, and not by that of his victim." To the same effect are *People v. Martinez*, 59 Cal. App. 121, 210 P. 61; *People v. Pribnow*, 61 Cal. App. 252, 214 P. 475.

It is here contended that, inasmuch as complainant's mother and another person were in an adjoining room, an outcry could easily have been heard by them, and that the questions were asked for the purpose of impeachment. From what we have already observed it is apparent that the prosecutrix was so dominated by the defendant and treated by her mother with complete abandon that she knew that any complaint she might make would be both hazardous and futile. At all events, upon the record before us we cannot say that the rulings were erroneous.

[6] Again it is insisted that the trial court erred in permitting the prosecution to impeach the witness Elizabeth Jones, complainant's mother, upon a collateral matter. The questions of the district attorney to said witness concerning an alleged quarrel between herself and the prosecutrix wherein it had been testified that the mother attempted to

persuade her daughter to drop the charges against the defendant were all answered in the negative; the witness positively stating that no such conversation occurred. When the prosecutrix was asked what the conversation was, objection was interposed, and it was sustained. No objection appears to have been made to any other of the questions propounded to either witness in regard to this subject, and the point is therefore without merit.

[7] It is further contended that the trial court erred in refusing to charge the jury that, in determining the credibility of the prosecutrix, they might consider the law as requiring that she make complaint as closely upon the occurrence as to be practically the first opportunity available to tell one in whom she had confidence, and that it would be presumed that an innocent woman would complain at the earliest practicable moment. It is well to note, in addition to what we have already said concerning the relations between the complainant and her mother, in whom counsel would infer that she had confidence, that the following testimony was given by her during redirect examination:

"Q. On how many occasions could you say that you tried to talk to your mother? A. There was numerous times, but I could not tell you how many times there were, but she never seemed to think anything about it, nor tried to get what I was hinting at at all."

[8] Complaint having repeatedly been made that the court below erred in failing to assume, or to ask the jury to assume, that the prosecutrix entertained an abiding faith and confidence in her mother, we are constrained to remark that, from all the facts presented, appellant and his wife were devoid of any proper sense of responsibility to their ward, and that it would be presuming upon the intelligence of the court and jury to expect them to believe the mother entitled to confidence. Furthermore, the requested instruction was the antithesis of the law of the case.

"The fact that she, a female under sixteen years of age, made no outcry but concealed from others knowledge of the act was not material to the inquiry, provided the jury upon sufficient evidence was satisfied that he was guilty of the act as charged." *People v. Martinez*, 59 Cal. App. 121, 210 P. 61.

The rule was also announced in *People v. Jacobs*, 16 Cal. App. 478, 117 P. 615; *People v. Fraysier*, 36 Cal. App. 579, 172 P. 1126.

[9] The jury were fully instructed upon all the elements of the offense charged, and that they should find the defendant guilty of rape, as charged in the information, guilty of assault with intent to commit rape, guilty of simple assault, or not guilty. A form of verdict applicable to each such possible finding was furnished them, and they returned their verdict upon the form first mentioned, in the following language:

"We, the jury in the above-entitled action, find the defendant, Wm. J. Jones guilty, as charged in the information, with a recommendation for mercy."

The court thereupon reminded them that they had been instructed that in such a case they should, in the event of conviction, state in their verdict whether the punishment should be confinement in the penitentiary, or in the county jail, as provided by section 264 of the Penal Code. It was said by the trial court:

"The court is not sure or clear just what you mean by the term 'mercy.'" "And I will ask you to go back to your jury room and see if you have any other, or, if you change your verdict, to come within the instruction as rendered. You do not need to do that, but I am now reading the law to you; and I do not direct you to do it, but I think it well to have you go back and consider."

The forelady replied that she thought their verdict had automatically taken care of the question of punishment. The jury again retired, shortly returning into court with the same or a similar verdict, bearing the insertion, "State's prison punishment," and adding to the statement "with a recommendation for mercy," "meaning leniency."

It is contended that the first verdict indicated an intention that the punishment should consist of a county jail sentence only, and that since section 1097 of the Penal Code provides that, where there is a reasonable doubt as to the degree of guilt, a defendant can be convicted of the lowest degree only. Appellant quotes from *People v. Pratt*, 67 Cal. App. 606, 228 P. 47, wherein was involved only the question of the applicability of an amended statute to an offense committed prior to the amendment, and it was contended that the jury should have been instructed in accordance with the latter. It was there said:

"When forms of verdict are submitted to the jury they should be comprehensive enough to cover every phase of the law under the evidence, and should include any kind of verdict that the jury would be warranted in returning after its deliberation, and this is especially so where a statute requires that a verdict of 'guilty' shall assess the degree of the crime and the place of imprisonment. If, therefore, the defendant was entitled to the benefit of the amendment it is clearly apparent that his substantial rights have been affected."

It was said, however, that no error had been committed, and the judgment was affirmed. If the cited case is at all pertinent here, what was said as to the form of verdict is merely dictum as to the question presented by this appellant, but in the instant case the jury were furnished with each form of verdict, and were fully instructed that they should also state the place of confinement therein. They recommended leniency in each

of their verdicts, but entirely ignored the instructions of the court as to place of punishment in the first, and did not alter it in this respect in the second, but added thereto "state's prison punishment." The court did not, by requiring them to complete their verdict in any manner, indicate a preference in this respect, if, indeed, it entertained an opinion in the matter. Had the jury decided at the outset that confinement in the county jail should be inflicted, it would have been a natural thing for them to have added "county jail punishment" instead of the amendment which they actually made of their own volition, and with a full understanding of the law. It is not contended that the jury inadvertently designated one place, intending the other, nor do we desire to be understood to hold that such contention would be tenable, but it lay with them to fix the place of confinement, and we cannot say as a matter of law, nor do we think it the fact, that they were influenced by the requirement that they complete the verdict to insert a penalty which was entirely contrary to their best judgment upon the evidence. In *People v. Jenkins*, 56 Cal. 4, it was held to be the duty of a trial court to require amendments of verdicts so that they meet the statutory mandates.

Other alleged errors are assigned, but they consist of points so well settled as to demand slight, if any, discussion. They relate to the giving or refusal of requested instructions. The defendant requested an instruction to the effect that, in determining the credibility of the prosecutrix, they should consider that the law required her to make complaint at the first opportunity after the occurrence. This is not the law. *People v. Gonzales*, 6 Cal. App. 255, 91 P. 1013, is cited by appellant, but it was there said that, in order that evidence of complaint be admitted, it should follow so closely upon the event as to be practically the first opportunity. It is therefore not authority for the point advanced, and other cases cited are of no avail here. From what we have already said it is apparent that the prosecutrix did complain to her mother at various times, but, whether near or remote to the occurrence, she received no consolation.

[10] It is argued that a requested instruction should have been given to the effect that the jury should keep in mind the fact that a charge of this nature is particularly difficult to disprove, though easily made, and that they should be satisfied to a moral certainty and beyond a reasonable doubt that the case was completely made out before they could render a verdict of conviction. We think other instructions fully covered the subjects here mentioned, and, though not couched in the same language, were sufficient. Under such circumstances error is not assignable. *People v. Pacheco*, 70 Cal. 473, 11 P. 761.

[11] Finally, it is contended that the court

erred in instructing the jury that the date alleged in the information upon which the offense charged was alleged to have been committed was immaterial; that any date on or about the 5th day of May, 1924, prior to filing the information was sufficient, and that the date need not be specifically proven. Such instruction was not erroneous. *People v. Britt*, 62 Cal. App. 674, 217 P. 767; *People v. Sheffield*, 9 Cal. App. 130, 98 P. 67; *People v. Dinsmore*, 102 Cal. 381, 36 P. 661.

No error appearing, the judgment and order appealed from are affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

Opinion of Supreme Court in Bank, Denying Hearing.

PER CURIAM. The petition for a hearing in the Supreme Court after decision and judgment in the district court of appeal is denied.

[12] As a matter of law, however, we would be constrained to hold as error the ruling of the trial court sustaining objections to the cross-examination of the prosecutrix as to whether she consented to the act of sexual intercourse or whether it was committed by fear or force and against her will. We can well understand that, if she had claimed the act was committed by force, how her claim might have laid the foundation, not only for impeachment as to the manner in which the act was accomplished, but also under certain circumstances it might have laid the foundation for impeachment as to whether the crime was committed at all. However, we have examined the record, and feel certain that the court's ruling did not carry with it any prejudicial effect, for the reason that the prosecutrix practically admitted throughout her examination that no force or threats were employed by the defendant, and no serious contention to the contrary was made. This being so, the defendant was left in as favorable light so far as this issue is concerned as it was possible for him to be placed. As an abstract question of law, however, we cannot approve of the court's ruling in sustaining the objections to the questions asked as to whether she resisted the defendant's acts, for the reason that the evidence sought to be elicited tended to disclose the circumstances of the crime, and it could not properly be excluded on the theory that the prosecutrix, being under the statutory age, all inquiry as to the circumstances of the crime was therefore cut off. This evidence was not offered as a justification or excuse for the commission of the offense, but was offered as constituting a part of the crime charged. We therefore disapprove of that part of the opinion which seems to sus-

tain the trial court's ruling, but hold that it produced no prejudicial result so far as the conviction was concerned.

PEOPLE v. ADAMS. (Cr. 868.)

76 Cal. App. 178

(District Court of Appeal, Third District, California. Jan. 11, 1926. Hearing Denied by Supreme Court March 11, 1926.)

1. Witnesses $\hookrightarrow$ 277(2)—Cross-examination of accused to bring out bad character is not proper, where accused has not attempted to prove his good character.

Where accused makes no effort to prove his good character in respect to traits involved in charge, cross-examination to prove bad character is improper, even if evidence produced related to traits involved in charge.

2. Criminal law $\hookrightarrow$ 369(1).

Guilt cannot be established by proof of general bad character, other crimes, or wrongful acts not relevant to that charged.

3. Witnesses $\hookrightarrow$ 344(1).

Witness may not be impeached by evidence of particular wrongful acts, except that it may be shown by examination of witness or record of judgment showing conviction of felony in view of Code Civ. Proc. § 2051.

4. Witnesses $\hookrightarrow$ 337(4).

Cross-examination of one accused of rape, as to having used assumed name while in reformatory and prison, *held* error.

5. Witnesses $\hookrightarrow$ 337(4).

Cross-examination of one accused of rape to show that he had engaged in boxing contests *held* improper.

6. Witnesses $\hookrightarrow$ 277(2).

In prosecution for rape, cross-examination as to accused's commitment to reform school and return thereto for incorrigibility *held* error.

7. Rape $\hookrightarrow$ 51(1).

Evidence *held* sufficient to support conviction of rape.

8. Criminal law $\hookrightarrow$ 1186(4)—Cross-examination of one accused of rape as to commitment to reform school and return for incorrigibility and use of assumed name, and whether he engaged in boxing contests, *held* reversible (Const. art. 6, § 4½).

Where testimony of prosecutrix and accused as to commission of alleged rape were in direct conflict, erroneous cross-examination of accused showing his commitment to reform school and return for incorrigibility and his use of assumed name, and fact that he had participated in boxing contests, *held* to require reversal, notwithstanding Const. art. 6, § 4½, and fact that accused was properly impeached by proof of commission of a felony.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Thomas Hudson Adams was convicted of rape, and he appeals. Reversed.

A. L. Wessels, of Ukiah, and Lewis D. Mooney, of Ft. Bragg, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the crime of rape, alleged to have been committed September 22, 1924, and sentenced to imprisonment in the state prison. He has appealed from the judgment of conviction and the order of the court denying his motion for a new trial.

The prosecutrix was born April 6, 1914. In the following November her mother married a man who is not the father of the child. The issue of the marriage is a daughter, born in May, 1915. On the 29th day of February, 1924, the superior court of Sonoma county granted the wife an interlocutory decree of divorce on the ground of extreme cruelty. She was given the custody of the daughter of the parties during the school months of the year, the father to have her custody during school vacations. Of course, the mother had the natural right to the custody of the prosecutrix. The mother was employed as a teacher in one of the public schools of Sonoma county, and after the entry of the interlocutory decree she and her younger daughter resided on a farm adjoining that of her husband. The mother endeavored to induce the prosecutrix to live with her, but the prosecutrix refused, and during the months of "March, April, May, and the better part of June," 1924, she lived with her stepfather on his farm. The probation officer then took her to the detention home at Santa Rosa, where she and her sister remained for several weeks. It appears from the evidence that the prosecutrix had more affection for her stepfather than for her mother. The mother was employed as teacher of the public school at Irmulco, Mendocino county, for the term commencing in September, 1924. The prosecutrix objected to going with her mother to Irmulco, and, in the language of the mother's testimony, the stepfather "said I could take" the younger girl, "but should not take" the prosecutrix, "and he held onto" her "hand and resisted my taking them. * * * She held back too and cried, and I finally just picked her up and carried her out to the car and she was kicking the whole time."

The mother and the girls lived together at Irmulco in a house provided for them by the school district. In the early part of August the mother and the defendant met for the first time, and about three weeks later they agreed to marry as soon as she was granted a final decree of divorce. The defendant visited the mother frequently, and their engagement was discussed with the children, who were requested by the mother to call him "Daddy." The younger girl complied with this request, but the prosecutrix testified that she did not, that she never

liked the defendant and frequently asked her mother not to marry him, but to go back to the stepfather. September 21st the mother went to Ukiah to attend a three-day session of the county teachers' institute, commencing on the 22d. She left the two girls in her home at Irmulco in charge of defendant, no other persons being with them. During the mother's absence the girls and the defendant slept together in the same bed, the latter sleeping in the middle. The prosecutrix testified that while the three of them were in bed together the defendant had sexual intercourse with her twice during the night of September 22d and once during the night of the 23d; that she tried to get away from him, but that he held her so that she could not; that she did not make any noise or outcry and did not know whether her sister was awake or not; that the defendant did not ask her not to tell what he had done and that she had said nothing about the matter to any person until the latter part of December, 1924. The defendant admitted that he slept with the girls, but denied that he committed the act charged. The children at no time made any complaint to the mother of any improper conduct on the part of the defendant during her absence, and he continued to visit her and to associate with the children as he had been accustomed to do. During the mother's absence at institute, the prosecutrix wrote the stepfather that her mother had agreed to marry the defendant.

On the 26th day of December the mother took the children to Willits and gave them into the custody of the stepfather, who took them to Santa Rosa. The prosecutrix testified that a few days later she told her stepfather that the defendant had committed the alleged offense; that she had not previously told any person of the offense; that she "was not going to tell anybody"; that she did not tell her mother because "I was afraid she would whip me." On the 31st day of December the prosecutrix was examined by a physician and surgeon of 10 years' experience, a graduate of Cooper Medical College. This physician testified that she made a careful examination of the sexual organs of the prosecutrix and found that the hymen "had been ruptured decidedly. * * * The hymen itself was entirely gone. Only the remnants of the hymen remained. * * * It was not done within a few days." The children were thereafter taken to Ukiah and placed in the county hospital, under the charge of the officers thereof, where they were kept until the time of the trial. While the children were at the county hospital, at the request of the mother and of counsel for the defendant, the county physician of Mendocino county, a graduate of Cooper Medical College, who had been engaged in practice continuously since the year 1896, examined the sexual organs of the prosecutrix. He testified: "I found the hymen intact. It

hadn't been ruptured. I examined her very carefully." A nurse at the county hospital, basing her statement upon an acquaintance of two months while the girl was at the hospital, testified that the reputation of the prosecutrix for truth and veracity was bad.

It was the theory of the defense, as announced at the trial, that both the stepfather and the prosecutrix were desirous of preventing the contemplated marriage of the mother and the defendant; that the stepfather exercised an undue influence over the girl, and that, when she informed him that the defendant had slept with the children during the mother's absence, the stepfather induced the prosecutrix to say and testify falsely that the defendant committed the alleged crime. The prosecutrix testified on cross-examination in part as follows:

"Q. Is it not a fact that the only thing you told him (the stepfather) was that your mamma had left you children with Mr. Adams, and that Mr. Adams had slept with you children, is that not right? A. That's the way * * * (my sister) told him, but I told him a little more.

"Q. What did you tell him? A. I told him he put me on top of him and put his finger in me.

"Q. That's all you told him? A. Yes. * * *

"Q. What did you do then? A. Well, my aunt took me for a walk and I told her about it. * * *

"Q. How long did you stay down there after you told him that? A. A month or three weeks.

"Q. Did you ever—when you found this out, did you ever write and tell your mamma about it? A. No.

"Q. You were writing to mamma all of the time while you were in Santa Rosa? A. Yes.

"Q. And never wrote and told her anything about this? A. No. * * *

"Q. * * * He (the stepfather) told you what to say when you got on the witness stand, didn't he? A. No. * * *

"Q. * * * (He) has been out to the county hospital on a number of occasions since you have been out there? A. Yes.

"Q. And you have sat on his lap most of the time? A. Yes.

"Q. And you liked him pretty well? A. Yes.

"Q. And you were sitting on his lap out here in the district attorney's office yesterday? A. Yes.

"Q. And he was kissing you and hugging you out there? A. Yes.

"Q. You have been pretty good friends? A. Yes.

"Q. And you know that he is not your father? A. Yes.

"Q. But you always do what he says, what he tells you to do? A. Yes.

"Q. Always been a good little girl that way? A. Yes.

"Q. And you were pretty mad because your mamma was going to marry Mr. Adams? A. No.

"Q. Why did you not write to * * * (your stepfather) and tell him about that? A. I wanted him to know it.

"Q. * * * Did you ever tell your mamma about this? A. No.

"Q. You have seen your mamma a number of times since this matter came up? A. Yes.

"Q. Why didn't you tell her about it? A. Well, because I was told not to talk about it.

"Q. Who told you that? A. Mr. Hurley.

* * *

"Q. Now, did anybody else except the district attorney tell you not to talk to your mamma about these things? A. I don't think so. * * *

"Q. You have seen your mamma several times since being at the county farm, haven't you? A. Yes.

"Q. And never told her anything about this? A. She talked to me about it, but I didn't say anything."

The foregoing outline of the evidence is not intended, of course, as an intimation that any witness testified falsely or that the weight of the evidence is on the one side or the other, but to show that the errors herein-after considered have resulted in a miscarriage of justice.

The defendant was 33 years of age at the time of the alleged offense. He had been convicted of the crime of forgery in the state of Washington and, as punishment therefor, had there served a term of three years in the state prison. He testified that his occupation was that of woodsman and he was engaged in that occupation during the year 1924 and up to the time of his arrest in January, 1925. His occupation was not otherwise shown. He was cross-examined in part as follows:

"Q. How old are you? A. Thirty-three.

"Q. And where were you born? A. Modesto, Cal.

"Q. What year? A. 1892—the 11th day of January.

"Q. Where were you during the year 1905?

"Mr. Wessels: Object to that as incompetent, irrelevant, and immaterial.

"The Court: This is cross-examination. Objection overruled. Go ahead.

"A. In 1905 I was in the State Industrial School at Whittier, Cal.

"Q. Reform school?

"Mr. Wessels: The only ground for impeachment the district attorney can ask here is whether he has been convicted of a felony. * * * I therefore object to the question as being incompetent, irrelevant, and immaterial and no foundation laid, and ask that the answer be stricken.

"Mr. Hurley: It is not for the purpose of impeachment at all.

"The Court: Objection overruled.

"Mr. Hurley: At the Whittier Industrial School in California? A. Yes, sir.

"Q. How many periods of time did you spend at the Whittier Reform School?

"Mr. Wessels: Same objection—incompetent, irrelevant, and immaterial.

"The Court: Same ruling.

"Mr. Hurley: You got out of there once and went back again as an incorrigible, didn't you?

"Mr. Wessels: Same objection.

"The Court: Same ruling.

"A. Yes.

"Mr. Hurley: You say your name is Thomas Hudson Adams? A. Yes.

"Q. Did you ever use any other name?

"Mr. Wessels: Oject; incompetent, irrelevant, and immaterial.

"The Court: Objection overruled.

"A. Yes, sir.

"Mr. Hurley: You state in your direct examination that your occupation is that of a woodsman? A. Yes.

"Q. Have you followed other occupations, businesses, or, professions besides the one you have given here? A. Not outside of the reform school and the penitentiary in Washington.

"Q. Ever prize fight any? A. I have boxed some.

"Q. Did you ever fight any before the public?

"Mr. Wessels: Object as incompetent, irrelevant, and immaterial. It is no discredit to a man to be a prize fighter and does not go to the credibility of the witness.

"Mr. Hurley: He testified as to his occupation.

"The Court: Go ahead. Objection overruled.

"A. I have boxed some in smokers.

"Mr. Hurley: My question is whether you have boxed before the public? A. Yes, sir."

[1-3] No reason appears for the introduction of the foregoing evidence except to prove the defendant's general bad character or to impeach him as a witness. The defendant made no attempt to prove that he was of good character in respect to the traits involved in the charge, and therefore it was not allowable for the prosecution to prove his bad character, even if the evidence produced had related to such traits; it having no tendency to show the relations between the defendant and the prosecutrix. *People v. Cook*, 148 Cal. 334, 340, 83 P. 43. It is well settled that the guilt of a defendant on trial for an alleged crime cannot be established by proof of general bad character or of other crimes or wrongful acts which have no relevancy to the crime charged, nor may a witness be impeached "by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony." Code Civ. Proc. § 2051. This statutory rule is so clear and certain that it is deemed unnecessary to cite any of the numerous cases holding that the statute means precisely what is stated therein.

[4-6] Relative to the use by defendant of an assumed name and to the fact that he had engaged in boxing contests, the language of the Supreme Court in *People v. Fleming*, 166 Cal. 357, 381, 136 P. 291, 302 (Ann. Cas. 1915B, 881), where similar errors were under consideration is particularly applicable. It is there said:

"There was no dispute whatever as to the true name of defendant, and obviously the sole purpose of seeking such proof was to reflect discreditably on the defendant by showing that he went under an assumed name, a thing, as said by this court, 'not conducive to a good character for defendant.' *People v. Arlington*, 123 Cal. 357, 55 P. 1003. * * * People look at things differently, and we would indeed be ignorant as to existing conditions if we did not know that some people do not look with favor

upon a man who engages in what they consider 'prize fighting,' even though the same be by amateurs as distinguished from professionals, and under the auspices of a club. * * * Obviously learned counsel for the prosecution did not think it would improve the standing of defendant with the jury to be known as a participant in such contests."

In *People v. Frank* (Cal. App.) 236 P. 189, it was held to be prejudicial error to admit proof that the defendant had used an assumed name. See, also, *People v. Williams* (Cal. App.) 236 P. 355; *People v. Mohr*, 157 Cal. 732, 109 P. 476; *People v. Denby*, 108 Cal. 54, 40 P. 1051; *People v. Waller*, 64 Cal. App. 390, 222 P. 171. It was clearly error to admit proof of the defendant's commitment to the reform school and of his return thereto for incorrigibility. In *People v. Wyett*, 49 Cal. App. 289, 193 P. 153, the defendant was charged with the infamous crime against nature. Evidence was admitted relating to the commission of a similar offense by the defendant against a person other than the prosecuting witness. It was held that the error of admitting such evidence required a reversal of the judgment, and that section 4½ of article 6 of the Constitution had no application to the case.

[7, 8] The testimony of the prosecutrix and that of the defendant as to the commission of the alleged crime are in direct conflict. There is no other direct evidence upon the question. Defendant's credibility as a witness, therefore, was of the highest importance to him. He was properly impeached by proof that he had committed a felony. Notwithstanding such proof, however, the jury might have believed him as a witness. But when, in addition thereto, it was shown that he had been committed to the reform school when 13 years old, that he was later returned thereto because he was incorrigible, that he had used an assumed name, and that he was a prize fighter, it is probable that the jury concluded that he had become so hardened and confirmed in wrongdoing as to be wholly unworthy of belief and so devoid of moral character that he would not hesitate to commit the atrocious crime with which he is charged. If it be said that such proof ought to be permitted in a case of this character, it is a sufficient answer that the law forbids it.

The evidence is sufficient to support the judgment. It is perfectly clear, however, that section 4½ of article 6 of the Constitution was not intended to mean that the mere fact that the evidence may support the judgment is a sufficient reason in all cases for refusing to set it aside. To give the section that meaning would often lead to gross miscarriages of justice, as where evidence vital to the case of a party is rejected or evidence vitally damaging to his case is erroneously admitted, or where the court erroneously instructs or refuses to instruct the

jury as to the law applicable to an essential issue. The courts have not attempted to frame a definition of "miscarriage of justice" which can be applied to the varying circumstances of the many cases where the constitutional provision is invoked, and obviously it would be impossible to do so. *Vallejo, etc., R. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 555, 147 P. 238. The quotations which follow, however, taken from cases in which the question has arisen, are elucidating:

"The central or all-important purpose of said constitutional provision is, obviously, to legally justify the courts in refusing to interfere with or disturb verdicts of guilty in criminal cases in the trial of which error has been committed and in which the evidence amply supports such verdicts, when such interferences may justly be withheld consistently with a just and proper regard for the substantial rights of persons tried for public offenses." *People v. Tomskey*, 20 Cal. App. 672, 683, 130 P. 184, 189.

"We do not understand that the amendment in question was designed to repeal or abrogate the guaranties accorded persons accused of crime by other parts of the same constitution or to overthrow all statutory rules of procedure and evidence in criminal cases. When we speak of administering 'justice' in criminal cases, * * * we mean something more than merely ascertaining whether an accused is or is not guilty. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected." *People v. O'Bryan*, 165 Cal. 55, 65, 130 P. 1042, 1046.

"The phrase, 'miscarriage of justice,' does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied." *People v. Wilson*, 23 Cal. App. 513, 524, 138 P. 971, 975.

"We are unable to determine whether the defendants would or would not have been convicted by the jury had this erroneously admitted testimony been withdrawn from their consideration. This being so, we do not feel that section 4½ of article 6 of the Constitution can be given application to uphold the judgment." *People v. MacPhee*, 26 Cal. App. 218, 226, 146 P. 522, 525.

"It is readily conceivable that the exclusion of respondent's statements * * * might have been directly responsible for the verdict. This being so, we are of the opinion that the error resulted in a miscarriage of justice." *Hirshfeld v. Dana*, 193 Cal. 142, 150, 223 P. 451, 454.

"We cannot even, after a careful review of the evidence, say that the jury, under proper instructions, would probably have reached a conclusion in favor of the plaintiffs. Under these circumstances, we would not be justified * * * in disregarding the error." *Langford v. San Diego Elec. Ry.*, 174 Cal. 729, 734, 164 P. 398, 400.

"Nor is it a matter for consideration * * * that another jury upon a new trial might upon

such conflicting evidence and proper instructions render a verdict of guilty." *People v. Roe*, 189 Cal. 548, 561, 209 P. 560, 566.

See, also, *Webster v. Orr*, 174 Cal. 426, 428, 163 P. 361; *People v. Degnen* (Cal. App.) 234 P. 129, 142; *People v. Walker* (Cal. App.) 231 P. 572, 582; *People v. Irby*, 67 Cal. App. 520, 530, 227 P. 920; *People v. Avila*, 50 Cal. App. 228, 231, 194 P. 768; *People v. Columbus*, 49 Cal. App. 761, 763, 194 P. 288; *People v. Clark*, 28 Cal. App. 670, 674, 153 P. 719.

Appellant contends that the court refused to select and appoint a physician to examine the prosecutrix. Defendant requested such selection and appointment prior to the time that the county physician testified, but the record shows that the request was withdrawn before such testimony was given. Had the request been renewed after the irreconcilable testimony of the two physicians had been given, it is probable that the court, in the interest of justice, and with the mother's consent, would have selected a physician to make the examination. The other grounds urged for a reversal are without merit.

The judgment and the order are reversed.

We concur: HART, J.; PLUMMER, J.

75 Cal. App. 770

MCCARGAR v. H. G. BITTLESTON LAW & COLLECTION AGENCY et al.
(Civ. 5309.)

(District Court of Appeal, First District, Division 1, California. Dec. 24, 1925.)

1. Pleading ☞35—In suit to annul judgment, that part of pleading which was not ground for relief should be considered surplusage on demurrer.

Where complaint in suit to annul judgment attempted to set out two causes of action, fraud and void assignment of claim on which defendant had sued, first of which was ground for relief, court should treat second as surplusage in considering general demurrer.

2. Justices of the peace ☞122(2)—Creditor who agreed not to take further proceedings in pending action in justice court without notice to debtor bound thereby, though debtor breached agreement.

Where creditor agreed that no further proceeding in pending action in justice court would be taken without notice in writing, and debtor agreed to pay debt in installments, breach of agreement by debtor did not give creditor right to take judgment without notice.

3. Contracts ☞75(1)—Agreement to accept payment in installments and not prosecute pending action held supported by consideration.

Creditor's oral agreement to accept debt in installments, and to take no further proceedings in pending action without notice, held supported by consideration, where debtor changed

his position for the worse by making payments on debt, relying on agreement.

4. Justices of the peace §128(3)—Debtor's allegation of payment, made since action brought, held sufficient to show judgment of justice thereon was wrong.

In suit to annul justice court judgment, allegation that \$15 had been paid on debt since action thereon was brought held sufficient allegation that judgment was wrong, and that result would be different in another trial.

5. Justices of the peace §128(2)—Appeal from judgment held not necessary before bringing suit to annul it, but motion must be made to set it aside (Code Civ. Proc. §§ 473, 974, 975).

Judgment debtor was not required to appeal from judgment of justice court under Code Civ. Proc. §§ 974, 975, before bringing suit to annul it, though he must have made motion to set it aside, under section 473.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Suit by C. W. McCargar against H. G. Bittleston Law & Collection Agency and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with instructions.

J. W. Hocker, of Los Angeles, for appellant.

H. G. Bittleston, of Los Angeles, and Edward Judson Brown, of Oakland, for respondents.

KNIGHT, J. This is a suit in equity to annul a judgment obtained by H. G. Bittleston Law & Collection Agency, a corporation, defendant herein, against C. W. McCargar, plaintiff herein, in the justice's court of Los Angeles township, Los Angeles county, for the payment of the sum of \$62.02 principal and \$5 costs, upon the ground that said judgment was obtained through extrinsic fraud, and upon the further ground that the assignment of the claim upon which the action was brought was void as being against public policy. A general demurrer to the complaint was sustained by the court with leave to amend. Plaintiff declined to amend, and judgment of dismissal of the action followed. Plaintiff appeals.

It is alleged in the complaint that the appellant, McCargar, "became indebted to one R. G. Muhleman, * * * and on the 13th day of October, 1922, owed said R. G. Muhleman the sum of \$62.02 as a balance on an account for goods, wares, and merchandise"; that on said last-mentioned date the respondent corporation, as assignee of the Muhleman claim, commenced an action against appellant in said justice's court to collect the amount due on said claim, and that summons in said action was served on appellant on February 21, 1923, whereupon it is alleged

an agreement was entered into between Bittleston, the manager of respondent corporation, and appellant "to the effect that, upon the payment of the sum of five dollars per month, commencing on said 21st day of February, 1923, and continuing monthly thereafter until the sum of \$62.02 had been paid on said account of R. G. Muhleman, said suit then pending in said justice court would be dismissed at the costs of the plaintiff, and that, pending said payments, this defendant need not make answer or in any wise plead in said action in said justice court, until further notice, in writing. * * *" The complaint then alleges that, relying on said agreement, appellant made three payments of \$5 each on February 23, 1923, April 3, 1923, and April 25, 1923, respectively; that, notwithstanding said agreement, the respondent corporation, on May 28, 1923, without notice to appellant, caused judgment to be entered in said justice's court action against appellant for the full amount sued for, to wit, the sum of \$62.02 principal and \$5 costs; that appellant, on June 2, 1923, received notice by mail of the entry of said judgment, and on June 4, 1923, served respondent corporation with notice of motion to set aside and vacate said judgment, and offered in writing to carry out said installment payments upon the setting aside of said judgment, but that respondent corporation opposed the granting of said motion, and the same was denied. The complaint also contains allegations to the effect that appellant "is informed, and has good reason to believe," that the respondent corporation obtained an assignment of said claim under a champertous and barratrous agreement, and it is alleged that therefore the judgment obtained in pursuance thereof was "unjust and inequitable, and unlawful, and should be vacated and set aside." It furthermore appears that, although the statute (Code Civ. Proc. §§ 974 and 975) gave appellant 30 days after notice of rendition of judgment, or until July 3, 1923, within which to appeal to the superior court upon questions of law from said justice's court judgment, under which appeal the superior court would have had jurisdiction to review all orders affecting the judgment appealed from, and to "set aside, or confirm, or modify any or all of the proceedings subsequent to and dependent upon such judgment," and, "if necessary or proper, order a new trial" (Code Civ. Proc. § 980; Wells v. Torrance, 119 Cal. 437, 51 P. 626), appellant failed to take such appeal. Instead of pursuing that remedy, he brought this suit on June 14, 1923.

[1] Although said complaint is in one count, there is an obvious attempt made to set forth two distinct causes of action without separately stating them: First, a cause of action to annul said judgment upon the ground of extrinsic fraud; and, secondly, a cause of

action to nullify the judgment upon matters intrinsic to the record, namely, an alleged void assignment of the claim upon which the justice's court action was based. The substance of the first cause of action, if sufficiently pleaded, would serve as legal grounds for relief in equity, but the facts alleged in the second cause of action, in our opinion, cannot be the basis of such relief. The demurrer was upon general grounds, however, and, consequently, the charges of champerty and barratry should be treated as surplusage and consideration given to the first cause of action only.

[2] The particular reason for holding the complaint insufficient for want of facts does not appear, but respondents endeavor to support the order sustaining the demurrer upon four separate grounds, the first of which is that it affirmatively appears from the complaint that appellant breached the agreement to pay \$5 a month on said indebtedness, and, consequently, the respondents were entitled to cause a default judgment to be entered against him. The complaint further alleges, however, that part of said agreement was that no further proceeding would be taken in said justice's court action without written notice being given to appellant, which notice, the complaint alleges, respondents failed to give. Apparently it was only in contemplation of such breach by appellant that notice was required to be given at all. Therefore, assuming that appellant did breach said agreement, he nevertheless was entitled to written notice before further court action could be legally taken against him, and it was the failure to give such notice which constitutes the alleged fraud.

[3] Secondly, the contention is made that said oral agreement was not supported by a valid consideration, and, therefore, the promise of respondents to accept installment payments was mere nudum pactum, citing in support of this point the case of Heim v. Butin, 109 Cal. 500, 42 P. 138, 50 Am. St. Rep. 54. In that case defendant agreed that he would not enter a deficiency judgment against the plaintiff in a foreclosure suit, and the court said:

"The defendant had a clear and undoubted right to such a deficiency judgment, and the plaintiffs neither gave nor agreed to give or confer any benefit in consideration of its release, nor did they agree to suffer any prejudice or forego any advantage. The promise of the defendant was, therefore, mere nudum pactum. But plaintiffs say they relied upon it, and acted upon it, and therefore the defendant is estopped from alleging or relying upon a want of consideration. This would be so if it appeared that their position was changed for the worse in consequence of their reliance on defendant's promise, but nothing to that effect is alleged."

In the instant case appellant alleges that, relying upon the agreement, he paid about

one-fourth of the amount due on the indebtedness, and that, notwithstanding such payment, respondents caused a default judgment to be entered against him for the sum of \$62.02, which was the full amount sued for. Appellant's reliance upon said agreement did, therefore, change his position for the worse to the extent of depriving him of the benefit of the credit for the amount of money paid in pursuance of said agreement. For that reason his situation does not fall within the operation of the rule stated in Heim v. Butin, supra.

[4] The third point urged by respondents is that the complaint fails to allege facts showing that the judgment entered in the justice's court is wrong, or that the result would be different if a trial were had upon the merits. Painter v. Painter, 133 Cal. 129, 65 P. 311; Peterson v. Weissbein Bros. & Co., 65 Cal. 42, 2 P. 730; Collins v. Scott, 100 Cal. 446, 34 P. 1085; Reed v. Bank of Ukiah, 148 Cal. 96, 82 P. 845. This proposition is based upon appellant's admission that at the time of the commencement of the justice's court action he owed the sum of \$62.02, for which amount the judgment was afterwards entered. In making this contention, respondents seem to lose sight of the fact that the appellant alleges payment of \$15 between the time of the commencement of the action and the entry of judgment, for which amount, if his allegation of payment be true, he would doubtless be given credit in the rendition of a judgment upon trial. It does appear, therefore, that, if a trial were had upon the merits, a different judgment would be rendered.

[5] The concluding contention urged by respondents is that appellant may not invoke jurisdiction in equity because he failed to prosecute an appeal from the judgment rendered in the justice's court, citing Heller v. Dyerville Mfg. Co., 116 Cal. 127, 47 P. 1016. The effect of the rule stated in that case is merely that, where it lies within the power of the court which rendered the judgment to set aside said judgment under section 473 of the Code of Civil Procedure, upon the grounds of mistake, inadvertence, surprise, or excusable neglect, a motion to accomplish that purpose must be made by the aggrieved party before he is entitled to invoke jurisdiction in equity. But neither in that case nor any other, so far as our attention has been called, is it held that the aggrieved party must go beyond the presentation of such motion, and obtain a final determination of the matter on appeal before he may proceed in equity. The complaint here shows that appellant did present a motion to set aside said judgment, and said motion was denied. It would therefore seem that he was required to go no further before resorting to equity. Estudillo v. Security Loan, etc., Co., 149 Cal. 556, 87 P. 19.

Respondents having failed to point out

wherein said complaint is insufficient as against attack by general demurrer, the judgment appealed from must be reversed and the cause remanded, with instructions to the superior court to overrule the demurrer. It is so ordered.

We concur: TYLER, P. J.; CASHIN, J.

76 Cal. App. 101

PEOPLE v. CRIDER. (Cr. 1257.)

(District Court of Appeal, First District, Division 1, California. Dec. 31, 1925.)

1. Escape ⇨9—Information held sufficient to charge offense of escaping from state prison, though failing to charge that defendant was "committed" to prison (Pen. Code, § 106).

Information alleging that, while undergoing sentence in a state prison under and by virtue of a judgment of superior court, defendant feloniously escaped from such prison, held sufficient under Pen. Code, § 106, though not charging that defendant was "committed" to such prison.

2. Escape ⇨10—Evidence held sufficient to sustain conviction for escaping from state prison (Pen. Code, § 106).

Evidence showing that defendant escaped while at work outside of a state prison under surveillance of prison guards held sufficient to sustain conviction though charged under Pen. Code, § 106, with having escaped from the prison.

3. Escape ⇨10—Proof in support of allegations of information that judgment of conviction had never been vacated, set aside, or reversed, but was still in force and effect, held unnecessary.

Proof in support of allegations of information that judgment of conviction had never been set aside or reversed, but was still in force and effect, held unnecessary in prosecution for escaping from state prison, where certified copy of judgment of conviction was offered in evidence supplemented by proof that defendant at time he escaped was undergoing sentence of imprisonment by virtue of such judgment.

4. Escape ⇨1—Prisoner held guilty of escaping from prison, though he may have conceived intention to escape while away from prison (Pen. Code, § 106).

Prisoner leaving prison camp held guilty of crime of escaping from prison under Pen. Code, § 106, though he may have conceived intention to escape after being away from prison.

5. Criminal law ⇨1208(9).

Judgment that defendant be punished by confinement in a certain state prison for term of indeterminate sentence held not subject to objection because of difference in penalties fixed by sections 105 and 106, Pen. Code.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Colvin Crider was convicted of escaping from a state prison, and he appeals. Affirmed.

Ernest B. D. Spagnoli, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Chas. A. Wetmore, Jr., Deputy Atty. Gen., for the People.

KNIGHT, J. This is an appeal by the defendant from a judgment of conviction of the crime of escaping from a state prison. The information charges in substance that while undergoing a sentence of twelve years' imprisonment in the state prison at San Quentin, under and by virtue of a judgment of the superior court of the state of California in and for the county of San Diego, rendered July 28, 1922, said defendant did willfully, unlawfully, and feloniously escape from said state prison.

Section 105 of the Penal Code reads as follows:

"Every prisoner confined in a state prison, for a term less than for life, who escapes therefrom, is punishable by imprisonment in a state prison for a term of not less than one year; said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison."

Section 106 of the same Code, which was later enacted, also provides:

"Every prisoner committed to a state prison for a term less than for life, who escapes or attempts to escape while being conveyed to or from or while confined within such prison or while at work outside such prison under the surveillance of prison guards is guilty of a felony and on conviction thereof the term of imprisonment therefor shall commence from the time such convict would otherwise have been discharged from said prison."

The undisputed evidence in the case shows that the defendant, after his commitment to said state prison was, at his request and in accordance with the rules of said prison, sent to a prison camp in Mariposa county maintained by the board of state prison directors under the surveillance of prison guards. The defendant arrived at said prison camp about February 14, 1924, and escaped therefrom on March 30, 1924. Subsequently, and on August 17, 1924, he was taken into custody at Tucson, Ariz., and returned to said state prison.

[1] It is first contended by the defendant that the information does not state facts sufficient to constitute a public offense in that it fails to charge that the defendant was "committed" to a state prison. From the statement of the substance of the information already made it is apparent that the point is without merit. While the information fails to allege specifically that the defendant was "committed" to said prison, it does allege that

while undergoing a sentence of twelve years' imprisonment in the California state prison at San Quentin, Cal., under and by virtue of a judgment of the superior court of San Diego county, he did feloniously escape from said state prison. We think this allegation sufficient to meet the requirement of the statute.

[2] Defendant further contends that the evidence is insufficient to sustain a conviction for the reason that while he was charged with having escaped from a state prison the evidence shows that he escaped while at work outside such prison under the surveillance of the prison guards. In the case of *Bradford v. Glenn*, 188 Cal. 350, 205 P. 449, the Supreme Court had occasion to pass upon a like point in connection with the application of section 787 of the Penal Code, and it was there said:

"We are of the opinion that a person serving a sentence of imprisonment in a state prison is, in contemplation of law, a prisoner therein, as well when at work outside under the surveillance of prison guards as when confined within its walls, so that if he escapes when outside he escapes from a prison, within the meaning of section 787."

In view of the language used in that decision, we conclude that there was no variance between the allegations of the information and the proof, and that the jury was properly instructed upon that subject.

[3] The information contained allegations to the effect that said judgment of conviction of the superior court of San Diego county had never been vacated, set aside or reversed, but was still in full force and effect. The prosecution offered no proof in support of those allegations and defendant now contends that the evidence in that regard is insufficient to sustain a conviction. It is our opinion that those allegations were not essential to the charge, and that therefore proof in support of them was unnecessary. A certified copy of the judgment of conviction was offered in evidence, supplemented by proof that the defendant at the time he escaped was undergoing a sentence of imprisonment by virtue of said judgment, thereby establishing the fact that he was a prisoner in said state prison, at the time of the escape, which is all that the statute requires.

[4] Some mention is also made by the defendant that there is evidence to the effect that when he departed from said prison camp his intention was to return to the prison to obtain medical treatment, but that on the way back to the prison he changed his mind and made his escape, and he claims therefore it was not proved that he escaped from the prison camp. We think it would make no difference when he conceived the intent to escape, because, in contemplation of law, he was at all times a prisoner and under the surveillance of the prison guards.

[5] As to the question of the difference in penalties fixed by the two Code sections above quoted, the judgment of the court was that the defendant, having been duly convicted "of the crime of felony, to wit, escape from state prison," was ordered "punished by imprisonment in the state prison of the state of California, at San Quentin, for the term of an indeterminate sentence as provided by law. * * *" If, hereafter, in fixing the term of imprisonment under the Indeterminate Sentence Law, the board of prison directors should impose an illegal term of imprisonment, the law affords the defendant ample remedy to correct any error which might thus be committed.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

76 Cal. App. 183

PEOPLE v. ADAMS. (Cr. 875.)

(District Court of Appeal. Third District, California. Jan. 11, 1926.)

1. Assault and battery ☞92.

Evidence held to sustain conviction of assault with deadly weapon.

2. Criminal law ☞1159(3).

Finding of jury upon conflicting evidence is binding on appellate court.

3. Criminal law ☞808.

Language of court in deciding case, though properly stating law, may not be language proper as instruction to jury.

4. Criminal law ☞763, 764(23)—In prosecution resulting in conviction of assault with deadly weapon, instruction on self-defense plea, that drawing of weapon is generally evidence to use it, held properly refused as instruction on facts.

In prosecution resulting in conviction of assault with deadly weapon, where accused pleaded self-defense, instruction that drawing of weapon is generally evidence of intention to use it held properly refused as being instruction upon facts.

5. Homicide ☞300(3).

Self-defense instruction in prosecution for assault with intent to murder, resulting in conviction of assault with deadly weapon, held proper.

Appeal from Superior Court, Sonoma County; Ross Campbell, Judge.

Riley Adams was convicted of assault with a deadly weapon, and he appeals. Affirmed.

J. Harold McAlpine, of Santa Rosa, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was charged with the offense of assault with intent to

commit murder, and convicted of the crime of assault with a deadly weapon, and appeals to this court from the order denying his motion for a new trial and from the judgment pronounced upon the verdict finding him guilty as stated.

[1, 2] The transcript shows that the defendant and the complaining witness were brothers; that on or about the 17th day of January, 1925, the defendant and his brother, after securing a supply of wine, repaired to the home of the brother of the defendant, and while there consumed a considerable quantity of the wine theretofore procured; that both the defendant and his brother became intoxicated; that while in such condition an altercation arose between them concerning former family differences; that the brother of the defendant, while seated upon a bed, used some opprobrious language toward the defendant, and, as claimed by the defendant, made threats against his life and reached for a gun; that the defendant seized a gun and hit his brother over the head, rendering him more or less unconscious, and causing the blood to stream from the wound inflicted by the blow; that thereafter, the defendant gathered up all the rifles in the house of his brother, of which there appear to have been several, took them outside of the house in which they had the altercation referred to, and threw the guns away; that defendant examined his brother to ascertain whether he had inflicted a fatal wound, took his departure, and on his way from his brother's residence stated to a witness that he and his brother had had a little trouble, "I hit him over the head, laid him out," and "what I hate about it is, my dog is over there, and I don't like to go back after him," and further, "he was lying on the bed, blood running out of his head, and, if I didn't kill him, I probably knocked some sense into him." Without going over the testimony in detail, it is enough to say that there is sufficient evidence to support the verdict of the jury of assault with a deadly weapon. On the part of the defendant it is claimed that his act was in necessary self-defense, but the finding of the jury upon this question by the verdict of the jury upon the evidence which shows the character of the trouble between the brothers and the assault by the defendant is binding upon this court.

[3, 4] The principal objection urged by the appellant is the refusal of the trial court to give an instruction to the jury couched in the following language:

"I instruct you that the drawing of a weapon is generally evidence of an intention to use it. Though the drawing itself is evidence of the intent, yet that evidence may be rebutted when the act is accompanied with a declaration, or circumstances, showing no intention to use it. But when the party draws the weapon, although he does not directly point it at the other, but holds it in such a position as enables him to use it before the other party could de-

fend himself, at the same time declaring his intention to use it against the other, the jury are fully warranted in finding that such was his intention."

In support of this proffered instruction the appellant cites the case of *People v. McMakin*, 8 Cal. 548, where it appears that this identical language is used in the opinion of the court in deciding the questions there presented. In that case, the assault consisted of drawing a revolver and holding it in such a position that it could be readily used, though, if discharged in the position in which it was held, the bullet would strike the ground before reaching the person assaulted. In considering the testimony in that case, the character of the assault, and the declarations made by the person charged with the assault, the court in its opinion used the language which was offered as a proposed instruction in this case. It will be observed, upon an examination of the case of *People v. McMakin*, supra, that the proposed instruction in this case was not given in that case, that the language used by the court in the *McMakin* Case was simply a statement of the reasons why the judgment should be upheld, and was not intended as a statement of the law proper to be given to a jury. The first sentence of the proposed instruction is objectionable, in that it practically would amount to an instruction upon the facts, and then, when it comes to dealing with the question of intent, while sufficiently clear to be understood by one conversant with legal principles, would be practically meaningless when addressed to a jury. It may be stated that generally, while the language used in an opinion of the court deciding a case may properly state the law applicable thereto, it, by no means, in all cases, constitutes language proper to be addressed to a jury in the form of an instruction. This, we think, is true of the language of the court used in deciding the *McMakin* Case.

[5] An examination of the transcript shows that the court properly instructed the jury on the law concerning self-defense, and, among other instructions, gave the following, which distinctly refers to the acts of the assaulted party as constituting justification for the defendant's acts and properly presented to the jury the question of self-defense. The instruction referred to is as follows:

"I instruct you that should you find from the evidence in this case that the person alleged to have been assaulted herein conducted himself in such a fashion just prior to the alleged assault of the defendant upon such person that the life of the said defendant was endangered by such conduct or that the defendant had such fear as a reasonable man might, under such circumstances, have had, that great bodily harm or death might result to him, and that the use of the deadly weapon was for such reason necessary, that you would also be warranted in finding, and should, under the law so find, that the use by the defendant of such deadly weapon

was justified by him, and your verdict in such case should be one of 'not guilty' of the offense as charged in the information or of the offense of assault with a deadly weapon."

There being no other question tendered upon this appeal, it follows that the order denying the defendant's motion for a new trial and the judgment herein are affirmed.

We concur: FINCH, P. J.; HART, J.

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76 Cal. App. 162

In re THOMSON'S ESTATE. (Civ. 5416.)

(District Court of Appeal, First District, Division 2, California. Jan. 5, 1926. Rehearing Denied Jan. 28, 1926. Hearing Denied by Supreme Court March 3, 1926.)

1. Appeal and error $\S$ 909(4)—Probate court will be assumed to have properly denied motion to require allowance of claim against estate, where record showed no evidence supporting ground on which it was based.

Where creditor of deceased obtained default judgment after his death, appellate court will assume that probate court properly denied creditor's motion to require administratrix to allow claim thereon, based on ground that rejection was arbitrary, where record did not show any evidence in support of such ground.

2. Courts $\S$ 202(1).

Probate proceedings are special and must be strictly followed.

3. Executors and administrators $\S$ 238—Motion to require allowance of claim, not complying with statute held properly denied (Code Civ. Proc. $\S$ 1498).

Motion to require allowance of claim against estate of deceased *held* properly denied, since such proceeding is not provided for in Code Civ. Proc. $\S$ 1498, which provides complete method of action where such claim is rejected.

Appeal from Superior Court, Alameda County; George E. Samuels, Judge.

In the matter of the Estate of Edgar R. Thomson, sometimes known as Edgar R. Thompson, deceased. From an order denying the motion of Thomas B. Dozier, as administrator with the will annexed of Leonard Franklin Dozier, deceased, to require Gertrude McNeil, as administratrix of Edgar

R. Thomson, sometimes known as Edgar R. Thompson, deceased, to allow a claim against such estate, he appeals. Affirmed.

Dozier, Kimball & Dozier, of San Francisco, for appellant.

Archibald B. Tinning, of Martinez, and Stanley R. Sterne, of Oakland, for respondent.

NOURSE, J. The petitioner appeals from an order denying his motion to require the respondent, as administratrix of the estate of Edgar R. Thomson, to allow and pay petitioner's claim against said estate. The appeal is presented on two typewritten documents entitled, respectively, "Clerk's Transcript on Appeal" and "Reporter's Transcript." No bill of exceptions is found in the record, and the appellant has failed to print in his opening brief or at all the moving papers or any evidence taken at the hearing of the motion. The document entitled "Reporter's Transcript" consists entirely of statements of counsel and argument in favor of and against the motion.

From this discussion we learn that the petitioner commenced two certain actions for the foreclosure of separate mortgages and served the decedent, Thomson, with process as a defendant therein. On May 11, 1923, Thomson died, and on June 6, 1924, respondent herein was appointed administratrix of his estate. In January, 1925, without substituting administratrix or taking any other proceedings, and without having taken the default of decedent during his lifetime, the appellant herein caused the default of decedent to be entered in the foreclosure suits. He thereafter took judgment against the decedent in each suit, and then presented to the administratrix of this estate his claim for the deficiency, amounting to \$7,094.22 and interest. This claim was rejected by the administratrix in due course. Thereupon this appellant commenced an action in the superior court upon the rejected claim, and, so far as we are informed, that action is still pending.

[1] The appellant's motion to require the administratrix to approve the claim was based upon the ground that the rejection was arbitrary. So far as appears from the record

before us, no evidence was offered in support of the ground specified. On the record, therefore, we must assume that the probate court properly denied the motion.

[2, 3] Furthermore, we find no authority in the statutes for a motion of this nature. Probate proceedings are special, and must be strictly followed. Section 1498 of the Code of Civil Procedure provides a complete method of action when a claim is rejected by the representative of an estate in probate, and no provision is made therein for a proceeding of this kind.

The only authority cited by appellant in justification of his motion is Estate of Page, 50 Cal. 40. The facts of that case are different from those of the case at bar. There a verdict had been returned against the decedent in his lifetime; while a motion for a new trial was pending, the defendant died. His executors were substituted, and their motion for a new trial was denied. Judgment was thereupon entered against the executors. That judgment came within the provisions of section 1504 of the Code of Civil Procedure, which read (enactment of 1872 in effect at the time of the decision):

The effect of "a judgment rendered against an executor * * * only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the probate judge."

In the case at bar, the judgments were not rendered against the administratrix but against the decedent after his death and without a substitution. It seems idle for appellant to argue that, because the decedent had not appeared in the foreclosure actions during his lifetime his default might have been taken and judgment might have been entered against him in his lifetime.

Appellant has not directed our attention to any statutory authority for the proceeding he has adopted, and the validity of the judgments which are in issue in the civil action which he has instituted against the administratrix is not, therefore, a proper matter for consideration on this appeal.

Order affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

76 Cal. App. 40

STORKE v. CITY OF SANTA BARBARA
et al. (Civ. 5317.)

(District Court of Appeal, First District, Division 1, California. Dec. 29, 1925. Hearing Denied by Supreme Court Feb. 25, 1926.)

1. Municipal corporations ⇨56—Cities organized under municipal affairs amendment to Constitution are entirely beyond interference of general laws (Const. art. 11, § 8, as amended in 1914).

Under Const. art. 11, § 8, as amended in 1914, relative to municipal charters, cities organized thereunder are entirely beyond the interference of general laws of state in regard to the administration of municipal affairs.

2. Municipal corporations ⇨79—Charter provisions relating to purely municipal affairs contravene general law (Const. art. 11, § 6).

Under Const. art. 11, § 6, charter provisions relating to purely municipal affairs contravene the general law pertaining to the same subject.

3. Municipal corporations ⇨79—Scheme of local taxation declared by municipality's charter is superior to general law (Const. art. 11, § 6).

Municipal taxation is a municipal affair, and, under Const. art. 11, § 6, a scheme of local taxation declared by municipality in charter is superior to the general law of the state on that subject.

4. Municipal corporations ⇨971(2)—Charter adopted under amendment to Constitution held not to require ordinance in order to authorize scientific appraisal of property by expert for taxation (St. 1917, p. 1824; Const. art. 11, § 8, as amended in 1914).

As Santa Barbara City Charter, adopted pursuant to Const. art. 11, § 8, as amended in 1914, required a scientific appraisal of property every five years, ordinance authorizing such appraisal was unnecessary to render general laws inapplicable, and contract with expert was not invalid for lack of such ordinance.

5. Municipal corporations ⇨971(2)—Passage of ordinance not required by charter itself to carry out provisions for scientific appraisal of property for taxation (St. 1917, p. 1824).

Under Santa Barbara City Charter, *held*, that passage of ordinance was not required to carry out its provisions relative to the scientific appraisal of property for taxation; such provisions being self-executing, and the duty of fixing the terms of employment of an expert being an administrative one.

6. Municipal corporations ⇨990—Allowance of exorbitant sums for appraisal of taxable property constructive fraud, for which taxpayer has ample remedy.

Allowance by city council of an unconscionable sum as compensation of expert for making appraisal of property as required by city charter for purposes of taxation would amount to a constructive fraud against the city, for which ample remedy would lie at the instance of taxpayer.

7. Municipal corporations ⇨971(2)—Contract for employment of appraisal expert prepared by city attorney, signed pursuant to motion of council and approved at regular meeting, became contract of city.

Where contract for employment of expert to appraise taxable property was prepared by city attorney and signed pursuant to motion adopted by city council, and signed contract at regular meeting of council was approved and ratified by resolution, such contract became contract of the city.

8. Municipal corporations ⇨971(2)—Employment of expert appraiser held not to create new office or make appraiser assistant or deputy assessor requiring employment by ordinance.

Where charter of city provided for a scientific appraisal of property by a recognized expert every five years, the employment of such expert did not create a new office or make appraiser an assistant or deputy assessor so as to require employment to be by ordinance.

9. Municipal corporations ⇨1001—Verification of claims of tax appraiser and presentation to and approval by council not necessary under charter (St. 1917, p. 1824).

Verification of claims of tax expert employed to appraise property pursuant to Santa Barbara City Charter *held* not required to be verified or presented to or approved by the city council in view of charter, where claims were paid without suit.

10. Municipal corporations ⇨971(2)—Contract requiring tax appraiser to report work done each week held not to violate charter as to time when appraisal should be made (St. 1917, p. 1824).

Provisions of Santa Barbara City Charter that scientific appraisal for purposes of taxation should be made as of specified date was not violated by contract with appraisal expert, providing that appraiser should present report of all work done each week, and, while provisions of charter would be read into contract, fact that certain portions of appraisal may have been prematurely made and filed did not affect power of council to enter into the contract.

Appeal from Superior Court, Santa Barbara County; Merle J. Rogers, Judge.

Action by C. A. Storke against the City of Santa Barbara and others. From a judgment of dismissal, plaintiff appeals. Affirmed.

S. J. Bingham, of Santa Barbara, for appellant.

W. P. Butcher, City Atty., of Santa Barbara, for respondents.

KNIGHT, J. This action was brought by plaintiff as a resident and taxpayer of the City of Santa Barbara to annul a certain contract purporting to have been entered into on behalf of said city with Norman E. McFadden, authorizing the latter to make "a scientific appraisal" of the real property within said city for the purposes of munic-

ipal assessment; also to require the said McFadden to repay to the city treasurer certain sums of money received by him as compensation for part of work performed pursuant to said contract, and to enjoin any further payment from being made thereunder. A demurrer to the complaint upon the grounds of insufficiency of facts, misjoinder of parties defendant, and uncertainty was sustained by the court with leave to amend, and, plaintiff having declined to amend, judgment of dismissal was entered, from which judgment plaintiff appeals.

The city of Santa Barbara was organized under a freeholders' charter, adopted and ratified, pursuant to the amendment of 1914 to section 8 of article 11 of the state Constitution. Stats. 1917, p. 1824. Said charter became effective on the first Monday in January, 1918, and under it the city was being governed when the transaction in question took place. The charter provides, among other things, that all powers of the city, except as otherwise provided in the charter, are vested in a council of five members. Charter, § 3. Every two years the council elects from its membership a presiding officer to be known as the mayor. Charter, § 9. Further provision is made for the appointment of a manager who shall be the administrative head of the municipal government and whose general and specific powers and duties are defined by said charter. Charter, § 37. An assessor is also appointed by the council. Subdivision (a), § 33. The charter declares a scheme of local taxation under the title, "Assessment of Taxes," which expressly or by similarity of provisions follows, in a general way, the procedure prescribed by the general law for the collection of county taxes. It departs, however, from the general law in some features, the most important of which is set forth in section 82 of said charter, reading as follows:

"In preparation for the first assessment of taxes after this charter takes effect, and at intervals of five years thereafter, the council shall, at or before its first meeting in February, provide for a scientific appraisal by a recognized expert, of all real property in the city, provided, that if such appraisal shall have been made before this charter takes effect, a new appraisal shall be required only at intervals of five years after such previous appraisal. This appraisal shall be made as if at 12 m. on the first Monday in March, and shall be used by the assessor as the basis for the assessment for that year, and he shall revise his valuation in each intervening year.

* * *

It is alleged in the complaint that—

At a meeting of the council, held on December 12, 1922, an oral motion was regularly adopted by the council instructing the city attorney "to prepare a contract to be executed by the city manager on behalf of the city with Norman E. McFadden as scientific appraiser as provided in section 82 of the charter, and

that the compensation be fixed at the sum of \$5,000 for the completed work, leaving the contracting party to bear all and every of his own expenses. That the contract provide for a bond on the part of Mr. McFadden in the sum of \$5,000 for the faithful performance of his contract."

The minutes of that meeting also show the following entry:

"The council informally agreed that suggestion be made to the city attorney to incorporate in the contract provision that the \$5,000 be paid in weekly payments in advance and in proportion to the amount of work performed, also that the necessary maps shall be provided by the city."

Following the adoption of said motion, a written contract was prepared, wherein the said Norman E. McFadden was named as party of the first part, and the city of Santa Barbara was named as the party of the second part, the terms of which contract, after reciting the substance of the charter provision requiring said appraisal to be made, provided:

"It is hereby agreed that the party of the first part, shall and does hereby promise to employ all the necessary assistance at his own cost and expense and make a scientific appraisal of all the real property of said city for the fiscal year of 1923-1924. That he will commence the execution of such work within ten (10) days from the date hereof, and prosecute the same faithfully and diligently from day to day until the whole thereof shall have been carefully completed, and a full and complete scientific report made thereof to the said party of the second part on or before the 15th day of March, 1923. That the party of the second part shall furnish all such maps as may be necessary for the proper prosecution of said work free of charge to the party of the first part. And in consideration of such work being completed within said time, said party of the second part promises to pay him, said party of the first part, five thousand (\$5,000.00) dollars, in the following manner, to wit: At the end of each week the party of the first part shall present a full report on all such work done by him for that week to the city assessor of the party of the second part, and if such work shall be satisfactory to the said assessor, he, said assessor, shall thereupon accept the same, and when so accepted shall report the same to the manager of said city, who shall cause a warrant to be drawn upon the treasurer of said city in favor of the party of the first part for 90 per cent. of all the work so done up to that time in the ratio such work shall bear to the entire work to be so done, and when the entire work is completed a warrant shall be drawn on the treasurer for whatever sum may then remain due and unpaid to the party of the first part, it being understood, however, and expressly agreed that such work shall not be deemed complete until the same shall be presented to said council and by it accepted by an order spread upon its minutes."

On December 14, 1922, said contract was signed by the said McFadden and by the city manager for the city. Subsequently, and on December 21, 1922, said contract was placed before the council at a regular meeting thereof, and the following resolution was duly passed:

"Resolution No. 366 (new series). A resolution providing for and authorizing the appraisal by a recognized scientific expert of the real property in the city of Santa Barbara and confirming all acts of the council of said city relative to such matter. Whereas the council of the city of Santa Barbara did, on the 12th day of December, 1922, at a special adjourned meeting called for that purpose, provide for a scientific appraisal of all the real property within said city by a recognized expert, and did authorize the manager of said city to enter into a contract with Norman E. McFadden as such appraiser, and whereas said manager has executed with said Norman E. McFadden a contract by the terms of which he the said Norman E. McFadden is to make such appraisal as such expert, now, therefore, be it resolved by said council that all the acts done at said special adjourned meeting by said council relating to said matter of assessment be, and the same are hereby ratified and affirmed, and the said Norman E. McFadden is hereby employed as such appraiser for said purpose, and said contract is hereby approved, and the said Norman E. McFadden is hereby declared to be the legally appointed expert appraiser for said purpose, and is authorized to make such appraisal as is provided by and in conformity with section 82 of the charter of said city."

The complaint further alleges that on January 10, 1923, McFadden entered upon the discharge of his duties as such appraiser, and on January 16, 1923, having completed part of the appraisal, presented a claim against the city therefor in the sum of \$288, which claim particularized the amount of work performed, was approved by "W. W. Smith" (whose official capacity does not appear from the record), and by two members of the finance committee of said council, after which it was "approved for payment" by the city manager. A warrant was then drawn by the auditor for payment of said claim, and the warrant was paid by the treasurer. Subsequently, and on February 13, 1923, McFadden completed another portion of said appraisal and presented a claim therefor in the sum of \$1,008. Said claim was substantially in the same form as the first one and was likewise approved (except by "W. W. Smith"), allowed and paid. On March 8, 1923, this action was commenced, and no further payments were thereafter made.

[1-4] The principal question presented by this appeal is whether the transaction involving the execution of said McFadden contract is legal, in view of the fact that it was not grounded upon the passage of an ordinance. Appellant's contention that said transaction is a nullity is based, first, upon the theory that the city of Santa Babara, in

the administration of its municipal affairs, is controlled by general laws until those general laws are contravened by municipal ordinances; that, inasmuch as the general law makes no provision for a scientific appraisal by an expert appraiser for the purposes of assessment, such general law controls until the legislative body of the city has enacted an ordinance to supersede it. This the city of Santa Barbara admittedly has not done. It will be found, however, that the cases cited by appellant on page 15 of his opening brief, in support of his claim as to the application of general laws, relate only to cities organized under the 1896 amendment to section 6 of article 11 of the Constitution. City of Long Beach v. Lisenby, 175 Cal. 575, p. 582, 166 P. 333. As to cities like Santa Barbara, which have been organized under, or which have by charter amendment brought themselves within the constitutional amendment of 1914, a different rule is held to prevail. That amendment, according to the cases hereinafter cited, declares an entirely new scheme for the granting of municipal charters, the effect of which places cities organized thereunder entirely beyond the interference of general laws in regard to the administration of municipal affairs. A clear and comprehensive statement of the scope of that amendment, and the effect of the decisions which have since been rendered construing it, is set forth in an opinion written by Mr. Justice St. Sure, in the case of Bank v. Bell, 62 Cal. App. 320, 217 P. 538 (18 Cal. Jur. 783). It is as follows:

"To recapitulate, it appears that, since the 'municipal affairs' amendments of 1914 to the Constitution, for such cities as have brought themselves within the condition of the amendments, the law is firmly established as follows: The powers of the cities are not derived from the Legislature, but from a freeholders' charter directly provided for by the Constitution. The city in its charter may make and enforce all laws and regulations in respect to municipal affairs subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by the general laws. The powers of the city are all-embracing, restricted, and limited by the charter only and free from the interference of the state by general laws. The result is that the city has become independent of general laws upon municipal affairs. Upon such affairs a general law is of no force. If its charter gives it powers concerning them, it has those powers. If its charter is silent as to any such power, no general law can confer it. As to municipal affairs the charter, instead of being a grant of power, is, in effect, a limitation of powers. The city can exercise the power if the charter does not prohibit it."

The authorities upon which that statement of the law is founded are cited and briefly discussed in the opinion, among them being Civic Center Ass'n v. Railroad Commission, 175 Cal. 441, 166 P. 351; Cole v. City of Los

Angeles, 180 Cal. 617, 182 P. 436; Morgan v. City of Los Angeles, 182 Cal. 301, 187 P. 1050; Matter of Nowak, 184 Cal. 701, 195 P. 402; Matter of Galusha, 184 Cal. 697, 195 P. 406; Los Angeles Gas & Electric Corp. v. City of Los Angeles, 188 Cal. 307, 205 P. 125. See, also, 18 Cal. Jur. 784. It would therefore seem that appellant's theory of the application of general laws to municipal affairs of the city of Santa Barbara cannot be sustained. But, aside from that question, it has been the established rule in this state ever since the adoption of the constitutional amendment of 1896 to said section 6 of article 11 that a charter provision relating to a purely municipal affair contravenes the general law pertaining to the same subject; and it has been furthermore specifically held that the matter of municipal taxation is a municipal affair, and, accordingly, that a scheme of local taxation declared by a municipality is superior to the general law of the state on that subject. Keyes v. San Francisco, 177 Cal. 313, 173 P. 475; Ex parte Braun, 141 Cal. 204, 74 P. 780. The city of Santa Barbara has declared in its charter a scheme of local taxation, in the adoption of which part of the general law has been expressly incorporated. Charter, § 89. But it has departed from the procedure of the general law in requiring a scientific appraisal to be made of the real property within the city by a recognized expert, at intervals of every five years. It will therefore be seen that the charter itself, which emanates from the Constitution, has contravened the general law upon the subject of said appraisal, thereby making it unnecessary, in any event, for the legislative body of the city to take further action by ordinance to accomplish that purpose.

[5] The next question arising is whether, as appellant contends, the charter itself requires the passage of an ordinance in order to carry into effect the provisions of said section 82 relating to the matter of scientific appraisal. As to this point appellant relies on section 6 of the charter, which reads:

"Except as otherwise provided, by this charter or by the Constitution of the state, the council may, by ordinance, prescribe the manner in which any power of the city shall be exercised."

We are of the opinion that said section 6, reasonably construed, cannot be held to apply to the matter at issue, for the reason that said section 82 is obviously self-executing and by its own terms prescribes the manner in which the power of the city in that respect shall be exercised, namely, by providing that said scientific appraisal shall be made by a recognized expert. The duty of fixing the terms of the employment of such recognized expert is, we believe, an administrative one, which, like many other administrative duties, may be carried out by the legislative body without the aid of an ordinance. The ques-

tion of what constitutes an administrative duty is dealt with in the case of Earl v. Bowen, 146 Cal. 754, 81 P. 133, and, upon the reasoning of that case generally and the conclusions reached therein, we think that the action of the council in the case before us, in proceeding by contract, may be properly sustained. Our conclusion that the passage of an ordinance is not essential is further supported, we think, by the reading of said section 82 in its entirety. The second paragraph thereof provides as follows:

"Whenever such expert appraisal is to be made, the council may, with the consent of the board of supervisors, provide by resolution for a joint appraisal * * * in which case the resolution shall authorize the payment by the city of not more than one-half of the total expense of such joint appraisal." (Italics ours.)

Apparently there can be no good reason assigned, at least none has been brought to our attention, why the framers of the charter should have intended to make a distinction between a joint and a sole appraisal, and allow a joint appraisal to be obtained pursuant to the adoption of a resolution, but require that a sole appraisal be obtained only by means of the passage of an ordinance. The possible result of the passage of such an ordinance should also be taken into consideration in determining whether it was intended by the charter framers that said charter provision should remain inoperative in the absence of the passage of an ordinance. In this regard the charter reveals that all ordinances passed by the city, excepting those specified in section 114 thereof—which excepted classes do not include an ordinance of the character of the one under discussion—are subject to referendum. Charter, §§ 111, 112, 113. If, therefore, as appellant contends, the passage of an ordinance be essential to effectuate the obtaining of such scientific appraisal, and such ordinance does not, as appellant further contends, become operative for a period of 30 days, the existence of dissatisfaction on the part of some of the electors over the question of the choice of the appraiser or in reference to the terms of his employment would allow a referendum to imperil and possibly defeat one of the mandatory requirements of the taxing system of the city. We are not prepared to say that such a situation was contemplated or intended. For the foregoing reasons we believe that the passage of an ordinance is not essential to the carrying into effect that portion of section 82 in question.

[6] Appellant asserts that if the council be allowed to proceed in this matter by contract it will open the door to abuse in that the council might allow exorbitant sums to be paid for the work of appraisal. Answering this proposition, it may be said that any attempt to fix the compensation for such work at an unconscionable sum would at least

amount to a constructive fraud against the city, for which ample remedy would lie at the instance of a taxpayer. Fraud is not made one of the elements of this suit.

[7] In regard to the legality of the execution of the contract, the facts pleaded in the complaint show that the contract was prepared by the city attorney and signed pursuant to a motion adopted by the council to that effect. Later, the signed contract was laid before the council for consideration at a regular meeting thereof, and by resolution, duly passed on December 21, 1922, was approved and ratified. It thereby became the contract of the city. The matter of obtaining a scientific appraisal is, as already pointed out, one of the essential preliminaries to be followed in complying with the mandatory provisions of the taxation scheme of the city, and therefore relates directly to the matter of the tax levy. Under section 29 of said charter a resolution "relating to * * * the annual tax levy" becomes operative immediately.

[8] Appellant further contends that the employment of an expert appraiser, in effect, amounts to the creation of a new office, or divides the duties of the assessor or makes of the appraiser a deputy or assistant assessor, and that, consequently, under section 35 of the charter, his employment must be accomplished by ordinance. We find no merit in the point. His employment is authorized by the charter itself, and the duties he is required to perform are entirely independent of those of the assessor.

[9, 10] The further point is made that the contract is illegal in that it did not provide, in accordance with the charter provision to that effect, that the scientific appraisal should be made "as if at 12 m. on the first Monday in March." We think the terms of the contract do not violate the charter provision. The contract provides merely that at the end of each week said appraiser "shall present a full report of all such work done by him for that week to the city assessor" (italics ours), and, if such work be satisfactory and accepted, he shall, subject to approval of the city manager, be entitled to receive 90 per cent. of the compensation due for the work done up to that time. The requirement of the charter, that said appraisal shall be made "as if at 12 m. on the first Monday in March," must, of course, be read into and considered a part of the contract, but the fact that certain portions of said appraisal may have been prematurely made and filed does not affect the power of the council to enter into the contract. It relates merely to the performance of the contract. It is also alleged in the complaint that the McFadden claims were not verified and were not presented to or approved by the council. Appellant has not cited us to any charter provision or other law of the city requiring those things to be

done, and in view of section 41 of said charter, which requires only that "all bills against the city must be approved by the heads of departments, and * * * countersigned by the manager, before presentation to the auditor," it would seem that verification of claims and presentation of them to the council are not necessary. Section 124 of said charter provides that "no suit shall be brought upon any claim for moneys or damages against the city until the demand for the same has been presented to the council and rejected in whole or in part"; but the McFadden claims were paid without suit.

It is our opinion that the demurrer was properly sustained.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

78 Cal. App. 223

BUTLER v. ROBINSON. (Civ. 4534.)

(District Court of Appeal, Second District, Division 2, California. Jan. 15, 1926.)

1. Judgment $\hookrightarrow$ 106(5)—Pleading $\hookrightarrow$ 323(1)—Motion to require plaintiff to set forth particulars of claim for services is not a demurrer, but is within statute as to bill of particulars, and judgment by default is proper after removal of motion for want of appearance (Code Civ. Proc. §§ 454, 585, subd. 1).

Defendant's motion to require plaintiff to set forth particulars of claim for services rendered defendant's testatrix is not equivalent to demurrer, but comes under Code Civ. Proc. § 454, providing for demand and delivery of particulars in suit upon an account; and hence, on removal of motion from calendar for want of appearance, clerk properly entered judgment by default under section 585, subd. 1, granting such power where there is no answer or demurrer.

2. Pleading $\hookrightarrow$ 192(2).

Objection to complaint, based on grounds of uncertainty, must be made by demurrer.

3. Judgment $\hookrightarrow$ 139.

Motion to set aside default and vacate judgment is addressed to sound discretion of trial court.

4. Judgment $\hookrightarrow$ 163—Failure to demand bill of particulars before motion therefor may be considered by trial court in passing on motion to vacate default (Code Civ. Proc. § 454).

Failure to first make demand on plaintiff for particulars of his claim, before moving to compel him to render a bill of particulars, under Code Civ. Proc. § 454, is a fact which trial court may consider in passing on motion to vacate default judgment.

5. Pleading $\hookrightarrow$ 85(4)—If motion to have plaintiff furnish details of claim is regarded as demand for bill of particulars, it does not extend time for answer (Code Civ. Proc. § 454).

If defendant's motion to require plaintiff to set forth details of claim for services rendered

defendant's testatrix is regarded as a demand for bill of particulars under Code Civ. Proc. § 454, it does not have effect of extending time for answer.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Lauretta Butler against J. W. Robinson, as executor of the estate of Ida Thomas, deceased. From an order denying motion to vacate judgment entered by default, defendant appeals. Affirmed.

James M. Robinson and James E. Fenton, of Los Angeles, for appellant.

Willis O. Tyler, of Los Angeles, for respondent.

CRAIG, J. The plaintiff brought an action in the superior court of this state against the appellant as executor of the estate of Ida Thomas, deceased, in which it was alleged, among other things, that "during the lifetime of the deceased the plaintiff rendered personal service to her and furnished her with board, room to live in, and with divers and sundry articles of medicine, all of the reasonable value of \$2,035.20," and "that during the lifetime of Ida Thomas, deceased, became indebted to the plaintiff for her care, room rent, and attention," in said sum. The complaint also contained an allegation that the deceased had promised to pay for the said board, room, and personal services. Thereafter the executor served and filed a motion:

"To require the plaintiff to set forth in her complaint the various dates when she claims that she rendered the personal service to the deceased during her lifetime, or that she furnish a bill of particulars of each and such items, or that she file an amended complaint, and attach to the complaint, by way of exhibit, a true copy of the claims which it is alleged therein she caused to be filed with the said executor, and that if more than one claim was filed with the executor, to furnish a true copy of each thereof, and to file in the clerk's office true copies of the said cause thereof as a part of the said complaint."

"2. To set forth in said complaint the facts of the promise on the part of the deceased to pay for her board and other personal service, which is mentioned in paragraph 3 of the complaint, and to state whether or not the said promise to pay was oral or in writing, and to give fully the terms thereof, and the date when made, and to whom made, so that this defendant may tender an issue with reference thereto, in his answer to the complaint."

The hearing of this motion was regularly placed on the calendar of the court for February 21, 1923. At that time the attorneys did not appear, and the motion was removed from the calendar. Thereafter the clerk, on request of the attorney for the plaintiff, entered a default upon which judgment was thereafter rendered as prayed for in the complaint. Soon after this the executor made

a motion to vacate the judgment and set aside the default. This motion was based upon the files and records in the case, and affidavits setting forth the matters heretofore stated, and other facts. After oral argument of the motion it was denied, and from the order of denial this appeal is taken.

In support of the appeal it is urged that it was error for the trial court to enter an order of default and judgment thereon, and also that the refusal of the court to vacate the judgment was error.

[1, 2] In discussing the first proposition, it is said that the motion which we have quoted was "in the nature of a special demurrer," and that because of such an appearance by the executor the trial court lacked jurisdiction to proceed without notice to the executor's attorney. It is obvious that the motion above quoted is one under section 454 of the Code of Civil Procedure. This section merely provides for demand and delivery of particulars in a suit upon an account. Such a motion is not the equivalent of a demurrer. The authority of the clerk in entering the default is given in section 585, subd. 1, of the Code of Civil Procedure. This provision grants such authority to the clerk where no answer or demurrer has been filed within the time specified in the summons, or such further time as may have been granted. This motion is in no sense a demurrer. In view of the wording of the last paragraph, it might be argued that it should be construed as a motion to make more definite and certain, but any objection to the complaint based upon the ground of uncertainty must be made by demurrer. *McFarland v. Holcomb*, 123 Cal. 84, 85, 55 P. 761.

[3, 4] In so far as the action of the lower court is concerned in denying the motion to set aside the default and vacate the judgment, that is a matter addressed to the sound discretion of the trial court. *Jones v. Southern Pacific Co.* (Cal. App.) 236 P. 336; *Eberhart v. Salazar* (Cal. App.) 235 P. 86. Both points are decided in the case of *Steineck v. Coleman* (Cal. App.) 236 P. 962, in which a motion was made to relieve against a default for failure to answer where it appeared from an affidavit that the defendant had served on the plaintiff a demand for a bill of particulars, and believed that as a matter of law his time to answer was extended by reason of this demand. It was there held that the action of the trial court in denying the motion to set aside the default and vacate the judgment was not subject to review on appeal, and also that the serving of a demand for a bill of particulars did not itself extend the time for answering. There is nothing in the affidavits on file in the instant case which materially distinguishes it from the situation there shown to have existed. Aside from the above authority, it may be said that the defendant's first motion was not of such a character as to raise an issue of any kind; it

merely asked for certain information for the benefit of the appellant in preparing his pleading. Section 454 of the Code of Civil Procedure provides adequate means for supplying such information in cases of the character. The appellant did not even follow the provisions of this section, for he did not first make demand upon the plaintiff, but, so far as the record shows, without any such demand, moved the court for the remedy provided in the last sentence of section 454, which reads as follows:

"The court or judge thereof may order a further account when the one delivered is too general, or is defective in any particular."

[5] However, it is not necessary to decide whether failure to make demand before bringing the matter to the attention of the court upon motion would be a ground for denial of the motion. It is certainly a fact which the trial court had a right to consider in passing upon the motion to vacate. If the appellant's first motion is to be regarded as a demand under section 454, then, as we have said, the case of *Steineck v. Coleman*, *supra*, holds adversely to appellant's contention as to it having effected an extension of time in which to file an answer.

The trial court's action in denying the motion to vacate the judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

198 Cal. 234

JOHNSON et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 11732.)

(Supreme Court of California. Feb. 25, 1926. Rehearing Denied March 25, 1926.)

Master and servant — 347—Statute classifying member of partnership receiving wages as "employee," within Compensation Act, held valid (Workmen's Compensation Act, §§ 6-31, 8(b), 69 [St. 1917, pp. 834-860] Const. art. 20, § 21).

St. 1917, p. 835, § 8 (b) classing working member of partnership receiving wages irrespective of profits as an employee within Compensation Act, §§ 6-31 held proper classification and not unconstitutional in view of Workmen's Compensation Act, § 69, and Const. art. 20, § 21.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

In Bank.

Certiorari to review an order of the Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Gerda E. Johnson and others, minors, by Gerda E. Johnson their guardian, ad litem, for compensation for the death of Axel Johnson, opposed by E. B. and A. L. Stone Company. To review an order of the Industrial Accident Commission refusing compensation the claimants bring certiorari. Order set aside.

Theo. M. Monell, of San Francisco, for petitioners.

Warren H. Pillsbury, of San Francisco, for respondent Industrial Accident Commission.

H. C. Kelsey, of San Francisco, for respondent E. B. & A. L. Stone Co.

WASTE, C. J. Petitioners, who are the surviving wife and children of Axel Johnson, filed with the Industrial Accident Commission an application for the adjustment of a claim for workmen's compensation asserted to be due on account of the death of Johnson, alleged to have been caused during the course of his employment as a member of a copartnership consisting of the E. B. & A. L. Stone Company, one of the respondents herein, and said deceased. Claim for compensation was made under the definition of the term "employee" found in section 8 (b) of the Workmen's Compensation Act (St. 1917, p. 835), which provides that "a working member of a partnership receiving wages irrespective of profits from such partnership shall be deemed an employee within the meaning of this section." The respondent commission denied an award and dismissed the application, upon the ground that the quoted language was within the condemnation of previous decisions of this court holding other portions of the same section unconstitutional. This pro-

ceeding in certiorari was thereupon instituted to test the correctness of the commission's ruling.

There is no dispute as to the facts involved. It is admitted that the decedent, Johnson, was a working partner with the respondent stone company under a contract providing that Johnson was to furnish a towboat owned by him, and to operate a lighter of the respondent stone company, and to pump sand and gravel, which was to be sold, the proceeds, after deducting certain expenses provided for in the contract, to be equally divided between the stone company and Johnson. The contract further provided that Johnson was to receive a salary of \$150 a month, which amount was one of the items of expenses allowed in the contract, which were to be equally divided. It is conceded that the injuries sustained, and proximately causing the death of the decedent, were sustained by him while acting as such partner. The sole question presented to this court is the constitutionality of that portion of section 8 (b), supra, which classes a working member of a partnership receiving wages, irrespective of profits, as an employee, and brings him within the scope of the application of the Compensation Act, which was not added to the statute until 1917 (Stats. 1917, p. 835).

Our Workmen's Compensation Act, like those of most of the states, followed closely the English acts of Parliament upon the same subject-matter. The English courts have uniformly held against compensation being awarded working members of partnerships. On the authority of one of the leading English cases, *Ellis v. Ellis Co.*, [1905] 1 K. B. 324, 7 W. C. C. 97, this court decided that the provisions of the Workmen's Compensation Act, prior to the amendment of 1917, were not applicable when the person injured was in the position of both employer and employee, and held that one partner could not recover compensation from the partnership of which he was a member for injuries received while performing services for it. *Cooper v. Industrial Acc. Comm.*, 171 P. 684, 177 Cal. 685, 689. The situation has, however, been materially changed by the amendment of 1917, which makes a working partner, receiving wages from the partnership, irrespective of profits, an "employee," within the definition of that term as used in sections 6 to 31 of the Workmen's Compensation Act.

Almost the precise question presented by this proceeding in review was considered in *Gallie v. Detroit Auto Accessory Co.*, 195 N. W. 667, 224 Mich. 703. The court was there required to pass upon an amendment to the Workmen's Compensation Law of Michigan (Pub. Acts 1921, No. 173), providing that members of partnerships receiving wages, irrespective of profits, came under the application of the act, which defined an "employee"

to mean "every person in the service of another under any contract of hire, express or implied." The court said:

"It is somewhat anomalous to say that a partner may, as a member of a firm, be an employer and as such come within the compensation law, and then if he works for the firm for wages be also an employee within the meaning of the act; but the compensation law so provides, and is evidently based on the holdings that a partner may, by special agreement, be entitled to wages for services rendered the firm, even though such compensation must be worked out in an accounting between the partners."

To the same effect is *Ohio Drilling Co. v. State Industrial Comm.*, 207 P. 314, 86 Okl. 139, 25 A. L. R. 367, where the court said:

"We think that the construction of the Workmen's Compensation Act, that member of a partnership who works for the partnership, and who while so engaged is injured, is not an employee within the meaning of the act, is an exceedingly narrow construction of the act, where the sole reason therefor is that stated in the British case, *supra* [*Ellis v. Ellis Co.*, *supra*], that a member of the partnership cannot place himself in the position of being a workman employed when he is one of the persons giving employment. * * * We see no good reason why the members of a partnership cannot jointly or severally perform the work or labor incident to the success of the joint undertaking and at the same time draw wages from the earnings of the partnership."

Respondents have cited two cases in which the opposite [English] rule has been followed: *McMillen v. Industrial Comm.*, 13 Ohio App. 310, and *Le Clear v. Smith*, 202 N. Y. S. 514, 207 App. Div. 71. These were both decisions of an intermediate appellate court and do not state what we believe must be the rule under our own statute.

It has frequently been held that partners, by express contract, may agree that one partner receive compensation for his service. *Nevills v. Moore Mng. Co.*, 67 P. 1054, 135 Cal. 561, 564; 20 Cal. Jur. 735. That being so, no good reason appears to us why the Legislature may not classify a working member of a partnership as an employee within the meaning of the Compensation Act. Nor does it appear to us that in so doing it thereby attempts to enforce a liability on the part of any person not an employer to compensate persons who do not sustain to him the relation of an employee—something it cannot do. *Employers' Liability Assurance Corp'n v. Industrial Acc. Comm.*, 203 P. 95, 187 Cal. 615, 617. Section 21 of article 20 of the Constitution vests the Legislature "with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of work-

men's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability, and their dependents for death incurred or sustained by the said workmen in the course of their employment." The Workmen's Compensation Act, and every part and section thereof, when interpreted by the court, must be liberally construed, "with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment." *Workmen's Compensation Act*, § 69. This court cannot hold that a working member of a partnership, receiving wages irrespective of profits from such partnership, shall not be deemed an employee within the meaning and scope of the act without doing violence to both the Constitution and the provisions of the act itself.

The more recent decisions of this court, relied on by respondents, are not in point. Some general language used in *Flickenger v. Industrial Acc. Comm.*, 184 P. 851, 181 Cal. 425, 19 A. L. R. 1150, lends apparent support to their contention; but the court was there dealing with the question whether or not the Legislature could enlarge the meaning of the term "employee" by restricting the definition of what constitutes an "independent contractor," so as to bring the latter within the application of the Compensation Act. The other decision, *Employers' Liability, etc., Corp'n v. Industrial Acc. Comm.*, *supra*, merely held that the commission had no jurisdiction to entertain an application or to make an award of compensation to a member of a partnership, where such partner was not an employee of the firm at the time of his injury, but an equal member performing, without wages, his part of the work and business, and to receive and receiving his only reward therefor out of an equal division of the profits.

We conclude, therefore, that at the time the decedent, Johnson, received the injuries resulting in his death, he was subject to the provisions of the Workmen's Compensation Act. Consequently the respondent Industrial Accident Commission had jurisdiction of the application for adjustment of compensation filed by the petitioners herein. Its order dismissing the claim of the applicants, the petitioners here, is set aside, and the case is remanded for further proceedings before the commission in keeping with the views herein announced.

We concur: SHENK, J.; SEAWELL, J.; CURTIS, J.; LAWLOR, J.; LENNON, J.; RICHARDS, J.

198 Cal. 170

SEVIER v. RILEY, State Controller.
(S. F. 11808.)

(Supreme Court of California. Feb. 17, 1926.)

1. Judges $\S$ 22(2) — Constitutional amendment, providing Legislature fix judges' salaries, repeals conflicting provision, gives Legislature plenary control and statute pursuant thereto is valid; "prescribed"; citing Words and Phrases, Second Series, "Prescribe" (Pol. Code, $\S$ 738b; Const. art. 6, $\S$ 11, 17).

Amendment to Const. art. 6, $\S$ 11, providing Legislature shall "prescribe" compensation of justices and judges of all courts of record, repealed conflicting article 6, $\S$ 17, and gives plenary control to Legislature of time, amount, and manner of compensation, subject to retained constitutional provision relative to prompt decision of submitted causes; and Pol. Code, $\S$ 738b, pursuant thereto, is valid (citing Words and Phrases, Second Series, "Prescribe").

2. Constitutional law $\S$ 18—Rule against repeal by implication is inapplicable, where constitutional amendment plainly conflicts with earlier provision.

Rule that repeal by implication is not favored does not apply when constitutional amendment is plain, inclusive, and manifestly in conflict with earlier provision.

In Bank.

Petition by Denver Sevier for writ of mandate directed to Ray L. Riley, as Controller of the State of California, to draw warrants for his salary as Judge of the Superior Court of Humboldt County. Writ granted.

Denver Sevier, of Eureka, in pro. per.

U. S. Webb, Atty. Gen., and Charles A. Wetmore, Jr., of Marysville, for respondent.

RICHARDS, J. The petitioner herein in his capacity as judge of the superior court of the state of California, in and for the county of Humboldt, applies for a writ of mandate to be directed against the respondent, Ray L. Riley, as Controller of the State of California, to approve the claim of the petitioner for the sum of \$208.33 and to draw his warrant upon the state treasurer therefor; said claim being for the sum to which the petitioner as said superior judge alleges himself to be entitled to have paid him by the state as the portion of his judicial salary for the month of August, 1925, by virtue of the adoption by the Legislature of 1925 (Stats. 1925, p. 979) adding a new section to the Political Code, numbered 738b and reading as follows:

"The annual salaries of the judges of the superior court of the state of California in and for the counties of Humboldt, Mendocino and Siskiyou shall be five thousand dollars; of the county of Lake shall be four thousand dollars; one-half of which shall be paid by the state, and the other half thereof by the county for which the judge is elected or appointed."

The petitioner has also made a similar demand for said increase in salary for the months of September and October, 1925, and has been met with a similar refusal.

The foregoing section is alleged by petitioner to have become effective on July 24, 1925. Prior to its adoption the salary of said petitioner as such superior judge was \$4,000 a year, payable monthly, one-half by the county of Humboldt and one-half by the state of California.

Section 17 of article 6 of the Constitution, dealing with the salaries of judges, as it originally stood, provided that the salaries of the judges of the Supreme Court and the judges of the superior courts should not be increased or diminished after their election nor during the term for which they were elected; that the salaries of the judges of the Supreme Court should be paid by the state and the salary of each of the judges of the superior courts should be paid one-half by the state and one-half by the county for which he was elected. The section specifically provided that the annual salary for the first term of the judges of the Supreme Court elected under the Constitution should be \$6,000, and the annual salaries of the judges of the superior courts, until changed by the Legislature, should be \$3,000 in all counties except certain enumerated counties in which the judges should receive an annual salary of \$4,000.

In 1904 this section of the Constitution was amended to provide that the justices of the Supreme Court and of the District Courts of Appeal and the judges of the superior courts "shall severally, at stated times during their continuance in office, receive for their services such compensation as is or shall be provided by law, which shall not be increased or diminished after their election, nor during the term for which they shall have been elected." Stat. and Amendments 1905, p. XXXVIII.

In 1906 this section was again amended. The section as then amended reiterated the provision in the former enactment that the justices of the Supreme Court and of the District Courts of Appeal and the judges of the superior courts "shall severally, at stated times during their continuance in office, receive for their services such compensation as is or shall be provided by law," but omitted the provision in regard to the increasing or diminishing of salaries during the terms of offices of the justices of the Supreme Court, the judges of the District Courts of Appeal, and the judges of the superior courts as a whole. Said amendment, however, made specific provisions that the salaries of the judges of the superior court in all counties having but one judge, and in all counties in which the terms of the judges of the superior court expired at the same time should not thereafter be increased or

diminished after their election nor during the term for which they should have been elected. It also specifically provided that the annual salaries of the judges of the Supreme Court after January 1, 1907, should be \$8,000 per annum, and that of the judges of the District Courts of Appeal should be \$7,000. Stat. and Amendments 1907, p. XXIX.

By this section the Constitution itself specifically provided the salaries payable to the justices of the Supreme Court and the justices of the District Courts of Appeal, and left the fixing of the salaries of the judges of the superior courts to the Legislature, subject to the one limitation that the salaries of judges of the superior court in all counties having but one judge, and in all counties in which the terms of the judges expire at the same time, should not be increased or diminished after their election nor during the term for which they were elected.

In 1924 at the November election the people of the state amended certain sections of the Constitution. Section 11 of article 6 of the Constitution was among the sections thus amended. This amendment, in addition to authorizing the establishment of municipal courts and other inferior courts, provides that "The compensation of the justices or judges of all courts of record, shall be fixed and the payment thereof prescribed by the Legislature." St. 1925, p. XXIV. In the meantime, and while these constitutional changes up to and including that of the year 1906 were being effected, the state Legislature, responding to the demands of the more populous counties of California, due to their increase in population and corresponding increase in litigation, adopted various enactments increasing, and in some counties again and again increasing, the number of superior judges assigned to such regions, and in so doing provided for the expiration of the terms of these additional judicial officers at different times from that of those holding office under previous conditions of the law. The result of these changes in the statutes especially since 1906, has been that of enabling a goodly number of the counties of the state to be exempted from the constitutional inhibition against an increase in the salaries of their superior judges to become effective during their respective terms of office, by the simple expedient of adding one or more to the number of their superior judges with terms expiring at different times than those already provided. The result of these changes in the Constitution and statutes prior to and up to the year 1924 was this: That as to the Supreme and appellate justices the salaries of these, both as to the amount and payment thereof, were rigidly fixed by the terms of section 17 of article 6 of the Constitution; that as to superior judges the salaries of these were subject to fixation by the Legislature, limited

by the provision in said section 17 of article 6 of the Constitution to the effect that in counties having but one superior judge or, if more, having the terms of these expiring at the same time, there could be no legislative increase in the salaries of these one or more judges which could become effective during their terms of office; while as to counties which had by legislative action effected an increase in the number of their judges so worded as to make the terms of their judgeships expire at different times, the constitutional inhibition was inapplicable, and that the increases in such salaries as the Legislature from time to time provided for in such counties became effective immediately. On the 4th day of November, 1924, the people of the state of California ratified the amendment to the state Constitution relating to the creation of municipal courts. By the terms of said amendment a radical change in the number and jurisdiction of the courts of record of the state of California was provided for. Municipal courts, which were to be courts of record and which were to possess and exercise a large measure of the jurisdiction which had theretofore been reposed exclusively in the state system of superior courts, were permitted to be established in counties, cities, and cities and counties of a designated population. The fixation of the salaries of the judges of these new courts of record having such original jurisdiction was to be wholly committed to the Legislature, and this may furnish an additional reason why the framers of said amendment to the Constitution placed therein the provision reading:

"The compensation of the justices or judges of all courts of record shall be fixed and the payment thereof prescribed by the Legislature."

[1, 2] There is no room for doubt as to the interpretation to be given to this clause in said amendment to the Constitution, since it makes manifest as clearly and tersely as words could do the intent of the framers thereof that the entire matter of the compensation of justices and judges of courts of record in this state, both as to the amount thereof and as to the time and manner of payment thereof should be transferred from the Constitution and reposed in the Legislature. This is made all the more manifest when we take note of the meaning of the word "prescribed" as employed therein. The term "prescribe" is defined by the lexicographers as meaning:

"To lay down beforehand as a rule of action; to ordain, appoint, define authoritatively." Century Dictionary.

"To lay down authoritatively as a guide, direction, or rule of action; to impose as a peremptory order; to dictate, appoint, direct, ordain." Webster's New International Dictionary.

In Words and Phrases it is stated:

"The word 'prescribed' has a well-defined legal meaning, denoting to lay down authoritatively as a guide, direction, or rule; * * * to dictate; to appoint; to direct; to give as a guide, direction or rule of action." Words and Phrases, Second Series, "Prescribe," p. 1154, and cases cited.

Among the cases cited in support of the foregoing definition is that of Merchants' Exchange v. Knott, 111 S. W. 565, 571, 212 Mo. 616, in which the meaning of the word is traced back through Kent and Sharswood to Blackstone, through which original sources we derive our best definition of civil or municipal law as being "a rule of civil conduct prescribed by the supreme power of a state." It is in the foregoing broad and general sense that we must assume this word to have been used by the framers of the clause in the constitutional amendment in question and as intending thereby to invest the state Legislature with the fullest measure of control, direction, ordination, and dictation over the matter of the amount and payment of judicial salaries in and for the courts of record of this state. The amendment in question contains but one limitation upon the completeness of this direction and control through its express retention in the Constitution of its former requirement having relation to the prompt decision of submitted causes. In all other respects the amendment is ample and inclusive. It is true that the same amendment does not expressly refer to section 17 of article 6 of the Constitution, which relates to the compensation of the justices of the Supreme and appellate courts and also of the judges of superior courts, and that whatever repeal of whatever portion of said section 17 is effectuated by said amendment to the Constitution is a repeal by implication. Granting the correctness of the rule that repeals by implication are not favored in law, such rule can have no application to situations wherein the language of the later amendment is plain, direct, and inclusive and is manifestly inconsistent and in conflict with the earlier provision of the amended instrument. It requires no argument to show that this amendment is so as to the compensation of the justices of the Supreme and appellate tribunals, and that to that extent at least section 17 of article 6 of the Constitution has been abrogated by said later amendment; and we are of the opinion that the same reasoning is to be applied to the remaining portion of said section having relation to the matter of the payment of salaries of certain superior court judges having terms expiring at the same time. The retention in the Constitution of the fragmentary portion of section 17 of article 6 of the Constitution last above referred to would be hostile to the spirit and

intent of the amendment in so far as the latter was designed to commit the matter of judicial salaries in all these various courts of record to the flexible control of the Legislature rather than to the rigid limitations of the Constitution; especially in view of changing conditions arising from the rapid increase in population, and consequent litigation, going on as a matter of common knowledge in various portions of the state of California at the present time.

The foregoing considerations would seem to furnish ample reason for the conclusion that the framers of the recent amendment to the Constitution intended by the clause therein, above quoted, to commit the entire subject of the compensation of the justices and judges of all courts of record in this state, both as to the amount thereof and as to the time and manner of payment, to the Legislature and to abrogate whatever of the former provisions of the Constitution touching that subject were found to be inconsistent with the exercise of such plenary legislative control.

Let the writ issue directing the issuance of warrants upon the state treasurer for the payment of the claims of the applicant herein conformably to the terms of his petition.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LAWLOR, J.

198 Cal. 261

NEW BLUE POINT MINING CO. v. WEISSBEIN et al.

FITZSIMMONS v. SAME.

(Sac. 3622.)

(Supreme Court of California. March 1, 1926.
Rehearing Denied March 29, 1926.)

1. Corporations $\S$ 432(4).

Seal is prima facie proof of execution by and authority of corporation, but may be overcome.

2. Corporations $\S$ 309(5)—Acquiescence of corporation for 12 years in handling of property under trust deed held to waive objection to validity of deed because of interest of directors.

Where no objections were made to validity of trust deed and trustees allowed to handle property thereunder for over 12 years, such acquiescence held to waive objections to its validity on ground that two of directors were creditors interested in execution of deed; there being no evidence that deed was procured by fraud or unfair dealing.

3. Acknowledgment $\S$ 20(1).

That one taking acknowledgment of trust deed of corporate property to secure creditors was himself preferred creditor held not to affect validity, notwithstanding St. 1880, p. 131.

4. Corporations —477(1).

Trust deed to corporate property to secure corporate debts *held* not void as in contravention of Civ. Code, § 857.

5. Corporations —481—Buying up claims of creditors of corporation, in order to procure consent of holders of two-thirds of claims to sale of property as provided in trust deed, *held* not fraudulent in itself.

Where trust deed of corporate property provided for sale by trustees on consent of two-thirds of creditors, buying up by prospective purchaser of sufficient claims to assure consent of two-thirds of creditors, and after purchase receiving amount of assignments as credits on purchase, *held* not in itself to amount to fraud.

6. Corporations —481—Failure of trustees to notify corporation of negotiations for sale of property under power in trust deed *held* not to show fraud, where deed did not require notice.

Where trust deed for benefit of creditors provided for sale of property under certain conditions, but did not require trustees to notify corporation of negotiations for sale, failure of such notice *held* not to show fraud.

7. Corporations —481—Finding that sale of property under trust deed was authorized by consent of requisite number of creditors *held* sustained under evidence.

Where trust deed of corporate property for benefit of creditors provided for its sale by trustees under certain conditions with written consent of holders of two-thirds of claims, finding that sale was authorized *held* sustained under evidence.

8. Trial —397(6).

Failure of trial court to find on certain issues *held* not objectionable, where affirmative findings contained by necessary implication negative finding on those issues.

In Bank.

Appeals from Superior Court, Yuba County; E. P. McDaniel, Judge.

Consolidated actions by the New Blue Point Mining Company against Jacob Weissbein and others, and by Edward P. Fitzsimmons against Jacob Weissbein and the New Blue Point Mining Company and others, in which defendant last named cross-complained. Judgment for defendants in first action, and plaintiff appeals, and judgment against defendant last named in second action and on its cross-complaint, and it appeals. Affirmed.

James F. Sheehan, Charles J. Heggerty, and Knight & Heggerty, all of San Francisco, for appellant.

Bert Schlesinger, of San Francisco, and W. E. Wright, of Nevada City, for respondents.

LENNON, J. This is an appeal by the New Blue Point Mining Company, a corporation, from the judgment of the superior court of

Yuba county, made and entered in two actions which were consolidated by consent and tried together in one action by the trial court. In Case No. 4264 appellant appeared as plaintiff, and in case No. 4486 the appellant appeared as defendant and cross-complainant.

The facts of the case succinctly stated are these: On the 21st day of March, 1902, the New Blue Point Mining Company, the owner in fee of certain mining properties and rights in Yuba and Nevada counties, under its corporate seal executed a deed of trust, designating Joseph Weissbein and Jacob Weissbein as trustees, to secure the payment of an indebtedness due and owing certain creditors. The trust deed specified the uses and purposes of the trust to be: (1) The sale of the mining property for a sum not less than \$100,000 within a period of five years, and if said property could not be sold for that sum within the designated time, then for such sum as the holders of two-thirds of the amount of the indebtedness against said corporation might agree upon in writing; (2) to pay to one Charles Kitts, a preferred creditor, the sum of \$5,130, together with interest thereon; (3) to pay the remaining ten creditors of the mining company various sums, together with interest thereon, which, with the preferred claim of Kitts, aggregated \$45,000; (4) to pay the taxes and all other expenses connected with the property; and (5) to repay to the corporation any balance remaining in the hands of the trustees after the payment of all claims and expenses, and to reconvey to the corporation the mining property in the event that said claims should be satisfied by the corporation. This trust deed was signed: "New Blue Point Mining Company, by P. Campbell, President, Edward Fitzsimmons, Secretary; A. McShane, by his Att'y in Fact, P. Campbell; P. Campbell; Edward P. Fitzsimmons and Albert Rigby." The seal of the corporation was affixed thereto.

There was attached to this trust deed a resolution which authorized the execution of the trust deed. It was passed at a special meeting regularly called of the directors and was unanimously passed by the directors present, P. Campbell, Edward Fitzsimmons, and Albert Rigby.

A ratification of stockholders was attached to the resolution, which ratification was signed by P. Campbell; A. McShane, by his attorney in fact, P. Campbell; Edward Fitzsimmons; and Albert Rigby. A McShane was the holder of 99,968 shares of stock and P. Campbell, Edward Fitzsimmons, and Albert Rigby were each holders of five shares. The acknowledgment of the ratification was taken before Charles Kitts, who, it will be remembered, was by the terms of the trust deed a preferred creditor.

Attached to the resolution also were re-

leases of the creditors named in the trust deed of their claims in exchange for the security of the trust deed.

On the same day a deed of grant, bargain, and sale was made and executed to Joseph and Jacob Weissbein, conveying to them all of the real and personal property of the corporation, together with the right to receive the rents, issues and profits thereof. This deed contained the express provisions that the grantees should hold said property in trust for the uses and purposes specified in said trust deed of even date, which was specially referred to and made a part thereof. This grant deed was recorded in both Nevada and Yuba counties.

No sale of the property was made within the five years specified in said trust deed. In November, 1909, the Tarr Mining Company, which had entered into possession of the property under an option of purchase for \$225,000, paid to the trustees on the purchase price \$6,187.50. This amount was distributed by the trustees pro rata among the creditors; \$18,000 was also advanced by the Tarr Mining Company to finance litigation which had arisen over the title to the water rights belonging to the property. And in 1911 \$6,500 more was paid by the Tarr Mining Company to the trustees, which sum was distributed among the creditors. Prior to the last-named payment, an agreement was entered into on the 31st day of October, 1911, between the trustees, as parties of the first part, New Blue Point Mining Company, as party of the second part, and the Tarr Mining Company, as party of the third part, wherein it was agreed that the Tarr Mining Company should pay the \$6,500 immediately and an extension of time for future payments should be made. This agreement also recited the purpose for which the \$18,000 had been advanced by the Tarr Mining Company, the fact that the trust deed had been duly made and executed to the trustees, and that the New Blue Point Mining Company was indebted on that date to the creditors named in the trust deed in the sum of \$60,458.75. This agreement was signed by the trustees, by the New Blue Point Mining Company, per Edward Fitzsimmons, secretary, with the seal of the corporation attached, and the Tarr Mining Company, by its president and secretary, and also by the creditors named in said trust deed or by their successors in interest.

The option to purchase was abandoned by the Tarr Mining Company. Thereafter the property remained idle for several years.

In February, 1917, an agreement was entered into between the trustees and Sidney B. Wood for the purchase of the property by Wood for the sum of \$75,000. Under this agreement Wood was to go into possession and operate the mine and make payments upon the purchase price at certain specified dates. Subsequent to this agreement, the time of the first payment was extended in

consideration of the payment by Wood of back taxes on the property amounting to approximately \$1,300. Wood operated under his bond for a period of about two years. Receipts from the San Francisco mint show approximately \$30,000 in ore was extracted from the mine. Wood testified that the cost of extraction approximated \$80,000. In 1919 Wood informed Jacob Weissbein, the surviving trustee, that he could not continue under the agreement, but that he would purchase the property as agent for Warren Delano, a resident of New York, if he could get it for \$20,000. Weissbein agreed to the sale of the property at this figure providing two-thirds of the creditors would consent to the sale as provided in the trust deed, and provided further that any litigation in which the property was involved should be taken care of by Wood.

Wood proceeded to buy up, as cotenant with one C. M. Schwerin, assignments of some of the claims of the creditors and presented to Weissbein a written consent to the sale of the property for \$20,000 with the signature of himself and Schwerin thereon as assignees of certain claims. The claim of J. W. Relley was represented by the signature "John Mulroy, Att'y in Fact for Relley Heirs." Weissbein also joined in said written consent, signing, "Weissbein Bros. & Co., by Jacob Weissbein." These signatures to the consent represented two-thirds of the amount of the indebtedness against said corporation. Wood having entered into an agreement to indemnify Weissbein from all claims arising from litigation with respect to the property, the latter proceeded with the sale of the property to Warren Delano for \$20,000. The deed, which was not introduced in evidence, was evidently executed to Bradley and Delano or to Bradley in trust for Delano. Subsequent to the sale of the property Jacob Weissbein donated to Wood his claim embodied in the trust deed. Later Wood procured assignments from certain of the Relley heirs, some of whom had been represented in the written consent.

Weissbein, in settling the account with Wood, gave the latter credit for the assignments which he held and permitted Wood to offset said assignments against the purchase price. Weissbein did not, therefore, receive \$20,000 actual cash from Wood, but the balance remaining after deducting the amount of the claims which had been assigned to Wood, which balance was \$7,093.59. At the time of the trial, Weissbein still retained in his possession \$2,380.80 for payment to the Relley heirs when he should be furnished with satisfactory proof that they were the parties entitled thereto.

For the sake of clarity we shall not attempt to set out the various pleadings involved in this controversy. We shall, instead, set out simply and succinctly the allegations contained in the complaint and cross-complaint

of the New Blue Point Mining Company relative to the transactions hereinabove detailed. The New Blue Point Mining Company in its pleadings alleged in effect that: (1) The trust deed of March 21, 1902, was null and void because (a) the directors Fitzsimmons and Rigby, who voted for the resolution authorizing said trust deed, were disqualified by interest from participating therein, being creditors named in said trust deed; (b) there was no consideration for the execution of the trust deed, the indebtedness therein set out being, in fact, the indebtedness of P. Campbell, and not the indebtedness of the New Blue Point Mining Company; and (c) the execution of the trust was not properly ratified by two-thirds of the holders of the capital stock of the corporation. (2) The trustees came into possession of certain moneys in trust for the corporation, being more particularly (a) the sum of \$31,244.50 from the Tarr Mining Company, and (b), in conjunction with Wood, the rents, issues, and profits which were the output of the mine under the operation of Wood, and (3) the deed by which the sale to Warren Delano for \$20,000 was consummated is null and void because (a) it was executed pursuant to a conspiracy between the trustees and Wood, Bradley and Delano to cheat and defraud the New Blue Point Mining Company out of its property, and (b) the written consent of two-thirds of the creditors was not secured as required by the trust deed.

The findings of fact and conclusions of law upon both actions were consolidated. Briefly summarized, the findings were to the effect: (1) That the New Blue Point Mining Company was not the owner in fee simple of the mining property at the commencement of the first action; (2) that the trust deed of March 21, 1902, was properly made and executed and delivered to the trustees named therein; that it was made for a valuable consideration and its making was ratified and confirmed by practically all of the stockholders of the company; (3) the trustees had rendered full accounts and statements to the creditors of all moneys received and expended by them, and that on October 31, 1911, the New Blue Point Mining Company and other persons interested had come to a mutual accounting concerning the moneys received and expended up to that time; and (4) that Bradley and Delano were purchasers in good faith and for value from the trustees. As conclusions of law the court held that: (1) By virtue of the grant, bargain, and sale deed from the New Blue Point Mining Company, title to the mining property had vested in the trustees; (2) by virtue of the deed from the trustees to the purchasers for \$20,000, the purchasers became the owners in fee of said property; and (3) the New Blue Point Mining Company was not entitled to an accounting from the trustees, from Wood, or from Bradley and Delano, the purchasers.

The two main contentions in support of the appeal are: (1) That the findings are not supported by the evidence; and (2) certain findings upon issues raised by the cross-complaint were not made by the trial court.

A careful, considerate and conscientious review of the record satisfies us that the evidence supports the findings, the findings warrant the conclusions of law, and they in turn support the judgment.

[1, 2] At first blush, it would seem that the argument of appellant that the trust deed was void by reason of the fact that it was not properly executed, in that the resolution authorizing its execution was voted upon by two directors who, as creditors, were interested, had merit. It is the rule that if a director necessary to constitute a quorum is interested in the proceedings the corporate act is voidable. Although the seal is prima facie proof of the execution and authority of the corporation, in opposition to this proof is the resolution, which shows on its face that two of the directors were interested as creditors. The presumption of due execution raised by the corporate seal is, therefore, overcome.

[3] It is of no importance that Kitts who took the acknowledgment was a preferred creditor. It has been decided that the original rule enunciated in *McShane v. Carter*, 22 P. 178, 80 Cal. 310, to the effect that a ratification of a sale of corporate property must be in strict form as required by Statutes of 1880, p. 131, has been liberalized. *Royal Con. Mining Co. v. Royal Consolidated Mines*, 110 P. 123, 157 Cal. 737, 137 Am. St. Rep. 165.

However, we are of the opinion that although it must be said that objections interposed to the validity of the trust deed, if interposed within a reasonable time after the execution thereof would have compelled the conclusion that said trust deed was not valid, nevertheless by reason of the long acquiescence of the corporation in the conduct of the trustees acting under their presumed authority, the corporation is not now at liberty to interpose those technical objections. *Standard Oil Co. v. Slye*, 129 P. 589, 164 Cal. 435, 445; *Main v. Casserly*, 7 P. 426, 67 Cal. 128; *Gribble v. Columbus Brewing Co.*, 34 P. 527, 100 Cal. 71.

From March, 1902, until April 24, 1914, when a cross-complaint was filed in an action brought by the Giant Powder Company against Jacob Weissbein, which cross-complaint was dismissed for lack of prosecution, no objection was made by the corporation to the handling of the property by the trustees. The trustees were absolutely permitted to enter into an agreement with the Tarr Mining Company for the sale of the property for \$225,000 and were permitted to give to Wood an option to purchase for \$75,000 without a word of protest from the corporation although it was cognizant of both deals. The

trustees were permitted to assume the burdens attendant upon the upkeep of the property with no word of protest from the corporation or offer to assume those burdens.

Moreover, the beneficiaries of the trust deed, who as creditors released all of their claims against the New Blue Point Mining Company, have suffered a distinct detriment from the fact that the corporation acquiesced for so long a time in the validity of the trust deed. Their claims are now barred, and it is impossible for the corporation, unless it be by paying their claims in full, to put them in as favorable a position as they were in at the time when, relying upon the validity of the trust deed, they released their claims. Irrespective of whether their claims were valid claims against the New Blue Point Mining Company or only against P. Campbell, they were entitled to have their claims adjudicated. Their rights were lost to them by the acquiescence of the corporation in the trust deed until the statute of limitations had run.

There is no evidence that the trust deed was procured by fraud or underhanded, unfair dealing. The participation of the directors is not set up to prevent the directors from gaining an advantage from their own wrong. The irregularity is set up for the purpose of destroying the entire effect of the instrument which will have the effect of cutting off the rights of third persons thereunder. By long silence and acquiescence the corporation has lost its right to avail itself of such objection.

It may also be noted in passing that the California cases, which hold that a director cannot legally form part of a quorum which acts upon a proposition in which he is personally interested, hold that the corporate act in which said director has participated is "voidable." They do not use the term "void," and it would seem, therefore, that some affirmative act of disaffirmance is necessary on the part of the corporation to take advantage of the irregularity.

[4] We are also of the opinion that the objection that the trust deed is void, as being in contravention of section 857 of the Civil Code, is without merit. *Sacramento Bank v. Alcorn*, 53 P. 813, 121 Cal. 379.

We are satisfied that the accountings by the trustees of the moneys received by them are correct. The two payments received on the purchase price of the property from the Tarr Mining Company were paid pro rata to the creditors. The \$18,000 advanced by the Tarr Mining Company for the expenses of litigation was paid to the trustees with the express understanding that it was to be used for that purpose, and consequently did not belong to either the creditors or the corporation itself. Although it would seem that Wood should have furnished the surviving trustee with a statement of his receipts and disbursements, there is no evidence that

more money was taken from the mine than was expended thereon. The mine receipts show that approximately \$50,000 worth of ore was extracted. Necessarily, there must have been cost of extraction, and according to the testimony of Wood this cost amounted to \$80,000. Doubtless the trial court, in making its findings relative to the accounting, considered as true this statement.

[5, 6] With reference to the validity of the deed from the trustees to Bradley and Delano, there is no evidence, aside from the actual facts of the admitted transactions, to show fraud. There is no evidence that Weissbein conspired with Wood to cheat and defraud the creditors, or that he aided and assisted Wood in any way in obtaining the consent of the holders of two-thirds of the claims against the corporation. If it be fraud for Wood to buy up some of the creditors' claims, procure the consent of holders of other claims sufficient to aggregate in the total two-thirds of the claims, and receive as credit on the purchase the amounts of his assignments, then it may be said that the sale was procured by fraud and the deed from the trustees to the purchasers void. The mere statement of the transaction does not, however, in our opinion, compel the conclusion of fraud. The inference, therefore, being legitimate that there was no fraud, the findings of the trial court must stand. The trustees were not required by the terms of the trust deed to notify the corporation of any negotiations looking to the sale of the property, and the fact that they did not do so cannot be said to show fraud on their part.

[7] It is true that, without the consent of the Relley heirs, the necessary consent of the holders of two-thirds of the claims was not secured. The procurement of their consent was a condition precedent to a valid sale of the property. The grant deed to the trustees specified that the trustees were to hold the property for the uses and purposes specified in the trust deed of even date. One of the purposes specified therein was to sell "with the written consent of the holders of two-thirds of the amount of the claims." The purchasers were put upon notice that the written consent of such holders was necessary to a valid sale. Apparently the necessary consent of two-thirds of the claims was procured. Although the consent of the Relley heirs was given by Mulroy, said heirs make no complaint that he was not authorized to give their consent. Moreover, subsequent to the consent by Mulroy, Wood secured sufficient assignments from the Relley heirs to total, in conjunction with the assignments already held by him, together with the consent of other claimants, two-thirds of the amount of the claims against the corporation. It is a fair inference from the subsequent giving of these assignments that the signing of the consent by John Mulroy was

with the consent of the heirs who later gave assignments.

[8] The complaint of the appellant that the trial court failed to find upon certain issues raised by the cross-complaint is, we think, without substantial foundation. It may be noted that the findings of fact and the conclusions of law were consolidated. The affirmative findings of the trial court on certain issues by necessary implication carried with them a negative finding of the truth of facts alleged in opposition thereto. *Fox v. Haarstick*, 15 S. Ct. 457, 156 U. S. 674, 39 L. Ed. 576; *Noble v. Beeman-Spaulling-Woodward Co.*, 131 P. 1006, 65 Or. 93, 46 L. R. A. (N. S.) 162. For instance, the finding of the trial court to the effect that the purchase of the mining property by Bradley and Delano was in good faith and for value is in effect a finding that such sale was not consummated by a conspiracy between Weissbein, Wood, Bradley, and Delano to defraud the corporation of its property. Findings upon other issues were not necessary, for the reason that no material evidence is to be found in the record which would support the findings, if made.

Judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LAWLOR, J.

198 Cal. 177

JOHNSTON v. DE BOCK et al. (Sac. 3644.)

(Supreme Court of California. Feb. 18, 1926.)

1. Homestead ☞57(3).

Evidence held sufficient to sustain finding that parties who filed declaration of homestead were not residing upon premises as required by Civ. Code, § 1237.

2. Homestead ☞57(3).

Court is not bound to accept as conclusive statements of parties who filed declaration of homestead that they intended to return to premises.

3. Appeal and error ☞1011(1)—Finding, on conflicting evidence, that parties who filed declaration of homestead were not residing on premises, will not be disturbed on appeal.

Finding, on conflicting evidence, that parties who filed declaration of homestead were not residing on premises, will not be disturbed on appeal, though there may be sufficient evidence on which court could have made contrary finding.

4. Ejectment ☞127—Judgment awarding value of use of premises on finding that plaintiffs had title and right of possession held proper, regardless of agreement between defendants and party from whom they purchased land to permit vendor to occupy premises free of charge (Code Civ. Proc. § 427).

Where plaintiff alleged title and right of possession under sheriff's deed and damages

on account of being deprived of returns and profits, which allegations were denied by defendants, who affirmatively alleged ownership and possession, judgment awarding value of use of premises since execution of such deed on finding that allegations of complaint were true held proper, under Code Civ. Proc. § 427, regardless of agreement between defendants and party from whom they purchased land to permit vendor to occupy premises free of charge.

In Bank.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Catherine M. Johnston against Clara E. De Bock and another. From a judgment for plaintiff, defendants appeal. Affirmed.

C. E. McLaughlin, Henry & Bedeau, Jay L. Henry, and McLaughlin & McLaughlin, all of Sacramento, for appellants.

R. Platnauer, of Sacramento, for respondent.

SHENK, J. This is an action in ejectment and for the value of the use and possession of certain real property in the city of Sacramento. The plaintiff had judgment, and the defendants appeal under the alternative method.

The appellants are husband and wife. The respondent was at one time the wife of Louis De Bock, a brother of the appellant August De Bock. In an action for damages for alienation of affections commenced and first tried in Placer county and tried the second time in the county of Sacramento, the respondent, on November 18, 1916, recovered a judgment against the appellants for \$5,000 and costs. On appeal said judgment was affirmed. *De Bock v. De Bock*, 184 P. 890, 43 Cal. App. 283. Execution was issued, and on execution sale the respondent bid in said property and received a certificate of purchase. In due time she obtained a sheriff's deed dated March 19, 1918, which was duly recorded. The proceedings on execution and sale were regular in all respects, but it is claimed by the appellants that the sheriff's deed was insufficient to pass title, by reason of a homestead declaration made by appellant Clara E. De Bock, for the joint benefit of herself and her husband on the 20th day of September, 1915, and filed for record on the following day. The homestead declaration was sufficient in form and substance, but the respondent insists that at the time the declaration was made and filed, the appellants were not residing on the premises as required by the Homestead Law (section 1237, Civ. Code). The court found in favor of the respondent's contention, and the main question presented on this appeal is whether the evidence is sufficient to support the finding. The appellant Clara E. De Bock acquired title to the lot in question by a deed

from her mother dated April 8, 1909. Thereafter, with the assistance of her mother, improvements were constructed thereon consisting of a lower flat of five rooms, known as No. 2411 P street and an upper flat of six rooms known as No. 2409 P street, in the city of Sacramento. The construction of the building was commenced in 1909 and completed in 1910. It was occupied for a short period by the appellants and then rented to a Mr. Greenblatt. Thereafter the appellants claim to have occupied the upper flat from time to time and at all times to have considered the same their place of residence.

The appellant August De Bock was a railroad conductor, operating on a division between Roseville, Cal., and Sparks, Nev. In 1913 and 1914 he and his wife rented and occupied a furnished cabin in Roseville. In July, 1914, they purchased a lot in Roseville on which they constructed a house. As soon as said house was completed, in 1915, they occupied and continued to occupy the same as their home until December, 1915, when they sold it to a Mr. Prouty. On August 3, 1911, the appellant August De Bock registered as a voter in Sacramento county and gave his residence as 2409 P street. His next registration was on August 3, 1912, at which time he gave his residence as No. 2415 P street, which was the home of his wife's mother and adjoined the premises in controversy. On March 11, 1914, he registered as a voter in Placer county and gave his residence as Roseville. This registration was canceled and he re-registered in Sacramento on December 16, 1915, nearly three months after the recording of the homestead declaration. In November, 1915, he was a witness in the superior court in Placer county on the first trial of the former action, and he there testified that he then resided at Roseville and that he had been a resident of Roseville for three years.

On March 28, 1912, and on January 7, 1914, the defendant Clara E. De Bock registered as a voter in Sacramento and stated her residence as No. 2415 P street. On November 16, 1911, she subscribed for a telephone and had the same installed and listed in her name at 2415 P street and such listing remained up to the time of trial of this action. At no time since 1911 did the appellants or either of them register as residing at No. 2409 P street. In the deed to the lot on which the appellants built their new home in Roseville appellant Clara E. De Bock was named as the grantee "of Roseville" and she personally filed the deed for record on November 2, 1914.

[1] G. A. Eichelberger, a witness produced on behalf of respondent, testified that he occupied the lower flat with his family from March 15 until December 8, 1915; that from March 15 to some time in August, 1915, a family by the name of Strand occupied the upper flat exclusively, and that from the

time the Strands moved out, in August, 1915, until December 8, 1915, the upper flat was wholly unoccupied. The testimony of this witness, together with the testimony of other witnesses produced on behalf of respondent, which need not be recited, and the admissions and declarations of the appellants, was sufficient evidence on which to base the finding of the court, as follows:

"That neither on the 20th day of September, 1915, nor on the 21st day of September, 1915, nor at the time of the making or the execution or the filing of the declaration of homestead set out in and annexed to defendants' answer, were the defendants, or either of them, residing upon or occupying the premises described in plaintiffs complaint, or any part thereof; * * * that said real property is not, nor is any part thereof, the homestead of the defendants or of either of them; and that at no time was said real property or any part thereof the homestead of the defendants or either of them."

[2, 3] The appellants contend that because of the nature of the occupation of the appellant August De Bock, he was required to be absent from Sacramento, and they testified that at the time of the filing and recordation of the declaration of homestead they considered No. 2409 P street as their home and intended to return to that place in seasons of repose. But the court was not bound to accept their testimony as to their intentions as conclusive. Concerning such evidence of intention this court said in the case of *Tromans v. Mahlman*, 44 P. 327, 111 Cal. 646:

"Whether she [the appellant] did in fact actually reside on the premises at the time the declaration was filed was a question of fact to be determined by the court from the evidence before it. The physical fact of her occupancy, as well as the intention with which she occupied the house, were both elements to be considered in determining actual residence, and the court was not bound to accept her statement that she intended to reside thereon as conclusive, if other facts to which she testified were inconsistent with such intention. Whatever inconsistency there was between these facts and her statement of her intention presented merely a conflict of evidence, on which the decision of the trial court was final. Its decision upon this conflict of evidence that she did not reside there is conclusive upon this court."

In the former appeal in that action (*Tromans v. Mahlman*, 27 P. 1094, 28 P. 579, 92 Cal. 1) it was said:

"It is settled law in this state, that to constitute a valid homestead the claimant must actually reside on the premises when the declaration is filed [citing cases]. * * * The obvious purpose of the statute in providing for the selection of a homestead was to thereby make a home for the family, which neither of the spouses could encumber or dispose of without the consent of the other, and which should at all times be protected against creditors. To effect its purpose, the statute has been liberally construed in some respects, but the re-

quirement as to residence at the time the declaration is filed has been strictly construed."

The foregoing statement of the law was approved in *Bullis v. Staniford*, 171 P. 1064, 178 Cal. 40. See, also, 13 Cal. Jur. 554, and cases cited. From a consideration of the record it must be concluded that there was a substantial conflict in the evidence as to the residence of the appellants at the time the declaration of homestead was filed, and even if it be assumed that there was sufficient evidence on which the court could have made a contrary finding on that issue, we are not at liberty on the record before us to disturb the finding that was made. *Bancroft-Whitney Co. v. McHugh*, 134 P. 1157, 166 Cal. 140; 2 Cal. Jur. 880, and cases cited.

[4] Under date of April 8, 1909, the appellant Clara E. De Bock entered into an agreement with her mother, Mary E. Welch, wherein and whereby, in consideration of the execution and delivery of the deed of the same date by the said Mary E. Welch and her husband to said Clara E. De Bock conveying to the latter the property in question, it was provided that if at any time in the future the said Mary E. Welch should so desire she should have the right to occupy the lower flat, with the proviso that the said Clara E. De Bock should have the benefit of all rentals from the whole of said building until all of the expense of the erection of said building had been paid by her. The trial court awarded to the respondent, in addition to the right of possession, the value of the use and occupation of the entire property from the date of the issuance of the sheriff's deed on March 19, 1918. The appellants contend that the judgment herein must be reversed for the reason that the evidence shows that the foregoing agreement was still in force at the time of trial, and that there was no authority on the part of the court to award to the respondent the value of the use and possession of the entire property during a period when Mary E. Welch was entitled to possession of the lower flat free of charge. The contention cannot be sustained. Section 427 of the Code of Civil Procedure provides:

"The plaintiff may unite several causes of action in the same complaint, where they all arise out of: * * * (2) Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same. * * *"

Under the permission of this section the respondent filed her complaint, wherein she alleged her title and right of possession under the sheriff's deed and damages on account of being deprived of the rents and profits. These allegations were denied by the answer, wherein the appellants also affirmatively alleged that continuously since the 8th day of April, 1909, the said Clara E.

De Bock was the owner in fee of the said property and was in possession of the same, and that the respondent had no right, title, or interest therein. The court found the allegations of the complaint to be true and the allegations of the answer to be untrue. Assuming that the mother was in possession under the appellant Clara E. De Bock without the payment of rent during the period in controversy, or some part thereof, it was immaterial whether or to what extent said appellant was receiving rent, for when the respondent established her right of possession she was entitled to the rental value of the premises during the time she was unlawfully deprived of the same. *Love v. Shartzer*, 31 Cal. 487; *Nathan v. Dierssen*, 130 P. 12, 164 Cal. 607; *Italian American Bank v. Canepa*, 199 P. 55, 52 Cal. App. 619; 9 Cal. Jur. 1030. The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; CURTIS, J.; LAWLOR, J.; LENNON, J.

198 Cal. 151
OGDEN v. BYINGTON et al. (Sac. 3594.)

(Supreme Court of California. Feb. 16, 1926.
Rehearing Denied March 18, 1926.)

1. Mechanics' liens ⚡23.

To support lien under Code Civ. Proc. § 1183, or section 1191, work or materials furnished must permanently improve land affected.

2. Mechanics' liens ⚡24—Preparing land for rice crop did not support lien (Code Civ. Proc. § 1183 or section 1191).

Plaintiff, furnishing tenant stock and equipment for construction of irrigating ditches and levee work in preparing certain lands for planting rice, *held* not to have lien on such land, under Code Civ. Proc. § 1183, establishing mechanic's lien, or section 1191, providing for lien on lots for improvement; work not having structural character or permanency necessary to bring it within statute.

In Bank.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by H. L. Ogden against Lewis F. Byington and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Arthur C. Huston and Harry L. Huston, both of Woodland, for appellant.

George K. Ford, Lewis F. Byington, and Tirey L. Ford, all of San Francisco, for respondents.

RICHARDS, J. This appeal is by the plaintiff from a judgment in the defendants' favor, in an action brought by the former to establish and foreclose a lien upon the real property of certain of the defendants. On and prior to March 22, 1920, the defendants, other than T. E. Maroney, were the owners

of a large tract of land in the county of Colusa, and thereafter continued to be the owners of said lands down to and after the date of the institution of this action. On March 22, 1920, the said owners of said lands entered into a cropping lease, in writing, whereby they leased to the defendant Maroney their said lands for a period of two years or thereabouts for the purpose of planting and growing thereon "rice and other grain." By the terms of said lease, the lessee was to properly irrigate said land and do all things to insure the growing of a good crop of rice thereon, and to harvest the same, and to deliver to the lessors one-third in weight of said rice, except that the lessors were to provide two pumps and engines for the supplying of water to certain portions of said premises from a water channel upon said lands, and were also to pay the expense of the necessary plowing and watering of a certain portion of said lands, during the summer of 1920, which had become infested with water grass, for the purpose of eradicating the same. The said lessee went into possession of the whole of said premises under said lease, and on April 12, 1920, entered into a written agreement with the plaintiff herein, by the terms of which the latter was to furnish certain stock and equipment at designated prices per month, consisting of teams, scrapers, plows, wagons, truck, tents, utensils, and labor for use "in connection with the construction of irrigating ditches and levee work" upon land generally described as lying about 5 miles northeast of Colusa, and for which said Maroney was to pay as the said work proceeded. Upon completion of the work contemplated by this agreement, the said Maroney not having paid the full amount claimed by plaintiff on account of the performance by him of said agreement, the plaintiff filed and recorded a claim of lien under the provisions of part 3, tit. 4, c. 2, of the Code of Civil Procedure against the real property of the said owners of said lands covering the balance alleged to remain due upon said agreement, and thereafter, and on October 18, 1920, commenced this action for the establishment and foreclosure of said lien. The defendants other than said Maroney appeared and answered, denying the existence and validity of said asserted lien upon their said real property, and in the trial which followed upon the issues thus presented the trial court made its findings of fact and conclusions of law, wherein it found that, while the said plaintiff furnished to said Maroney the material, labor, appliances, teams, supplies, etc., to be used, and which were used in connection with the preparation of the said lands for the planting of a crop of rice thereon, the said preparation thereof, and the work done in connection therewith, and the results accomplished thereby were solely and only for agricultural purposes, and were part of the work nec-

essary to, and included in, the cultivation of said lands and the raising of a crop of rice thereon, and "that no structure of improvement of any kind was constructed or erected on said land, nor was any value added to said land." The court made certain other findings not necessary to be considered in our view of the only real question presented upon this appeal.

It is the contention of the appellant that the work done and material and supplies furnished by him in the performance of his contract with Maroney, the tenant of the owners of the lands sought to be subjected to his said lien, was such as is "contemplated and contained within the terms and provisions of the sections of the Code of Civil Procedure relating to the liens of mechanics and materialmen," and particularly of sections 1183 and 1191 of said Code. He chiefly relies upon the provisions of section 1183 thereof for support of his said claim of lien, and upon that portion thereof which provides that:

"Mechanics, materialmen, contractors, sub-contractors, artisans, architects, machinists, builders, miners, teamsters and draymen, and all persons and laborers of every class performing labor upon, or bestowing skill or other necessary services, or furnishing materials to be used or consumed in or furnishing appliances, teams and power contributing to the construction, alteration, addition to or repair, either in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon road or other structure, shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished and for the value of the use of such appliances, teams or power," etc.

In support of his contention that the labor done, materials and equipment furnished, and supplies used by him in the performance of his said contract with Maroney comes within the scope and intent of the foregoing provision of the Code of Civil Procedure, the appellant strongly relies upon the decision of the District Court of Appeal in the case of *Mendoza v. Central Forest Co.*, 174 P. 359, 37 Cal. App. 289. That was a case wherein the lien sought to be upheld was one created under a contract for the construction of certain ditches, drains, roads, checking, and other like work in the course of the development of a tract of land, so as to prepare the same to be seeded to alfalfa, and to provide for the irrigation of the crop or crops of alfalfa to be thereafter grown thereon. The trial court, in upholding said lien, referred in its findings to the detailed specifications of the contract for the doing of the said work and to the permanency of its structural character, and in its conclusions of law found and concluded "that the farm development thus erected upon the lands of the Central Forest Company, as aforesaid, constitutes and is a structure within the meaning of section 1183

of the Code of Civil Procedure." In sustaining this conclusion, the appellate tribunal held that:

"The farm development here contemplated was a finished piece of work composed of integral parts, some of which the statute expressly designates as structures, and when completed consisted of ditches, drains, embankments, roads, so correlated as to form one harmonious entity designed to accomplish a particular object and constituting a permanent and valuable improvement to the land and necessary to its highest and most profitable uses. When finished, it stood out as obvious and visible in its usefulness and its purpose as would a house, or barn, or any other of the structures enumerated in the statute."

A comparison of the findings of the trial court in the foregoing case with those of the trial court in the case at bar will serve to show that the essential characteristic of the work done and improvement made upon the surface of the land in the Mendoza Case is entirely lacking from the facts and findings in the present case. The characteristic referred to is that of "permanence." In the former case the specified development to be done was in the preparation of the land for the planting and conservation of a perennial crop, viz. alfalfa; and both the trial and the appellate court designated it to be a permanent and visible structural change in the surface of the land in question, "constituting a permanent and valuable improvement to the land necessary to its highest and most profitable uses." In the case at bar, on the contrary, the findings of the trial court are that the materials furnished and the work done were solely and only done in the preparation of the land in question for the cultivation and raising of a crop of rice thereon: "and that no structure or improvement of any kind was constructed or erected on said land, nor was any value added to said land."

[1. 2] When we come to consider the other cases which have been brought before this court or the appellate tribunals involving similar claims or lien for work done or materials furnished under either the provisions of section 1183 or section 1191 of the Code of Civil Procedure, we find that the element of permanency in the improvement of the land affected has been in each instance a determining factor in the disposal of each case. As in the case of *Young v. Shriver*, 206 P. 99, 56 Cal. App. 653, wherein the lien sought to be imposed was claimed under the provisions of section 1191 of the Code of Civil Procedure, which purports to provide a lien for the grading, filling in, or otherwise improving of a lot or tract of land, or the street,

highway, or sidewalk in front of or adjoining the same, the court holding that the preparation of agricultural land by plowing or otherwise for the ordinary seasonal or agricultural uses thereof was not such work as was contemplated by said section of the Code; and in so ruling the court cites the case of *Brown v. Wyman*, 9 N. W. 344, 56 Iowa, 452, 41 Am. Rep. 117, as holding that the breaking up or plowing of virgin prairie land for the growth of crops, while necessary for that purpose, was not more necessary than the annual plowing of such lands which precedes the planting of such crops, and hence was not such work as would entitle the party doing the same to the benefit of a lien upon the land. In the case of *Thomas v. Gismegian*, 216 P. 601, 191 Cal. 497, wherein a claim of lien was asserted for the grading and leveling of agricultural land so that the same could be irrigated for the purpose of farming by means of irrigation, this court approved the ruling of the appellate court in the case of *Young v. Shriver*, supra, but in so doing drew the distinction between that case and the case then at bar, which consisted in the fact that the grading and leveling done in the latter case, as shown by the record in said case, was done upon hilly, rough, ridgy, uneven, hog wallow land which required the grading, leveling, and filling shown to be done as a necessary prerequisite to its cultivation. This court, in referring to such work, designated it "as in the nature of a permanent improvement as distinguished from the plowing and leveling essential to the raising of annual crops," and for that reason upheld the asserted lien. From this comparison of these recent decisions it would seem to be sufficiently plain that the character of the work done and materials and supplies furnished, and for which a lien is sought to be established and foreclosed in the instant case, was not such in point of structural character or permanency as would bring it either within the provisions of section 1183 or section 1191 of the Code of Civil Procedure, so as to subject the lands of the respondents to any lien predicated upon the performance of the plaintiff's contract with the respondents' tenant, and for the collection of any balance claimed to be due from such tenant by virtue thereof. This conclusion renders unnecessary a consideration of any other questions presented upon this appeal.

The judgment is affirmed

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LAWLOR, J.; CURTIS, J.; LENNON, J.

198 Cal. 196

FAIR OAKS BANK v. JOHNSON et al.
(Sac. 3523.)(Supreme Court of California. Feb. 23, 1926.
Rehearing Denied March 25, 1926.)

1. Sales ⇨52(7)—Evidence held to justify finding that execution of note and mortgage, given in payment of tractor, was procured by false and fraudulent representations.

Evidence held to justify finding that execution of note and mortgage given in payment of tractor, was procured by false and fraudulent representations as to condition of tractor.

2. Estoppel ⇨110—Facts constituting estoppel against defense set up in cross-complaint, in action on note and mortgage, cannot be relied on on failure to set up any of such facts in any of pleadings.

Where, in action on note, and to foreclose mortgage, maker filed a cross-complaint against owner and payee, alleging fraud in procuring note and mortgage, to which separate answer was filed, owner and payee cannot rely on facts constituting estoppel, as defense to cause of action embraced in cross-complaint, which were not set up in any of their pleadings.

3. Estoppel ⇨110.

Rule requiring party relying on estoppel to plead it, applies only when such party has an opportunity to make such plea.

4. Estoppel ⇨115—Failure of plaintiff to plead facts by way of estoppel in answer to cross-complaint precludes it from proving such facts either to controvert answer to complaint or in support of answer to cross-complaint.

Where owner of note and mortgage, after bringing action thereon, had opportunity to plead facts by way of estoppel in answer to cross-complaint filed by maker, failure to make such plea precluded it from proving such facts either to controvert answer to complaint or in support of its answer to cross-complaint.

5. Mortgages ⇨455—Cross-complaint to action on note and to foreclose mortgage, securing it, setting up fraud in procuring note and mortgage, was properly filed to secure cancellation of mortgage.

Cross-complaint to action on note and to foreclose mortgage securing it was properly filed by maker, setting up allegations that execution of note and mortgage was procured by fraud, so as to secure cancellation of mortgage.

6. Estoppel ⇨121—Express finding on facts relied on as estoppel against allegations of cross-complaint was not necessary, where court impliedly found against such facts by finding allegations set up in cross-complaint were true.

Where trial court found that cross-complaint, setting up fraud in procuring note and mortgage sued on, was true, and action was tried on theory that estoppel relied on by plaintiff as defense to cross-complaint was in issue, it thereby impliedly found against plaintiff on issue of estoppel, rendering express finding on such issue unnecessary.

In Bank.

Appeal from Superior Court, Sacramento County; J. O. Moncur, Judge.

Action by Fair Oaks Bank against Elmer N. Johnson and Don H. Slocum, wherein defendant Johnson filed a cross-complaint against the plaintiff and the other defendant. From a judgment for defendant Johnson, plaintiff and defendant Slocum appeal. Affirmed.

Elliott & Atkinson, of Sacramento, for plaintiff and appellant.

Elliott & Atkinson and Verne McGeorge, all of Sacramento, for cross-defendant and appellant.

Evan J. Hughes, of Sacramento, for defendant and respondent.

CURTIS, J. This is an action brought to collect the amount alleged to be due on a promissory note, and to foreclose a mortgage given to secure the same. The note and mortgage were executed by the defendant Johnson in favor of the defendant Slocum, and assigned by the latter to plaintiff. The complaint is in the usual form of a complaint for the foreclosure of a mortgage. The defendant Johnson answered, alleging that the note and mortgage were given in payment of a second-hand Avery tractor purchased by him from the defendant Slocum, and that the latter, in order to induce Johnson to purchase said tractor, made certain false and fraudulent representations as to said tractor. Said defendant Johnson also filed a cross-complaint against plaintiff and said defendant Slocum, setting up the same matters as were alleged in his answer, and asked for a cancellation of said note and mortgage. The court found that the allegations of defendant Johnson's answer and cross-complaint were true, except in some respects not material on this appeal, and gave judgment in favor of Johnson and against plaintiff and Slocum. Plaintiff and Slocum have appealed.

[1] Appellants' first contention for a reversal of the judgment is that the findings are not supported by the evidence. While the evidence is conflicting, we are not able to say that it is not sufficient to support respondent's claim that the note and mortgage were procured through the false and fraudulent representations of the defendant Slocum. There was evidence that Slocum represented to respondent that the tractor, for the purchase price of which the note and mortgage were given, was in first-class mechanical condition, except for a few loose bolts; that it was good as new; that it had not been used enough to really break the machine in; that it had only plowed about 10 acres; and that the former owner had no trouble with it; that the tractor had been returned by the previous owner because his land was too steep to operate the machine; that, com-

pared with the land of the defendant Johnson on which it was proposed to use the tractor, if purchased, the land of the previous owner was practically straight up and down, and that there was no reason why the tractor would not do perfectly satisfactory work on respondent Johnson's land. There is no question from the evidence but that Johnson believed these statements, and relying upon them, bought the tractor and gave the note and mortgage sued on herein as payment thereof. The evidence further shows that, after the delivery of said tractor to respondent, he attempted to use the same upon his land, and in doing so the countershaft of the tractor broke within 3 hours after respondent had begun operating it and within 10 to 12 days thereafter a second countershaft broke; that within one month from the time he began to use the machine a connecting rod broke, and knocked a large hole in the side of the crank case; that in the ordinary use of the tractor the engine heated excessively; that the tractor would not pull up hill; and the former owner had returned it to the defendant Slocum for the reason that he could not get the power out of it.

The evidence further shows that the tractor would not pull the plows up the grades on respondent's land, and that these grades were steeper than those of the land of the former owner; that, upon the connecting rod breaking, Johnson notified Slocum of that fact, and the latter agreed to take it up with the company; that later the tractor was taken from Johnson's land, and he testified at the trial that "it is all scattered about the ground where they left it when they took it apart." Thereafter respondent gave notice of rescission of the contract, note, and mortgage. This evidence was sufficient to justify the findings of the court that the execution of the note and mortgage was procured by the false and fraudulent representations of the defendant Slocum.

The evidence being sufficient to justify the findings, the judgment against the defendant Slocum is valid. As to the judgment against the plaintiff, the assignee of Slocum, it is conceded by appellants that at the date of the execution of the note and mortgage, April 2, 1921, a note secured by a mortgage was a nonnegotiable instrument, although since that date such a note has been made negotiable. Civ. Code, § 3265. It is not contended that the amendment to said last-mentioned section of the Code has any retroactive effect. The judgment, therefore, is valid and binding upon the plaintiff as well as on the defendant Slocum, unless the further contention of appellants is meritorious. This contention is that the respondent is estopped from setting up the defense of fraud as against plaintiff, for the reason that the evidence showed that at the time of the purchase of said tractor said respondent himself procured the loan from the plaintiff, evi-

denced by said promissory note and mortgage, and that, although said note was made payable to defendant Slocum, yet in reality the loan was made by the bank, the plaintiff herein, to respondent Johnson for the purpose of enabling the latter to purchase said tractor, and that, while it was made in the first instance payable to defendant Slocum, it was immediately thereafter indorsed and transferred by Slocum to plaintiff, and that this was all done in accordance with the agreement and understanding entered into prior to the execution of said note between respondent and appellants; that respondent Johnson failed to inform the appellant bank of any of the statements or representations made by Slocum to him at the time they were negotiating for the purchase and sale of said tractor, and therefore said respondent is estopped from setting up said defense as against the appellant bank.

[2, 3] Neither appellants the Fair Oaks Bank nor Slocum set up in any of their pleadings any of the facts which they now rely upon as constituting an estoppel against respondent. In other words, neither of said appellants has pleaded any facts by way of estoppel. Each of said appellants was made a defendant in respondent's cross-complaint asking for the cancellation of said note and mortgage, and each filed a separate answer to said cross-complaint. The opportunity to plead estoppel was thus given to each of said appellants. "It may now be regarded as firmly settled that, as a general rule, a party who has an opportunity to plead an estoppel upon which his cause of action depends must do so." 10 Cal. Jur. 654. Upon his failure to do so the question cannot be considered. *Placer County v. Lake Tahoe Ry. & Tr. Co.*, 209 P. 900, 906, 58 Cal. App. 764. "Such is the uniform rule of decision laid down by this court from the case of *Clarke v. Huber*, 25 Cal. 593, and to *Chapman v. Hughes* [58 P. 298, 60 P. 974, 66 P. 982] 134 Cal. 641." *Burk v. Santa Cruz*, 127 P. 154, 156, 163 Cal. 807, 811. These authorities unquestionably dispose of appellants' right to rely upon an estoppel as a defense to the cause of action embraced in respondent's cross-complaint. The question arises, however, whether appellants' failure to plead an estoppel to the cross-complaint in any way affected the right of the appellant the Fair Oaks Bank to rely upon an estoppel as against the defendant Johnson's defense in the proceeding to foreclose said mortgage. Did the appellant the Fair Oaks Bank, by its failure to plead facts by way of estoppel as a defense to respondent's cross-complaint, waive its right to prove said facts in the foreclosure proceeding? The rule requiring a party relying upon estoppel to plead it only applies when such party has an opportunity to make such a plea, and it is well settled that in a proceeding like that instituted by the plaintiff herein, to foreclose its mortgage, no oppor-

tunity is afforded it to make the plea of estoppel, and that it may, without pleading it, prove the facts relied upon in the same way as if they had been pleaded. This action, although it embraces the proceedings instituted to foreclose a mortgage, and those instituted by the respondent for the purpose of having said mortgage canceled, is but one action. There can be but one judgment rendered thereunder. The rights of the parties thereunder are determined by their respective pleadings. There cannot be one rule applicable to the Fair Oaks Bank as the plaintiff in said action and another and different rule applicable to said bank as a cross-defendant in the proceedings instituted by Johnson to cancel the note and mortgage. To hold that the bank could rely upon an estoppel as the plaintiff in said action, but that it could not rely upon an estoppel as a cross-defendant therein, might result in a judgment in said action decreeing the foreclosure of said mortgage, and further adjudging that it be set aside and canceled, two absolutely inconsistent determinations. "The law does not favor estoppels, for their effect is to prevent the party against whom they are invoked from proving the truth of the matter, to ascertain which, as a general proposition, is the great end of judicial inquiry. * * *

The doctrine is a harsh one, and is never to be applied, except where to allow the truth to be told would consummate a wrong to the one party, or enable the other to secure an unfair advantage." *Franklin v. Merida*, 35 Cal. 558, 566 (95 Am. Dec. 129); *Wheaton v. Insurance Co.*, 18 P. 758, 76 Cal. 416, 430, 9 Am. St. Rep. 216.

[4] The appellant the Fair Oaks Bank had an opportunity to plead facts by way of estoppel in its answer to the cross-complaint, and, having failed to make such plea, is, in our opinion, precluded from proving said facts in any stage of the proceedings, either to controvert the allegations of respondent's answer to the complaint or in support of its answer to respondent's cross-complaint. Our attention has not been called to any direct authority in support of the conclusions to which we have arrived. On the other hand, we know of none prescribing a contrary rule. It seems, however, upon principle, that from the well-established rule requiring an estoppel to be pleaded in case there is an opportunity to do so, otherwise no proof thereof will be permitted, there can be no escape from the above conclusion.

[5] We are unable to agree with the assertion that the cross-complaint was unnecessary as between the parties to this action. It is true that the same facts substantially

are set up therein as were alleged in respondent's answer to the complaint. Had the action been confined simply to the foreclosure of the mortgage, and had judgment therein been rendered in favor of the respondent, said judgment could have provided only that the plaintiff in said action take nothing. It could not have been decreed in said action that said mortgage be delivered up and canceled. The mortgage was on record as a lien against respondent's real property, and he was entitled, if the same had been procured by fraud and misrepresentation, to have the same surrendered up and canceled of record. This relief could only be obtained by him either by an independent action brought for that purpose, or, in case action had been brought to foreclose the mortgage, by the filing of a cross-complaint asking for the same relief.

[6] There is another consideration, however, which in our opinion leads to the conclusion that the judgment should be affirmed. Even if we assume that the plaintiff had the right to rely upon estoppel, yet, as the trial court found the allegations of respondent's answer to the complaint and his cross-complaint to be true, we think this was at least an implied finding that the facts relied upon by appellant as an estoppel were not true. As we have already seen, the effect of an estoppel is to prevent the party against whom it is invoked from proving the truth of the matter upon which he relies. In this action the facts relied upon as an estoppel, if proven to the satisfaction of the trial court, would have prevented the respondent from proving the false and fraudulent statements, which he claimed were made to him by the defendant Slocum, as a defense to plaintiff's action to foreclose said mortgage. The record shows that the action was tried upon the theory that it was not necessary to plead the facts relied upon by plaintiff as an estoppel, and that such estoppel was in issue. When the court, therefore, found that the allegations of respondent's answer and cross-complaint were true, it must have necessarily passed upon the issue of estoppel, and, by finding in favor of respondent, impliedly found against the appellant upon said issue of estoppel. An express finding, therefore, upon such issue was not necessary under the circumstances of this particular case.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; LAWLOR, J.; LENNON, J.

198 Cal. 157

SALTZEN v. ASSOCIATED OIL CO. OF CALIFORNIA (two cases).
(Sac. 3616, 3617.)

(Supreme Court of California. Feb. 16, 1926.
Rehearing Denied March 18, 1926.)

1. Appeal and error ⇨882(12).

Party, requesting instruction given by court, cannot deny that it is correct in law.

2. Appeal and error ⇨1032(1).

Injury is not presumed from error.

3. Trial ⇨243—Specific instruction as to contributory negligence and general instruction as to burden of proof held not contradictory and misleading.

Where, in automobile accident case, court correctly instructed that burden of showing contributory negligence was on defendant, subsequent general instruction that, if proof was equally balanced on any material issue, plaintiff had not sustained burden imposed on him, did not render instructions so contradictory and misleading as to be reversible error.

4. Automobiles ⇨245(9)—Negligence of truck driver in not giving timely turning signal, as required by Motor Vehicle Law, held for jury (Motor Vehicle Law, § 20, subd. n, as amended by St. 1919, p. 216, § 12).

Where automobile in which plaintiffs were riding was propelled against a tree on edge of highway through alleged carelessness of driver of defendant's truck, and evidence was conflicting as to whether driver gave timely signal of turning, as required by Motor Vehicle Law, § 20, subd. n, as amended by St. 1919, p. 216, § 12, question of negligence held for jury.

In Bank.

Appeals from Superior Court, Yolo County; W. A. Anderson, Judge.

Separate actions by Susan M. Saltzen and by J. D. Saltzen against the Associated Oil Company of California. From judgments for defendant, plaintiffs appeal. Affirmed.

Arthur C. Huston, Sr., and Arthur C. Huston, Jr., both of Woodland, for appellants.

Henry Ach, of San Francisco, Irving D. Gibson, of Sacramento, and A. G. Bailey, of Woodland, for respondent.

RICHARDS, J. These two appeals, while taken separately, depend upon the same state of facts and the same question of law and are submitted upon a single set of briefs. They arise out of the same accident wherein each of the plaintiffs therein suffered injuries for which damages were sought to be recovered by each in a separate action; the two actions having, however, been, by stipulation of the parties, tried together. The accident in question occurred upon August 22, 1922, upon the public highway between the town of Davis and the city of Woodland, in Yolo county, when an automobile owned and being operated by the plaintiff and ap-

pellant J. D. Saltzen and in which his wife, Susan M. Saltzen, the other plaintiff and appellant, was riding, was propelled against a tree along the edge of said highway through what they each alleged to be the carelessness and negligence of a driver of a large truck owned by the defendant in each action and being operated by its said agent along and upon said highway. To the complaint of each of said plaintiffs charging such negligence and resultant injuries the defendant answered, denying negligence on the part of the defendant or its said servant, and denying that whatever injuries the said plaintiffs or either of them sustained were the proximate result of any such negligence, and, on the other hand, alleging affirmatively that the said accident and whatever resultant injuries the plaintiffs, or either of them, suffered thereby, were proximately caused by the negligence and also by the contributory negligence of the said J. D. Saltzen in the operation of the car of which each of said plaintiffs was an occupant at the time of their injuries. The causes went to trial before a jury and were tried together, and at the conclusion of said trial the jury returned a verdict in each case in favor of the defendant, and from the judgments entered thereon, respectively, the plaintiffs have prosecuted these appeals.

[1-3] The first contention urged by these appellants is that the trial court erred in giving certain instructions to the jury which the appellants assert to have been erroneous and contradictory. In the course of its charge to the jury the court gave, as applicable to each case, the following instruction at the plaintiff's request, viz.:

"You are instructed that the burden of showing that the plaintiff is guilty of contributory negligence rests upon the defendant in this case, unless the same appears from the plaintiff's own evidence."

Later, in the course of its instructions, the court gave to the jury the following instruction having application apparently to the case of the plaintiff J. D. Saltzen, viz.:

"You are instructed that the burden is upon plaintiff to prove by a preponderance of the evidence that he actually sustained the injury from which he claims to have been suffering since the accident, and also, if he sustained any injury, the nature and extent thereof. If you believe from the evidence that the proof is equally balanced upon any material issue of fact, then plaintiff has not sustained the burden which the law imposes upon him of making proof of any fact in issue by a preponderance of the evidence, and in such event it will be your duty to find in favor of defendant upon such issue."

The plaintiff and appellant J. D. Saltzen insists that the foregoing two instructions are contradictory to the extent of being prejudicially misleading to the jury, and hence

that the giving of them constituted prejudicial error. In making this contention the appellant J. D. Saltzen concedes that the first of the foregoing instructions was and is correct in point of law. He could not in point of fact do otherwise, since it was his own requested instruction; but he contends that the instruction which followed it, and which is above quoted, was so erroneous and contradictory of the former instruction as to have misled the jury to the extent of a verdict against him. We do not, however, so read said latter instruction. In its opening phrases it evidently has reference to the burden which is cast upon the plaintiff of proving the nature and extent of his injuries and their relation to the accident in question; and, while the scope of the instruction was unduly broadened by its concluding phrases, and hence ought not in that form to have been given, we are unable to say that the jury would be misled by its general phrasing to the point of a disregard of the earlier and very clear and pointed instruction which the court had given at the said plaintiff's request upon the subject of contributory negligence, and upon which of the parties to the action the burden rested of showing that the plaintiff was guilty of contributory negligence. In said first given instruction the court was dealing specifically, expressly, and only with the subject of contributory negligence, and the jury could not have misunderstood its plain and explicit terms. In the second of said instructions the subject of contributory negligence was not mentioned, and it is difficult to see how its generalities, however inapt, could have wrought confusion in the minds of the jurors upon that subject. The older rule that injury was to be presumed from error has not obtained in this court since the decision of the case of *Vallejo, etc., R. R. Co. v. Reed Orchard Co.*, 147 P. 238, 169 Cal. 545, 554, and the cases which the appellant J. D. Saltzen cites as upholding his above contention do not, when examined, sustain it. In the case of *Rathbun v. White*, 107 P. 309, 157 Cal. 248, there was a specific instruction which was erroneous and highly prejudicial, and this court held that the error created thereby would not be cured by a merely general instruction correctly stating the rule but giving it no specific application. The reverse of that situation is presented here wherein we find that the specific instruction correctly sets forth the rule as to where the burden of showing contributory negligence lies, and the utmost that the appellant J. D. Saltzen can claim is that its effect has been destroyed by the later giving of a general instruction which, however erroneous, does not purport to cover the subject to which the correct and specific instruction relates. The other cases cited by said appellant are either easily distinguishable from the instant case or were decided at a time when the prior rule as to

presuming injury from error prevailed. In the recent case of *Alloggi v. S. P. Co.*, 173 P. 1117, 37 Cal. App. 72, it appeared that the trial court had given an incorrect instruction upon the subject of contributory negligence, but at a later point in its instructions gave a correct instruction upon the same subject, and in dealing with that situation upon appeal the court said:

"We are not unmindful of the rule that conflicting and contradictory instructions upon a material phase of the case require a reversal where it cannot be ascertained from the record before us which instruction prevailed, or was likely to prevail with the jury. While it is true that the instruction complained of in the present case is erroneous, and in a measure in conflict with several other instructions which correctly stated the rule of law relative to contributory negligence, nevertheless the correct rule of law was so specifically stated and restated to the jury that we feel that the idea in the several correct instructions must have preponderated in the consideration of the jury, and that as a consequence the erroneous instruction neither contributed to nor controlled the verdict."

We think a similar and even stronger situation is here presented and that this court ought not to adopt or give application to a rule that the positive effect of an express instruction upon a specific subject which is admittedly correct will be overcome by a general though erroneous instruction not expressly dealing with that subject in the absence of a very clear showing that the jury have been misled thereby. Among other cases bearing upon this subject are *Garrette v. Granger, etc., Ass'n*, 208 P. 1010, 58 Cal. App. 396; *Bourguignon v. Peninsular Ry. Co.*, 181 P. 669, 40 Cal. App. 689, 695; *Green v. S. P. Co.*, 199 P. 1059, 53 Cal. App. 194; *Haun v. Tally*, 181 P. 81, 40 Cal. App. 585 (on rehearing); *Phillips v. Hobbs*, 227 P. 622, 67 Cal. App. 199, 210.

The appellant Susan M. Saltzen makes the same contention as that above considered with respect to similar instructions applying to her case. While it is true that the instruction which the trial court gave with special reference to her case is more broad and hence somewhat more objectionable than that above quoted as complained of by the appellant J. D. Saltzen, we are bound to conclude that if the jury was not misled in the one case they would not be in the other in the light of the fact that the court's correct and specific instruction as to contributory negligence was given in each case, and that the foregoing authorities set forth the correct doctrine to be applied to each of these appeals.

[4] The appellants each make the final contention that the jury should have found by their verdict that the driver of the defendant's truck was guilty of negligence as a matter of law and that their and each of their injuries were proximately caused there-

by. The evidence with relation to the said driver's conformity to or disregard of the duty enjoined upon him by the Motor Vehicle Law (St. 1919, p. 216, § 12, subd. n) of extending his hand a sufficient length of time before turning his truck as to give timely notice of his intention is quite in conflict, and under the quite well-settled rule the question of the negligence of the driver of the vehicle is under such circumstances a question of fact for the jury. We think it was so in the instant case, and, the jury having resolved the conflict in the defendant's favor, there is no merit in the appellants' said contention upon these appeals. We discover no error in the record sufficiently prejudicial to justify a reversal of these cases.

The judgment in each case is affirmed.

We concur: WASTE, C. J.; LAWLOR, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.

198 Cal. 163

In re BURKE'S ESTATE. (Sac. 3626.)

(Supreme Court of California. Feb. 16, 1926.)

1. Appeal and error ¶1010(1).

Supreme Court is bound by finding of trial court on question of fact, if supported by any substantial evidence.

2. Executors and administrators ¶93(1), 96—Administrator, or executor, undertaking to carry on deceased's business without authority, or make new contracts, does so at his peril.

If administrator, or executor, without authority, undertakes to carry on business in which deceased was engaged, or undertakes new contracts or engages in new enterprises, he does so at his peril.

3. Executors and administrators ¶93(1).

Generally, an administrator, or executor, is under no obligation to continue business of deceased.

4. Executors and administrators ¶91—Administrator, acting to detriment of estate, is not surcharged, if he acts with authority in good faith as a reasonable man.

Where administrator is charged with duty or vested with power to act, and does so to detriment of estate, he will not be surcharged, if he acts in good faith and as a cautious and prudent man would likely act under same circumstances.

5. Executors and administrators ¶510(10)—Whether it would have been better for administrator to have breached building contract rather than complete performance was for probate judge.

Where administrator completed a building contract binding on personal representatives, and there was no evidence that intestate would

have performed contract more profitably, the question whether damages for breach would have been less than loss by performance was for probate judge.

6. Executors and administrators ¶202½—Administrator is under duty to perform his intestate's contracts, unless acts to be performed are personal.

Administrator is under duty to perform contracts of his intestate, unless acts to be performed are personal, and therefore discharged by death.

7. Contracts ¶309(1), 311—Contracts contemplating performance by others, or involving services that may be performed by others, are not discharged by death or disability.

Contracts involving services that may be performed by others, or in which performance by others is contemplated, are not discharged by death or disability of party who was to perform such acts.

8. Contracts ¶311—Building contract is not ordinarily deemed a personal contract discharged by death.

Ordinarily, a building contract is not one deemed to have been entered into because of personal skill or taste of contractor, so as to be discharged by contractor's death, unless it appears that the character, credit, and substance of contractor was an inducement to the contract.

9. Executors and administrators ¶109(1).

Procurement of permission of probate court is not absolutely essential to allowance of expenditure by the administrator.

10. Executors and administrators ¶92—Loss sustained by administrator in completing building contract held properly allowed, though question of completing contract was not submitted to probate court.

Where probate court found that administrator acted reasonably in completing building contract, and there was no evidence that intestate could have performed contract more profitably, the probate court properly allowed loss sustained by administrator, though administrator acted without submitting question of completing contract to probate court.

11. Executors and administrators ¶82—In cases of doubt as to administrator's duty, probate court should be consulted.

Where there is a doubt as to duty of an administrator or as to policy to be pursued, the probate court should be consulted before any steps are taken that might seriously affect funds of estate.

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

In the matter of the estate of Thomas Francis Burke, deceased. From an order of the probate court, settling and allowing the first account and report of the administrator, Miller & Lux, Incorporated, a creditor, appeals. Affirmed.

T. P. Wittschen, of Oakland, Gail C. Larkin, of Los Angeles, and Joseph C. Sharp and J. E. Woolley, both of San Francisco (Vincent J. McGovern, of San Francisco, of counsel), for appellant.

Stephen P. Galvin, of Los Banos, and H. K. Landram, of Merced, for respondent.

SEAWELL, J. This appeal is from an order made and entered by the probate court settling and allowing the first account and report of the administrator in the above-entitled proceedings, against the objections of appellant, a creditor, whose claim had been approved and allowed for the sum of \$3,376.62 by the judge of said court.

Said account included the allowance of a credit in favor of the administrator covering a loss sustained as the result of the administrator carrying out to completion two building and construction contracts, one of which was entered into by the intestate with the Odd Fellows' Association of Los Banos, and the other was made with the city of Los Banos.

The intestate, a contractor and builder, had commenced to perform both of said contracts, and while so engaged died, and his administrator completed the performance of the covenants of his said intestate's contracts at a loss. While the work commenced by the intestate had not greatly advanced at the time of his death, it had, nevertheless, progressed to a somewhat substantial stage. The foundations were laid, and the preliminary work had been completed in both instances, and considerable material, steel, and timbers had been cut and placed in preparation for the erection of the superstructure. Contracts for material had been entered into by the intestate. No complaint is made that the administrator, in completing the contracts of his intestate, was guilty of fraud or mismanagement, or that the cost of completing said work of construction was greater than it should have been. Objection is made, however, to his undertaking the completion of said unfinished construction in the circumstances of the situation. There would have remained sufficient assets in the hands of the administrator to have discharged said creditor's claim, had not the loss been sustained in the manner above related. No objection appears to have been made by the creditor to the completion of said work at any time during its progress.

The probate court, in its order settling said account, make the following finding:

"The court finds that the administrator carried out and completed two building and construction contracts entered into by deceased in his lifetime, but uncompleted at the time of his death; that said contracts did not require the personal skill of the deceased in their carrying out and completion; that in the carrying out and completion of the same a loss of \$6,894.17 was suffered and

sustained; that said loss is a charge against the estate, and chargeable against the estate, as part of the cost of administration, and should be allowed."

[1] This court is bound by the finding of the trial court on a question of fact, if the finding is supported by any substantial evidence. Appellant has not pointed out wherein the above finding is not sufficiently supported, but we have, nevertheless, examined the record, and find there is sufficient evidence to support it.

[2] The law is well settled in this state by numerous authorities that if an administrator or executor, without being authorized to do so, elects or undertakes to carry on the business in which the deceased was engaged, he does so at his peril. *Estate of Knight*, 12 Cal. 200, 73 Am. Dec. 531; *Estate of Moore*, 13 P. 880, 72 Cal. 335; *In re Rose*, 22 P. 86, 80 Cal. 166; *Estate of Broome*, 122 P. 470, 162 Cal. 258; *Estate of De Rome*, 165 P. 919, 175 Cal. 399.

[3, 4] The rule announced in the above-cited cases is also applicable in cases wherein an administrator or executor undertakes to make new contracts or to engage in some new enterprise. In all such cases it is held that the administrator, or executor, except in rare and special instances, is under no obligation or duty to continue the business of the deceased. Nor is he permitted to enter into contracts or speculate by embarking in business enterprises on behalf of the estate, and, if he ventures to do so, he will be held to strict accountability for any losses thus suffered. The reasoning of those cases is not applicable in its strict sense to cases in which the administrator is charged with a duty, or vested with power to act, and the wisdom of the course to be pursued is in doubt, and who, in the performance or exercise of his duty or power, acts to the detriment of the estate, provided he acted in good faith and as a cautious and prudent man would likely act under similar circumstances. In such a case he will not be surcharged, although the consequences may be bad.

[5] In the instant case, the decedent had entered into a contract binding himself and his personal representative to perform the covenants, which were subsequently performed by the administrator. There is no evidence before us to sustain the conclusion, and we are not permitted to assume as a fact proved that the intestate would have performed his contract, more profitably to himself than it was performed for his estate by his administrator. The solvency or insolvency of himself or his estate depended upon the wisdom or lack of wisdom evidenced by the execution of his contract as tested by the final result. We cannot say, therefore, that, had he lived, he would have been better able to pay his obligation to appellant than was his administrator. The foregoing obliga-

tions were created by his own hand and act and were not new obligations incurred by the contracts of his administrator. The parties with whom the contracts were made were entitled to have them respected, and there is no evidence or suggestion that performance was waived by them. Whether it would have been to the interest of the estate, and the creditor as well, for the administrator to have refused to perform, on the theory that any damages recovered against the estate for a breach would have been smaller than the loss suffered by performance, was at best a question addressed to the judgment of the probate judge.

[6-8] The general rule is that it is the duty of an administrator to perform the contracts of his intestate unless the acts to be performed are personal, such as an author to compose a particular work, an artist to paint a particular painting, a sculptor to produce a particular piece of statuary or other work of art, or a lawyer, or physician to render services. Contracts to perform such personal acts are discharged by death or by the disability of the person who was to perform said acts. This rule, however, does not apply where the services are of such a character that they may be as well performed by others. *Janin v. Browne*, 59 Cal. 37; *McCann v. Pennie*, 35 P. 158, 100 Cal. 547; *Husheon v. Kelley*, 124 P. 231, 162 Cal. 656. Nor where the contract by its terms shows that performance by others was contemplated. 6 Cal. Jur. 448. Ordinarily, a building contract is not to be brought within that class of contracts which are deemed to have been entered into because of the personal skill or taste of the person who is to perform it. *Janin v. Browne*, supra; *McCann v. Pennie*, supra; *In re Hinchon*, 116 P. 47, 159 Cal. 755, 36 L. R. A. (N. S.) 303; *Macdonald v. O'Shea*, 108 P. 436, 58 Wash. 169, Ann. Cas. 1912A, 417; *Bambrick v. Webster Groves Presbyterian Church*, 53 Mo. App. 225. It is otherwise, of course, where it is made to appear, as remarked by Lord Denman, that the "character, credit and substance of the party" contracted with was an inducement to the contract. A building contract may, from the character and kind of work to be performed, properly fall within the rule of "personal performance acts." But this is not such a contract.

The rule as stated by 24 Corpus Juris, 53, 54, and which is approved by the weight of judicial authority, and text-writers, is that—

"Executors or administrators are generally bound by all the covenants or contractual obligations of their decedents, except such as are personal in their nature and of which personal performance by the decedent is of the essence, or such as are terminated by decedent's death, even though performance is detrimental to the estate; and, where the personal representative neglects or refuses to carry out the contract of his decedent, the other party has the usual remedies, as in electing to treat it as rescinded and claiming damages. * * *

The rule has been thus stated by this court:

"Where the contract * * * is of an executory nature, and the personal representative can fairly and sufficiently execute all the deceased could have done, he may do so and enforce the contract (*Parsons on Contracts*, 131); e converso, the personal representative is bound to complete such a contract, and, if he does not, may be made to pay damages out of the assets (*Siboni v. Kirkham*, 1 Mees & W. 418)." *McCann v. Pennie*, supra. See, also, *Janin v. Browne*, supra; *Quick v. Ludbarrow*, 3 Balshode, Rep. 30; *Hawkins v. Ball's Adm'r*, 18 B. Mon. (Ky.) 816, 68 Am. Dec. 755; *Halyburton v. Kershaw as Adm'r*, etc., 3 De-saus. (S. C.) 105; *Billing's Appeal*, 106 Pa. 558; 2 *Woerner's American Law of Administrators* (3d Ed.) p. 1041, § 328; 2 *Williams on Executors and Administrators*, p. 1348 (10th Ed.).

Appellant chiefly relies upon *Exchange National Bank v. Estate of Betts*, 176 P. 660, 103 Kan. 807, 3 A. L. R. 1604, as a case directly in point. We have examined that case and others cited by appellant, but we cannot accept the doctrine as therein announced as a precedent which should control our decision in the instant case, in view of the legal principles heretofore announced by this court, and other courts, and which we think are applicable to the facts and binding as to the law of the case. While it may be said that some of the authorities of this state herein cited to sustain the position of respondent, strictly speaking, may be said to be obiter, nevertheless they are at least persuasive, and find support in well-recognized principles of the law of contracts. In the cases of this state in which this court has had occasion to consider the question at all, the conclusion arrived at by us has been favored either by express language or by implication. There is, however, direct authority to be found in the cited cases sustaining our conclusion.

[9, 10] It is a fact that the administrator herein acted without having first submitted the question of the completion of the contracts to the judgment of the probate court. In some jurisdictions such a failure on his part would be regarded as a sufficient reason for the disallowance of an expenditure of the estate's funds. But this court has not gone to the extent that some jurisdictions have gone and made the procurement of the permission of the court absolutely essential to the allowance of an expenditure made by the administrator. In *Re Clos*, 42 P. 971, 110 Cal. 494, it was said:

"It would have been better, perhaps, as it would in any case, had the executrix first procured the permission of the probate court to make the contemplated improvement before proceeding thereto; but this is not an indispensable condition to the allowance of the demand in her account, where it appears that the expenditures were just and reasonable, and have been made in the interests of the estate. *Estate of Moore* [25 P. 915] 88 Cal. 1."

[11] The probate court, having examined into the matter before us, concluded that the administrator had acted reasonably in the premises and approved his action. We emphasize the recommendation made by the court, and add that, in all cases where there is room for doubt as to the duty of the administrator or as to the policy that should be pursued, the judgment of the probate court should be consulted before any steps are taken that might seriously affect the funds of the estate.

In view of our decision on the main question, it becomes unnecessary to pass upon the other questions raised by appellant, for the reason that they are included within and are subsidiary to the main question decided.

The order appealed from is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; LAWLOR, J.; LENNON, J.

193 Cal. 183

SULLIVAN v. DUNNE, Judge of Superior Court. (S. F. 11802.)

(Supreme Court of California. Feb. 18, 1926. Rehearing Denied March 18, 1926.)

1. Mandamus ☞164(4)—Objections to writ of mandate to certify transcript on appeal, not specifically alleged by appellees and adopted by judge, are waived (Code Civ. Proc. § 953a et seq.).

Objections to writ of mandate to judge to compel certification of transcript on appeal, under Code Civ. Proc. § 953a et seq., not specifically alleged by appellees and adopted by judge, are waived.

2. Mandamus ☞15—Failure to appeal orders striking demurrer to and motion to strike petition for appointment of guardian is no defense to mandate to certify transcript, on appeal from appointment; they not being appealable (Code Civ. Proc. § 963, subd. 3).

Failure to appeal from orders striking demurrer to and motion to strike petition for appointment of guardian for incompetent is no defense to writ of mandate to certify transcript, on appeal from order granting letters of guardianship, under Code Civ. Proc. § 963, subd. 3, as they were not final nor appealable.

3. Guardian and ward ☞8—Proceedings in general guardianship are in probate, but statute gives broad discretion analogous to that of chancery courts (Code Civ. Proc. §§ 1763, 1767; Civ. Code §§ 251, 253, subd. 5).

Proceedings in general guardianship of infants, idiots, and lunatics are in probate, but Code Civ. Proc. § 1763, with section 1767, gives a broad discretion analogous to that of courts of chancery to conserve the best interests of their wards as shown in Civ. Code, §§ 251, 253, subd. 5, providing for control and removal of guardian.

4. Attorney and client ☞74.

Determination of actual existence of presumed authority of attorney attempting to act for insane client rests with trial court.

5. Attorney and client ☞78.

Where an attorney was not authorized, his assumed client can found no rights on his unauthorized act.

6. Attorney and client ☞72—Claim of attorney to represent client in another case is of no moment on issue of authority in instant case.

Claim of attorney, whose authority is questioned, to represent insane client in another case, is of no moment, as authority to represent client in one case is no evidence of authority in another.

7. Attorney and client ☞76(3)—Attorney's authority was terminated by total incapacity of insane client of which he knew (Civ. Code, § 2356, subd. 3).

Attorney's authority to resist appointment of guardian was terminated by total incapacity of insane client of which he knew, under Civ. Code, § 2356, subd. 3.

8. Insane persons ☞33(2).

One, understanding nature of guardianship proceedings, may appeal from appointment of guardian, without a guardian ad litem, but not one totally incapacitated.

9. Insane persons ☞33(1).

Under guardianship proceedings, no confinement of incompetent is authorized, unlike proceeding under St. 1903, p. 485, as amended.

10. Amicus curiæ ☞1.

Attorney cannot urge, as amicus curiæ, right to represent insane person in opposing appointment of guardian.

11. Insane persons ☞34.

Son and daughter are preferred as guardians and ministers of temporal affairs of insane person over strangers to his blood.

12. Attorney and client ☞96.

Where attorney, without authority, attempted to appeal his acts, noticing appeal and preparation of record, under Code Civ. Proc. § 953a, were ineffectual.

13. Insane persons ☞33(2).

Attorney in his individual capacity had no power to appeal from decree appointing guardian for his incompetent client, under Code Civ. Proc. § 938.

In Bank.

Petition by Frank J. Sullivan for writ of mandate to be directed to Frank H. Dunne, as Judge of the Superior Court, City and County of San Francisco, Department No. 9 thereof, to compel certification of reporter's transcript on appeal from a decree adjudging petitioner incompetent. Writ denied.

Robert P. Troy, of San Francisco, for petitioner.

Cushing & Cushing, of San Francisco, for respondent.

SEAWELL, J. This is an original proceeding in mandamus to compel the respondent, Hon. Frank H. Dunne, as judge of the superior court in and for the city and county of San Francisco, to certify a reporter's transcript prepared in accordance with section 953a et seq., Code of Civil Procedure, on an appeal from an order and decree adjudging Frank J. Sullivan, the alleged petitioner herein, to be an incompetent, and appointing as guardians of his person and estate (consisting of property of the value of about \$2,000,000) his children, Noel Sullivan and Gladys S. Doyle. Said appeal was attempted to be perfected by Robert P. Troy, Esq., who, as he claims, was at all times herein mentioned the attorney for the said incompetent.

It appears from the application herein, that on the 8th day of May, 1925, Noel Sullivan and Gladys S. Doyle filed in the respondent court their verified petition, alleging the incompetency of the said Frank J. Sullivan, and prayed that they be appointed guardians of his person and estate. Thereafter, on May 14, 1925, the said Robert P. Troy, Esq., appeared in opposition to the petition, and at the same time alleging himself to be the attorney for the said Frank J. Sullivan, purported to file a demurrer and a notice of a motion to strike the said petition from the files. Said attorney had made no prior appearance in the cause and based his authority to so represent the said Frank J. Sullivan in all matters therein pending upon an authorization which he claimed the said Frank J. Sullivan had executed about six months prior to his incompetency. It is also alleged that he is at the present time acting, as the attorney for the said Frank J. Sullivan in the case entitled *Phelan v. All Persons*, S. F. No. 11565, pending in this court, and which will again be referred to. On May 18, 1925, Noel Sullivan and Gladys S. Doyle served upon the said Robert P. Troy a notice of a motion supported by affidavits striking the demurrer and motion theretofore interposed by the latter from the files, for the reason that the said Robert P. Troy had not been authorized by said Frank J. Sullivan to appear for him in said cause or authorized to file on his behalf said demurrer or motion, and that he willfully and without authority appeared for said Frank J. Sullivan therein, and, finally, that there was no authority in law for the filing of a motion, demurrer, answer, or other opposition of any kind to the petition. On the 8th day of June, 1925, the respondent struck from the files the demurrer and motion of the said Robert P. Troy, on the grounds:

"That said Robert P. Troy had no authority from Frank J. Sullivan to file on his behalf either said demurrer or said notice of motion to strike out said petition and that said Robert P. Troy willfully and without authority appeared, or attempted to appear, for a party in said proceeding, to wit, for Frank J. Sullivan. * * *

At the same time the respondent judge refused to make an order permitting the latter to visit and consult with the said Frank J. Sullivan on account of his physical and mental condition, and also denied his application for a trial by jury. The court thereupon declined to recognize said Robert P. Troy as an attorney in the proceedings, proceeded to a consideration of the merits, and, at the conclusion thereof, found that the said Frank J. Sullivan had been personally served with notice and a citation of the proceeding (section 1763, Code Civ. Proc.), and that since the 10th day of March, 1925, he was, on account of old age, paralysis, and weakness of mind, unable, unassisted, to properly manage or take care of himself or his property, and by reason of his condition was likely to be deceived and imposed upon by artful and designing persons. It thereupon ordered, adjudged, and decreed that the petition of Noel Sullivan and Gladys S. Doyle be and the same was granted. Entry of judgment was made on June 15, 1925, but Troy averred that he had never been served with a notice of the entry thereof and that he had no knowledge of the entry of the same until he voluntarily examined the records on August 4, 1925. He attempted to file a notice of appeal therefrom on August 7, and at the same time filed a notice to the clerk to prepare a record in accordance with section 953a, Code of Civil Procedure. After the preparation of the record and the forwarding of the five-day notice to the attorneys by the clerk, it was presented by the said Robert P. Troy to the respondent for certification. On motion of the said Noel Sullivan and Gladys S. Doyle, respondent refused to certify the same, for the reasons that the said Robert P. Troy had no authority to file said notice of appeal from said order granting the petition for guardianship; that said Robert P. Troy had no authority to file a notice and request to the clerk of said court to make up and prepare said transcript or to appear for the said Frank J. Sullivan in any proceeding for the settlement thereof; and that said Robert P. Troy had no right to have a record on appeal from said order granting said letters of guardianship prepared, for the reason that the orders striking from the files had not been appealed from within the time allowed by law. Hence the proceeding.

In response to the issuance of an alternative writ duly issued herein, the respondent interposed both a demurrer and an answer, wherein he admitted that a notice of appeal had been filed in said court, but alleged the fact to be that the making or filing of said notice was not the act of the said Frank J. Sullivan, but was the act of the said Robert P. Troy alone; that he appeared in the said proceeding wholly without the authority of the said Frank J. Sullivan; that respondent had no information or belief sufficient to enable him to answer the allegations relative

to a prior authorization of the said Robert P. Troy, but alleged in respect thereto that such an appointment was inherently and wholly improbable in the nature of things, and that he was unwilling to find as a fact that the said Robert P. Troy had ever been so authorized, and that he was warranted in finding as a fact that said Troy had no authority to appear in said cause or proceeding; that if any antecedent, authorization, or employment existed, it had been wholly canceled and terminated by the total incapacity of the said Frank J. Sullivan on the 10th day of March, 1925, of which the said Robert P. Troy had full knowledge.

[1, 2] The contentions advanced by the said Troy in support of the issuance of the writ are that the finding of the court that "he appeared willfully in the cause and without the authority of the said Frank J. Sullivan" should not be affirmed in view of the presumption that he was acting in accordance with and by force of a prior authorization from the latter, and that the proceeding, by virtue of the perfection of the appeal, had been transferred to this court, notwithstanding the fact that the appeal may not have been filed by an attorney duly authorized by his client, and that it was the duty, therefore, of the respondent to certify the transcript. Inasmuch as all objections which might have been urged against the certification of the transcript have been waived except those specifically set out by the said Noel Sullivan and Gladys S. Doyle and adopted by the court as a justification for its refusal to certify the same (*Pierce v. Works*, 154 P. 852, 171 Cal. 684), and in view of our conclusion that the third assigned reason is without merit, inasmuch as the attempted appeal has been taken from the order granting letters of guardianship (section 963, subd. 3, Code Civ. Proc.; 13 Cal. Jur. 167), rather than from the intermediate and interlocutory orders striking the demurrer and motion from the files, which were neither final nor appealable (*Wood, Curtis & Co. v. Missouri, etc., Ry. Co.*, 92 P. 868, 152 Cal. 344), we pass at once to the consideration of the question whether the first two grounds assigned by the respondent and attacked by the said Robert P. Troy are legally sufficient to justify the former's refusal to certify the transcript. We are of the opinion that they are.

[3-6] At common law the king, as *parens patriæ* and fountain of justice, is the general protector of all infants, idiots, and lunatics. But the chancellor, in his quality of keeper of the king's conscience, in this respect fully represented the crown, and thus acted in the general guardianship of all infants, idiots, and lunatics; the king delegating his authority to avoid application to him in person. But the superintendence of the trust, when the fact of lunacy is ascertained and a proper custodian of the insane person and of his estate appointed, is a part of the general ju-

risdiction of the court of chancery. *Woerner, American Law of Guardianship*, pp. 2, 3, 4. Such proceedings in this state, however, are in probate. In *re Bundy*, 186 P. 811, 44 Cal. App. 466; 14 Cal. Jur. 354. Nevertheless, section 1763, Code of Civil Procedure, prescribing the methods to be followed in matters of guardianship of insane and incompetent persons and the powers of the courts in such proceedings, gives a broad discretion, quite analogous to that vested in courts of chancery to conserve the best interests of their wards. In *re Crocker*, 163 P. 1015, 174 Cal. 660. In such proceedings the courts, indeed, will zealously guard and scrupulously conserve the interests of the incompetent. Under section 1767, Code of Civil Procedure, the appointment of a guardian is proper where it appears that the alleged incompetent is for any reason mentally unable, unassisted, to properly take care of himself or manage his property, and, by reason thereof, would be likely to be deceived or imposed upon by artful or designing persons. *Estate of Schulmeyer*, 153 P. 233, 171 Cal. 340. In the determination of this cause the issue arose, at the time of the disposition of the order striking the demurrer and motion from the files, and at the time of the certification of the record on appeal, whether the said Robert P. Troy acted with authority from his alleged client. The trial court found and adopted its conclusion thereon, as a basis and justification for its refusal to certify the record, that it was inherently and wholly improbable that there ever existed a prior appointment authorizing the said Robert P. Troy to represent the incompetent in the cause. The solution of this question must rest in this case, as in any other, with the trial court. *Estate of Schulmeyer*, 153 P. 233, 171 Cal. 340. The fact that an attorney appears on behalf of a party raises a presumption of "authority upon his part to do so." But this presumption is disputable, and where it is shown, as it is here, that the attorney was not authorized, the party whom he assumed to represent can find no rights upon the unauthorized act. *Title Insurance & Trust Co. v. California Development Co.*, 143 P. 723, 168 Cal. 397. The claim that the said Robert P. Troy is at the present time representing the said Frank J. Sullivan in a cause now pending in this court, entitled *Phelan v. All Persons*, *supra*, in which the latter is the appellant, is of no moment in this case. The fact that an attorney may possess the necessary authority to represent a client in one case is not evidence of his authority to represent him in another and distinct proceeding. Whether the interests of the guardians and the incompetent herein will be necessarily antagonistic or adverse to the faithful performance of their duties in that proceeding does not appear, but, if such adversity of interests should arise, it may then become the duty of the probate court to remove the for-

ner and substitute other competent persons in their stead. Section 253, subd. 5, Civ. Code. Furthermore, section 251, Civil Code, provides that—

"In the management and disposition of the person or property committed to him, a guardian may be regulated and controlled by the court."

[7] The court further found, and alleged in its answer, that, if any antecedent employment authorizing an appearance of the said Robert P. Troy for or on behalf of the said Frank J. Sullivan in this proceeding existed, the same and the relationship of attorney and client upon which it was based had become wholly canceled and terminated by the total incapacity of the said Frank J. Sullivan on March 10, 1925, of which the said Robert P. Troy had full knowledge. There is not the slightest doubt but that the said Frank J. Sullivan is now and since March 10, 1925, has been an incompetent person. The court found that the latter had become mentally unable, unassisted, to properly care for, and manage his property or himself, and that it would be likely that he would be deceived or imposed upon by artful or designing persons. *Estate of Schulmeyer*, supra. In support of the petition for letters of guardianship, affidavits were introduced by Noel Sullivan and Gladys S. Doyle. Other documentary evidence, such as affidavits of the attending physicians and others, was introduced upon the motion to dismiss the instant appeal, all of which is, in the main, reproduced and discussed by counsel in the closing brief filed in this case. Said affidavits establish the fact that on March 10, 1925, the said Frank J. Sullivan suffered a hemorrhage of the left ventricle of the brain and that the right side thereof, within a very short time, likewise became affected; that since that time the said Frank J. Sullivan has been unable to speak, write, talk, or communicate in any way with any person; that his mind since said time and by reason thereof has become a "complete blank"; that he has been unable to use his limbs or to care for himself or to exercise any of his faculties; that he is absolutely helpless and at all times since said time has been compelled to require assistance to enable him to eat and drink and has likewise been unable to sit up or stand alone; that on June 8, 1925, he was removed to Santa Cruz in the hope and expectation that the climate there would be beneficial to his health; that at all times since said 10th of March, 1925, he has been "of profoundly unsound mind." This evidence, in addition to other circumstances appearing herein, is legally sufficient to support the conclusion of the respondent. Not only is this true, but there is not the slightest statement or suggestion of substantial value contradicting or controverting the showing made by the guardians as to the utter help-

less physical condition and general insanity of the said Frank J. Sullivan. Counteraffidavits, interposed by the said Robert P. Troy, are wholly lacking in material substance, and for the most part constitute mere conclusions of the affiant, inasmuch as it is alleged therein that the latter has neither seen nor communicated with the said Frank J. Sullivan since March 10, 1925.

It is the statutory rule in this state that the power of an agent is terminated as to any person having notice thereof by the incapacity of the principal to contract. Section 2356, subd. 3, Civ. Code; *San Francisco Clearing House v. McDonald*, 122 P. 964, 18 Cal. App. 212, 216. It is also well recognized by the authorities that the law of principal and agent is generally applicable to the relation of attorney and client (1 *Weeks on Attorneys*, p. 216), and that the insanity or incapacity of the client will therefore operate as a termination of the authority of the attorney (1 *Thornton on Attorneys at Law*, p. 236; 1 *Am. & Eng. Ency. of Law*, 1226; *In re Stenton*, 105 N. Y. S. 295, 53 *Misc. Rep.* 515; *Merritt v. Merritt*, 50 N. Y. S. 604, 27 *App. Div.* 208; *Joost v. Racher*, 148 *Ill. App.* 548; 6 *C. J.* 676; *Chase v. Chase*, 71 *N. E.* 485, 163 *Ind.* 178).

The case of *Chase v. Chase*, supra, likewise involved a proceeding in mandamus and presented facts not dissimilar to those appearing in this proceeding, and the court there stated, in answer to similar contentions herein advanced, that:

"Although it appears to be a controverted question whether the intervening insanity of a principal operates per se as a revocation of the agency, as against third persons, who have, without knowledge of such insanity, and before an inquest, dealt with the agent on the assumption that the prior authority still existed, yet we apprehend that no authority can be found which sanctions, as between the principal and the agent the right of the latter to act where he has full knowledge of the principal's insanity. Indeed, the doctrine that the insanity of the principal per se terminates the agency is stated in unrestricted terms by most of the text-writers. * * * This is generally put upon the ground, where a reason is assigned, that the derivative authority cannot continue beyond the time when the principal might himself lawfully act in the premises. * * *

"We must assume, to give the agreement operation, that it was intended to provide for circumstances which afterward existed, wherein the client was too insane to request counsel to defend him, or to exercise any act of authority over the litigation. Indulging the assumption indicated, the agreement was contrary to public policy, as it is incompetent for an attorney to bargain for an authority which enables him, at his own discretion, and without let or hindrance from any one, to carry a defense to the limits of the law."

[8] We may add to what has already been said that, if the said Frank J. Sullivan has not become so mentally enfeebled but what he

could have understood the nature of the guardianship proceeding herein, he would have undoubtedly been entitled to the benefit of an appeal from the decree, in his individual capacity and without the necessity of the intervention of a guardian ad litem. In *re Moss*, 53 P. 357, 120 Cal. 695. If, however, he has become so mentally destitute as to lack that degree of understanding, it must be presumed in support of the validity and the regularity of the findings of the respondent that the institution of the guardianship proceeding had become essential to the protection of his person and the preservation of his estate. In either proceeding, or on appeal therefrom, an appearance or attempted appearance by the said Robert P. Troy, as the alleged attorney of the incompetent, would have been without authority of law.

[9] It may be pertinent to here point out that this particular proceeding is not, and bears no relation to, a proceeding instituted under the provisions of the general and comprehensive act defining the powers and duties of the state commission in lunacy and providing for the "care, custody, apprehension, commitment, and maintenance of insane persons and other incompetents" (St. and Am. 1903, p. 485, approved March 26, 1903), and which act has been subsequently amended and supplemented. That act provides the procedure that must be observed in the determination of the question whether or not any person who is alleged to be insane is so far mentally disordered in mind as to endanger health, person, or property, and therefore a fit person for commitment to a state hospital for the insane. The rights of alleged insane persons are fully set out in said act, including the right to be represented by counsel, if desired, and, if finally committed and dissatisfied with the order of commitment, the right is given to such person to have the question of his insanity tried by a jury, if a demand is made therefor within five days thereafter. But this is not such a proceeding. Under guardianship proceedings no purpose of confinement is contemplated; in fact, the adjudication of incompetency in this proceeding would not justify a commitment of Frank J. Sullivan to a state hospital for the insane. And this would be so even if the court had pronounced him insane. The only thing determined in a proceeding of this kind is that a guardian should be appointed by reason of incompetency. Incompetency is but a preliminary step, but necessary to support the order appointing the guardian. In *re Moss*, *supra*.

[10, 11] Upon a full consideration of the matter we feel satisfied that the court's finding that said Robert P. Troy was not authorized by any enforceable agreement or contract of employment to represent the alleged incompetent in the proceedings had in the court below must be sustained. He does not

and could not urge such right of representation as *amicus curiae*. The petitioners for letters of guardianship are son and daughter, respectively, of the incompetent, and there appears to be no reason why their good faith should be questioned or suspected. All other things being equal, the law would prefer them as guardians and ministers of his temporal affairs over strangers to his blood.

[12, 13] It appearing that the attempted appeal has been taken by Robert P. Troy on behalf of the said Frank J. Sullivan, but without authority from him, the filing of the notice of appeal and the notice for the preparation of a record under the authority of section 953a, Code of Civil Procedure, were ineffectual (Title Insurance & Trust Company v. California Development Company, *supra*), and since the said Robert P. Troy has no authority to perfect an appeal from the decree, in his individual capacity (section 938, Code Civ. Proc.; 2 Cal. Jur. 215, 216), the respondent was therefore justified in refusing to certify the transcript on his behalf.

The alternative writ heretofore issued will be dismissed, and the application for a peremptory writ is denied.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; LAWLOR, J.; CURTIS, J.; LENNON, J.

198 Cal. 195

In *re SULLIVAN*. (S. F. 11765.)

(Supreme Court of California. Feb. 18, 1926.
Rehearing Denied March 18, 1926.)

Attorney and client ~~§~~96—Appeal by attorney without authority may be dismissed on motion (Code Civ. Proc. § 953a).

Appeal by attorney without authority, his acts, under Code of Civ. Proc. § 953a, in attempt to appeal, being void so that appeal was not taken according to law, may be dismissed on motion.

In Bank.

Motion in the matter of the guardianship of the person and estate of Frank J. Sullivan, an incompetent person, to dismiss appeal from a decree of the Superior Court, City and County of San Francisco, Frank H. Dunne, Judge, adjudging appellant an incompetent. Motion granted.

Robert P. Troy, of San Francisco, for appellant.

Cushing & Cushing, of San Francisco, for guardians.

SEAWELL, J. This is a motion to dismiss an appeal, perfected by one Robert P. Troy, from an order adjudging one Frank J. Sullivan to be an incompetent, and appointing his children, Noel Sullivan and Gladys S. Doyle, guardians of his person and estate. Said attorney has, at all times during the pen-

dency of the instant proceeding, and now subscribes himself as the attorney for the said Frank J. Sullivan, and claims the authority to represent the latter in the premises. In the case of *Sullivan v. Dunne*, S. F. No. 11802, 244 P. 343, this day decided, it was determined by this court, on a proceeding in mandamus, that the said Robert P. Troy had no authority from the said Frank J. Sullivan to appear for him in the said cause, and, by reason thereof, the notice of appeal and the notice to the clerk for the preparation of a record in accordance with section 953a, Code of Civil Procedure, were void and ineffectual. The appeal has not been taken, therefore, in accordance with law, and is subject to be dismissed on motion. *Title Insurance & Trust Co. v. California Development Co.*, 143 P. 723, 168 Cal. 397.

From what has been said herein, and in the case of *Sullivan v. Dunne*, supra, the motion to dismiss the appeal must be granted, and the appeal is dismissed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; LAWLOR, J.; CURTIS, J.; LENNON, J.

198 Cal. 204

In re GARTENLAUB'S ESTATE.

GARTENLAUB v. UNION TRUST CO. OF SAN FRANCISCO et al.

(S. F. 10902.)

(Supreme Court of California. Feb. 23, 1926.
Rehearing Denied March 25, 1926.)

1. Trusts $\Leftrightarrow$ 272(1)—Accretions to trust fund from increase in value of securities composing its corpus are part of corpus and not "income, revenues, and profits of trust estate," payable to life beneficiary.

Accretions to trust fund resulting from increase in value of bonds or other securities in which its corpus is invested are regarded as part of corpus of trust and not as "income, revenues, or profits," to which life beneficiary is entitled.

2. Trusts $\Leftrightarrow$ 272(1)—Discount at which bonds are purchased for trust estate is not net income, revenue, and profit to which life beneficiary is entitled.

Discount at which bonds are purchased by trustee as part of corpus of estate is not net income, revenue, and profit to which life beneficiary is entitled, but amount of discount remains in hands of trustee as uninvested part of corpus, and he has duty to make timely investment in other securities, the interest of which would accrue to life tenant.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Abraham Gartenlaub, otherwise known as A. Gartenlaub, deceased. From an order settling the sixth annual account of the Union Trust Company of San Francisco, as trustee, Alice G. B. Gartenlaub appeals. Affirmed.

See, also, 197 P. 90, 185 Cal. 375, 24 A. L. R. 1.

Garret W. McEnerney and Andrew F. Burke, both of San Francisco, for appellant.

Norman A. Eisner and Heller, Ehrman, White & McAuliffe, all of San Francisco (Samuel S. Stevens, of San Francisco, of counsel), for respondents.

RICHARDS, J. This appeal is from an order of the superior court in and for the city and county of San Francisco, settling the sixth annual account of the respondent Union Trust Company of San Francisco as trustee of the trusts created by the last will and testament of Abraham Gartenlaub, deceased. The appeal is prosecuted by Alice G. B. Gartenlaub, the widow of said deceased and a life beneficiary under the terms of his last will and of the trusts created thereby; and the sole question presented upon this appeal involves the extent, if any, of the right of said life beneficiary entitled to the "net income, revenue and profit" of the trust properties in the hands of said trustee to have the discounts, if any, at which bonds are purchased by the trustee accumulated for her benefit and paid over to her by the trustee. Abraham Gartenlaub died in the city and county of San Francisco on June 1, 1914. His will was thereafter admitted to probate and his estate distributed according to its terms. By his said last will and testament, practically his entire estate, then appraised at the sum of \$476,900.42, was devised and bequeathed to the Union Trust Company of San Francisco as trustee for the uses and purposes therein set forth. The trusts thereby impressed upon said properties and imposed upon said trustee were the following:

"First. As soon as may be to sell and convert into money said entire estate and property (except such portion thereof, if any, as may consist of money or of securities of the kind or kinds hereinafter authorized as and for investments for and on account of this trust estate, and except also that the home hereinafter referred to shall not be sold during the lifetime of said Alice G. B. Gartenlaub, unless she shall in writing consent thereto, or unless she shall have relinquished her right in and to the said home, or any part thereof).

"Second. To invest and reinvest the same and also the proceeds thereof arising from such sale or sales and from time to time to change investments with full power and authority to do all and everything requisite or advisable for the efficient discharge of its duties hereunder and subject only to the rules of law and equity applicable to such cases, or as is herein provided, and said trustee is hereby authorized and em-

powered to invest said trust estate in the securities mentioned immediately hereinafter, to wit:

"(a) In loans secured by first mortgage on first class real estate, to an amount not exceeding sixty per cent. of the value of the security;

"(b) Bonds of the municipalities of the state of California;

"(c) Bonds of public school districts of the state of California;

"(d) Bonds of the various counties in the state of California;

"(e) Bonds of the state of California; and

"(f) First mortgage bonds of commercial railroads, but not including street or interurban railroads; and subject further to the provision that no investment in the bonds of any one debtor, whether state, county, municipal or corporate, shall exceed the sum of twenty thousand (\$20,000) dollars and further that no investment shall be made in the stocks of any corporation whatsoever, nor in the bonds of the United States, for the reason that said bonds yield too low a rate of interest.

"Third. To have and to receive the rents, issues, income and revenue of every kind of said trust estate during the lifetime of said Alice G. B. Gartenlaub and Mrs. Sarah Fox, both of the city and county of San Francisco, state of California, and during the lifetime of the survivor of them and thereout to pay to said Alice G. B. Gartenlaub monthly from date hereof and during the lifetime of said Alice G. B. Gartenlaub seventy-five per cent. of the entire net income, revenue and profit of every kind arising from said estate in said month in any way whatever, and if at the end of any one year it shall appear that said Alice G. B. Gartenlaub has not received an average of at least the sum of seven hundred and fifty (\$750.00) dollars for each month of said year, or the portion of the year that said trust has been operative, then, and in that event, said trustee shall resort to the personal property of the corpus of said trust estate and thereout shall take sufficient to make up and pay over to said Alice G. B. Gartenlaub a sum sufficient to make the aggregate receipts of said Alice G. B. Gartenlaub the equivalent of seven hundred and fifty dollars (\$750.00) for each month of said year, or portion of year that such trust has been operative, unless said Alice G. B. Gartenlaub shall in writing consent to waive the making up of said deficiency, or shall consent to postpone payments on account thereof in whole or in part; and it is hereby expressly provided that said Alice G. B. Gartenlaub shall have no right to anticipate any payment or payments herein provided for, or to give, grant, sell, assign, or transfer or in any way or manner dispose of her rights, or any thereof, herein provided for, save only of course that after she receives monthly her share of the income or payments, as herein provided, she may then freely use and dispose of the same as her pleasure and wish may dictate.

"Fourth. The remaining twenty-five per cent. of said net income, revenue and profit shall be paid by said trustee from time to time as received to Sarah Fox, or if she shall die before the death of said Alice G. B. Gartenlaub, leaving any child or children her surviving, or the issue of any deceased child, then to such child or children and the issue, if any, of any deceased child, such issue to take per stirpes and not per capita.

"Fifth. If said Alice G. B. Gartenlaub shall die before said Sarah Fox, then, and thereafter the whole of said net rents, income, revenue and profits of said trust estate shall then and thereafter be paid by said trustee to the use of said Sarah Fox, so long as she shall live; or if said Sarah Fox shall die before said Alice G. B. Gartenlaub, leaving a child or children her surviving or the issue, if any, of a deceased child then the said remaining twenty-five per cent. of said net income, revenue and profit of said estate shall go to and shall by said trustee be paid over to such surviving child or children, said issue to take per stirpes and not per capita.

"Upon the death of the survivor of said Alice G. B. Gartenlaub and of said Sarah Fox, the trust and trusts hereby created shall wholly cease and determine and thereupon all of said property of every kind whatsoever shall pass to and vest in the children of said Sarah Fox, or to the survivor of them, if any, and to the issue, if any, of any or all of said children who may then be dead, said issue to take per stirpes and not per capita."

The interpretation to be placed upon the foregoing provisions of the will of said decedent and upon the duties and responsibilities of the trustee thereunder was in certain of its phases before this court upon a former appeal (*Estate of Gartenlaub*, 198 P. 209, 185 Cal. 648, 16 A. L. R. 520), wherein the question involved was as to whether premiums paid in the purchase of bonds by said trustee should be charged against the principal or corpus of said trust estate or against the revenue thereof derived from such investment of its funds. In order to determine that question, this court was called upon to deduce and set forth the essential principle governing the administration of trusts of this character and hence governing this particular trust; and it did so in the following terms:

"A testator who creates a trust such as that in the instant case has two objects in view: First, the payment of the income arising from a fund to certain persons during lifetime; second, the transfer of that fund to certain individuals upon the death of the life tenants. The existence of a corpus, principal, or fund is an essential element of the trust and the preservation of this principal until the termination of the life estates is indispensable to the fulfillment of the testator's plans. Therefore, any depletion of the principal tends to frustrate the fundamental purpose of the trust and should be avoided and, where the price paid for a bond consists of more than the par value thereof, that method of accounting should be adopted which will prevent the impairment of the principal unless the testator has clearly directed to the contrary. Otherwise the life tenant, who is entitled to receive only income, will, in effect, have received a part of the principal."

Applying the foregoing principle to the question presented upon that appeal, this court held it to be the duty of the trustee in cases where bonds had been purchased at a premium to withhold from the income derived from such an investment such an amount thereof as would be required to return to the

principal the amount of the corpus thereof which had been expended in the payment of the premiums paid upon such purchases. The appellant herein, while apparently conceding the correctness of the foregoing principle as applied to purchases of bonds at a premium by the trustee, insists that the converse effect of its application is to be given to the purchase of bonds by the trustee at a discount. A moment's consideration will, however, show that the two situations are not such in either identity or in difference as to give room or reason for such converse application. In the case of premiums they are paid out by the trustee from the corpus of the trust funds in the course of making an investment of such funds in securities which have the twofold desirability of being safe and of yielding a satisfactory return in the way of income; and it is, therefore, held in harmony with the aforesaid principle that the premium at which such securities were purchased should be amortized out of such income in order that the integrity of the corpus may be preserved. But in the case of purchases of securities at a discount, the amount of such discount remains in the hands of the trustee for the time being at least, in the form of uninvested corpus and does not become, as we shall show later any part of the income or profits of the investment to which the life tenant is entitled under the terms of the trust. It does not, therefore, follow that since the life tenant in the application of said principle to premiums must yield up a portion of the income in order to maintain the integrity of the corpus he must, therefore, be entitled to the discounts which, if allowed him, would impair, for the time being at least, and perhaps imperil in the long run the corpus of the trust fund. The only possible or even plausible basis upon which the life beneficiary can rest the claim that she is entitled to receive the amount of unexpended corpus represented in the discount of any particular bond purchase consists in the assumption that the controlling reason why bonds, of equal safety with other bonds which command a selling price at par or at a premium, are upon the market at a discount and are purchased by trustees at such discount, is that such yield lower interest returns, and that this being so, and such bonds being safe and hence certain of being eventually redeemed at par, the life tenant is entitled to have the amount of the discount at which such bonds have been purchased paid over to her in order to make up to her that amount of income which she would have received had the trustee invested that portion of the corpus in securities having a par valuation and hence yielding the larger income. In order to support this assumption, the appellant urges that in the purchase of bonds trustees are governed by certain bond tables or interest tables known to the money mar-

ket, and wherein the value of bonds as a purchasable commodity is determined by the rate of interest which they carry. The appellant argues from this premise that, since the corpus of the estate can suffer no ultimate impairment from the investment in safe bonds at a discount, she is entitled to such discount for the reason stated.

The difficulty with the foregoing assumption, and hence with the argument based thereon, is that said assumption is not true in point of fact. The question as to what is the duty of the trustee in making investments of the corpus of the trust fund is a question of fact determinable by other conditions and considerations than those derivable merely from the study or comparison of bond and interest tables or than the state of the money and bond market as shown thereby. This is made clear in the instant case by the uncontradicted testimony of Mr. Greene, the trust officer of the respondent and admittedly an expert in both knowledge and experience in respect to those states of the bond and money market which relate to and determine the duties of trusteeships of this character. Mr. Greene testified as follows:

"In buying bonds for trust estate, my company does not ordinarily pay so much attention to the interest yield of the bond as to the safety of the investment. It is our duty to maintain the capital unimpaired as far as we can. Of course, I realize that it is the duty of a trustee to secure as high a return on the bonds purchased by it as is compatible with safety, in order that a life tenant entitled to the income of bonds may receive as large a return as a safe and conservative investment will permit. Therefore, as between two bonds which may be considered equally safe for investment purposes, I would prefer the one which yields the higher rate of return if it is a legal investment for trust funds under our Bank Act. The fact that safe bonds are selling at a discount at any time is due very largely to general financial conditions and to the fact that other bonds presumably as safe pay a higher rate of interest on their par value. Other considerations play a part in requiring the sale of a bond at a discount, such as the fact that the company issuing the bond is new, or not well known or established. It is true that in the case of a well-known and well-established company issuing bonds which are well secured and which constitute safe investments, the main factor which leads to the sale of the bonds at a discount is that the interest return from the bonds is lower than that which can be obtained from other investments presumed to be equally safe. It is true that bonds of the same issue and which are secured by the same security sometimes sell at different times at different prices. Such bonds may sometimes sell at par, again above par, and at other times below par. The fluctuation in price of such bonds of the same issue and secured by the same security may be due to the relation which the interest rate of the bonds will bear at different times to the return which may be secured from other investments which are equally safe and numerous other causes and factors. Undoubtedly, the safest

bonds are state, county, municipal, and school district obligations. The rates of interest which they bear are generally less than corporation bonds because of their safety and their income tax exemption."

[1, 2] The effect of the foregoing evidence is to negative the assumption that the controlling factor in determining bond investments by trustees is that of the state of the market, as shown by bond and interest tables, and to affirm the right of trustees to invest the corpus of their trust estates in bonds which may at the time of the investment be obtainable at a premium or at par or at a discount, regardless of the return in the way of interest or income which is provided for by their terms. If this be true, it follows that since the right of the life tenant is measured by the duty of the trustee, the full amount to which the former would be entitled in the way of "income, revenue, and profit arising from said corpus" would be none other than the amount actually provided for as such income, revenue, and profit by the terms of the bond regardless of the price at which it had been acquired. This conclusion becomes all the more inevitable when the legal meaning which has been given to the terms "income, revenue, and profit" is ascertained. These terms have been held in a uniform line of decisions as not to include increases from any cause in the value of the corpus of trust estates; as in *Perry on Trusts* (6th Ed.) § 546, it is stated that—

"Any accretion to the fund itself as by the rise in value of securities goes to the remainderman. The life tenant also derives advantage from this increased value through the larger income resulting; but if the securities mature or are sold the increased value belongs to the remainderman."

In *Stewart v. Phelps*, 75 N. Y. S. 526, 71 App. Div. 91, the court holds that—

"Increase" the value of the "trust estate by reason of the increase in value of certain securities belonging thereto * * * belong to the corpus of the fund and should not be paid over to the life beneficiary as income."

In the *Matter of Gerry*, 9 N. E. 235, 103 N. Y. 445, it was held in respect to a trust fund created by will by the terms of which the "annual interest, income and dividends" were to be payable to a life beneficiary, a surplus over the amount of the original fund resulting from the sale of securities in which the fund was invested was an accretion to the fund to which the remaindermen were entitled and was in no sense a profit upon the investment. In the case of *In re Cutler*, 52 N. Y. S. 842, 843, 23 Misc. Rep. 508, it was declared to be well settled that in investments and reinvestments of trust securities gains realized are capital, and not income, citing *In re Gerry*, supra. In the *Matter of Graham's Estate*, 47 A. 1108, 198 Pa. 216, it was held that where a trustee invests the moneys of

the trust estate in bonds and subsequently sells the bonds at an advance and invests the proceeds in other securities, the profit on the bonds is part of the principal of the estate, and as between a life tenant and a remainderman is capital, and not income. In the *Matter of Vedder*, 15 N. Y. S. 798, it was held that the increase from natural causes in the value of the property of a trust estate does not constitute "profits," and therefore does not go to a life tenant to whom are given the "income and profits of such estate during life; but such increase becomes principal and goes to the remainderman." In the case of *Duclos v. Benner*, 17 N. Y. S. 168, 62 Hun, 428, it was held that under a direction in a will to set apart and invest a certain sum and pay over "the income, interest, profits and earnings thereof" to the testator's widow semiannually, where such sum is invested in government bonds which are subsequently sold at a profit, the widow is not entitled to such profit, but it belongs to the trust fund as a part thereof. In the early case of *Townsend v. United States Trust Co.*, 3 Red. Sur. (N. Y.) 220, it was decided that under a trust created by will which directed a specified sum to be invested in one of three named classes of bonds and "the interest, income or dividends" arising therefrom to be paid to the cestui que trust during his lifetime, the investment having been made in one of the forms specified and the bonds so acquired thereafter sold at a profit, the cestui que trust was not entitled to receive such profits, but only interest upon the same. This case has been quite generally cited and uniformly followed in later cases involving the same principle, and we think it may be taken to be settled law that accretions to a trust fund resulting from the increase in value of the bonds or other securities in which its corpus is invested, due to whatever cause, are to be regarded as part of the corpus of the trust and not as income or revenues or profits to which the life beneficiary is entitled. This conclusion gains an added force from the consideration that whenever bonds are purchased by the trustee at a discount the amount of such discount remains in the hands of the trustee as an uninvested part of the corpus of the trust estate, and it is the duty of the trustee to make a timely investment of the same in other securities to the interest upon which as it accrues the life tenant would be entitled, and thus there would be made up to her approximately the amount of income which she would have received had the original investment been in bonds at par; and this is all to which, under the express terms of the trust, she would be entitled.

It may be apt at this point in the discussion to dwell upon the foregoing suggestion in its application to the terms of the particular trust involved in this inquiry. The appellant herein is given by the will of her deceased husband "seventy-five per cent. of the

entire net income, revenue and profit of every kind arising from said estate," payable monthly during her lifetime; and it is further provided therein that "if at the end of any one year it shall appear that said Alice G. B. Gartenlaub has not received an average of at least the sum of \$750 for each month of said year, or the portion of the year that said trust has been operative, then, and in that event the said trustee shall resort to the personal property of the corpus of said trust and thereout shall take sufficient to make up" to said life tenant such deficiency. It thus appears that the only contingency upon the happening of which the trustee would be justified in paying over to the life tenant any portion of the corpus of the trust estate would be that above provided for; yet if the argument presented on behalf of the appellant is to be given effect the trustee would be required to withdraw from the corpus of said estate the uninvested portion thereof represented in the amount of the discount he has retained in making purchases of bonds at less than par, and pay the same over to the life tenant under the terms of the foregoing trust which require the monthly payment to her of the income, revenue, and profit arising from said estate. If it be contended by the appellant that she is not asking the present payment over to her of such discounts but only their accumulation for her benefit, the answer is twofold: First, that the right to have such discounts accumulated must rest upon her right to receive the same now or later as "income, revenue and profits" of said estate, which right, as we have seen, does not exist; second, there is no provision in the will of said decedent creating said trust which would empower the trustee to accumulate any portion of the trust properties in any other form than as a part of the corpus itself. It is not difficult to forecast the confusion which the application of the principal for which the appellant contends might create not only in the administration of this trust but generally in the administration of trust estates. Mr. Greene has testified to the fact that there are various conditions other than the rate of interest which determine the advisability of buying securities at less than par and which determine the disposition of such securities from time to time by the trustee. This is in accord with common knowledge as to the variable state of the bond and money market during the very years that the trustee in the instant case has been exercising the offices and duties of its trust. It is easy to conceive of instances during this period wherein trustees who have justifiably purchased certain securities at a discount might later find it equally advisable to dispose of such securities at the same price below par at which they had been purchased. But what if in the meantime some court upon the life tenant's insistence had directed the discount represented in the original pur-

chase paid over to the life tenant? Or, it might well be during the changing conditions of the recent strenuous years securities deemed to be good investments at the offered discount might, without fault on the part of the trustee, become valueless. In such case, would the corpus of the estate be held to suffer not only the loss incident to the unfortunate investment, but also the amount of the discount which its trustee had in the meantime been required to pay over to the life tenant?

Again, the assumption on the part of the appellant of her right to discounts, based upon investments in the classes of safe securities contemplated by the creation of this trust, is based upon the fixity of such investments until the maturity and redemption at par of the particular bond purchased at such discount; but such a limitation cannot in reason be imposed upon trustees, since in the performance of their duty to invest, preserve, and increase the corpus of the trust they are empowered to purchase and sell securities and to invest and reinvest in the same, depending upon the state of a variable bond and money market and upon the variations in the value of securities caused thereby. This being so, to bind such trustees by the obligation to pay over, or even to accumulate discounts for the benefit of life beneficiaries, would be to create conditions constantly involving, if not imperiling, the integrity of the corpus of the trust estate which it is their essential duty at all times to preserve intact; or, as in the case of the purchase of bonds at a premium, to restore as soon as is practicable out of income. It is the duty of courts in giving application to the essential principle governing the administration of trust estates announced in *Estate of Gartenlaub*, supra, to approve a rule of action which will tend to relieve the administration thereof in the hands of trustees from the confusion, difficulties, and possible involvement of the corpus of the estate as would arise out of the situations above outlined and others that might well arise out of the adoption of the proposition for which the appellant herein contends. We therefore deem it wiser to adhere to the doctrine enunciated by this court in its former decision and to render the same applicable to discounts as they were therein made to premiums, viz.:

"The duty to restore to principal the total amount invested in the bonds cannot be evaded upon the theory that the bonds may, as a result of fluctuations in market value, be sold at higher prices than those for which they were purchased. * * * The fluctuations in market value after purchase by the trustee are merely changes in the value of the assets of the trust estate, which are to be wholly disregarded in any accounting between life tenant and remainderman for funds from the trust estate invested in income-bearing property."

The trial court having given such application of the principle in its order settling the

trustee's account from which this appeal is taken, it follows that its said order must be and the same is hereby affirmed.

We concur: WASTE, C. J.; SHENK, J.; LENNON, J.; LAWLOR, J.; CURTIS, J.; SEAWELL, J.

198 Cal. 273

CITY OF OAKLAND v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA. (S. F. 11748.)

(Supreme Court of California. March 1, 1926.
Rehearing Denied March 29, 1926.)

Admiralty — 20—Employment on dredger tender had no relation to navigation and commerce, and Workmen's Compensation Act applied, not general admiralty law (St. 1917, p. 831, as amended).

Work of employee on city dredger tender while tied to wharf being prepared for day's work, though in navigable waters and used throughout San Francisco Bay, had no direct relation to navigation and commerce, and the Workmen's Compensation Act (St. 1917, p. 831, as amended) applied to employee and abrogated his remedy for injury under general admiralty jurisdiction.

In Bank.

Petition by the City of Oakland for writ of certiorari to the Industrial Accident Commission of the State of California to review an order awarding compensation for injuries. Award affirmed.

Leon E. Gray, City Atty., and Markell C. Baer, Asst. City Atty., both of Oakland, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondent.

WASTE, C. J. Charles Paul, a civil service employee of the city of Oakland, a municipal corporation, was injured while working as a deck hand or donkeyman on an anchor barge or scow, used as a tender to a municipal dredger owned and operated by the city. The dredger was, from time to time, employed for the purpose of deepening the channel in the Oakland estuary and in the Bay of San Francisco. The barge was used in stringing out towlines and hoisting anchors, and in transporting such material as was necessary. It was capable of being towed anywhere about the bay, or even beyond the Golden Gate. At the time of the injury to Paul, it was tied up at one of the city's municipal wharves, and was afloat on the navigable waters of the estuary. At 8 o'clock on a morning, while the crew was making preparations for the day's work, and preliminary to the barge being towed to such places along the shore as might be required, Paul was injured while engaged in cutting wood for the

purpose of supplying fuel for a boiler on board. On application by the injured employee, the respondent, Industrial Accident Commission, made an award of compensation, and the cause comes to this court on a writ of review to determine whether or not it has jurisdiction in the premises.

The contention of the city of Oakland, which is its own insurance carrier, is that the injury was of a maritime character, and that therefore the application of the state Workmen's Compensation Act (St. 1917, p. 831, as amended) was excluded by the paramount force of the law maritime of the United States. The respondent Commission was at first of the same mind, and dismissed the application for an adjustment of compensation. On rehearing, it assumed jurisdiction, and made an award. Two theories are advanced by it in support of its final action. Its first contention is that Paul's employment and injury were nonmaritime, in that neither had any direct relation to navigation or commerce, citing *Grant Smith-Porter Ship Co. v. Rohde*, 42 S. Ct. 157, 257 U. S. 469, 66 L. Ed. 321, 25 A. L. R. 1008. Petitioner relies upon certain decisions of this court as sustaining a contrary view. It was held in *Zurich, etc., Insurance Co., Ltd., v. Industrial Acc. Comm.*, 218 P. 563, 191 Cal. 770, that the Industrial Accident Commission of California did not have jurisdiction in the case of a deck hand on a dredger and launch operator, whose work was performed mainly in connection with a privately owned dredger operating on navigable waters, and who was drowned while driving a launch from the dredger to the shore while engaged upon an errand in connection with his employment. It was conceded, in fact during the oral argument it was stipulated, in that case that the employment of Denny at the time of his death was of maritime nature. See, also, *Alaska Packers' Ass'n v. Industrial Acc. Comm.*, 218 P. 561, 191 Cal. 763, and *James Rolph Co. v. Industrial Acc. Comm.*, 220 P. 669, 192 Cal. 398. Petitions of the Industrial Accident Commission to the Supreme Court of the United States for a writ of certiorari to this court in the *Alaska Packers Case* and in the *Zurich Insurance Co. Case* were denied. Subsequently, on a writ of error in the *Rolph Co. Case*, the decision of this court, that the Industrial Accident Commission had no jurisdiction to award compensation for the death of a workman killed while actually engaged in maritime work, under a maritime contract, upon a vessel moored to her dock in San Francisco Bay, and discharging her cargo, was affirmed. 44 S. Ct. 302, 264 U. S. 219, 68 L. Ed. 646. When these decisions are correctly understood, it is at once apparent that actual engagement by the injured employee in maritime work, under a maritime contract, were the distinguishing

features of each of the cases. They do not decide the question here presented.

Grant Smith-Porter Ship Co. v. Rohde, supra, relied on by the respondent, lays down the rule to be followed under the facts here present. That was a proceeding in admiralty to recover damages from a shipbuilder for injuries which a carpenter received while working on an unfinished vessel moored in the Willamette river at Portland, Or. The questions presented were determined on a certificate from the court below stating the facts to the Supreme Court of the United States. That court said that the contract for constructing the boat "was nonmaritime, and, although the incomplete structure upon which the accident occurred was lying in navigable waters, neither Rohde's general employment, nor his activities at the time had any direct relation to navigation or commerce"; and, as the matter was only of local concern, to permit the rights and liabilities of the parties to be determined by the local law would not interfere with the characteristic features of the general maritime rules. Therefore it held (page 478, 42 S. Ct. 159) that, while general admiralty jurisdiction extended to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying in navigable waters within a state, under the circumstances stated, the "exclusive features of the Oregon Workmen's Compensation Act [Or. L. § 6605 et seq.] would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist." Another, and the latest, decision of the Supreme Court of the United States on this subject (*Millers' Indemnity Underwriters v. Braud*, 46 S. Ct. 194, 70 L. Ed. —) also supports the contention of the Industrial Accident Commission. In that case the decedent, while employed as a diver, submerged himself from a floating barge anchored in navigable waters near the bank of the river for the purpose of sawing off the timbers of an abandoned set of ways, once used for launching ships, which had become an obstruction to navigation. While thus submerged, the air supply failed and he died of suffocation. The courts of Texas affirmed an award of compensation made under the Workmen's Compensation Law of that state (*Vernon's Ann. Civ. St. Supp.* 1918, arts. 5246—1 to 5246—91), and, on writ of error, the case went to the Supreme Court of the United States. In its decision that court again points out that matters which are not of mere local concern because of their special relation to commerce and navigation are beyond the regulatory power of the state (citing cases); but holds that, as to certain local matters, regulation of which will work no material prejudice to the general maritime law, the rules of the latter may be modified or supplemented by state statutes. The decision of the Supreme Court of Texas sus-

taining the award was accordingly affirmed, for the reason, said the court, that:

"The record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the state Compensation Act; but the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law."

So, in the case at bar, there is nothing in the record from which it can be said that either Paul's general employment as a civil service employee of the city of Oakland, or his activities at the time he was injured, had any direct relation to navigation or commerce. We are of opinion, therefore, that, under the circumstances stated, the exclusive features of the Workmen's Compensation Act of the state apply and abrogate any remedies the injured employee would have under the general admiralty jurisdiction. *Grant Smith-Porter Ship Co. v. Rohde*, supra; *Millers' Indemnity Underwriters v. Braud*, supra. On the authority of these decisions, we are satisfied that to permit the rights and liabilities of the parties to this proceeding to be determined by the respondent commission, under the provisions of the Workmen's Compensation Act, will not in any way interfere with the characteristic features of the general maritime rules.

The second theory on which the Industrial Accident Commission assumed jurisdiction of this matter is that the city of Oakland, being but a political subdivision of the state, cannot attack the right of the state to make the provisions of the Workmen's Compensation Act applicable to all its employees. It contends that it was decided by the Supreme Court of the United States in a very recent case (*City of New York v. McEntee et al.*, 44 S. Ct. 229, 263 U. S. 688, 68 L. Ed. 507) that a municipality is not entitled to invoke the protection of the federal maritime law in opposition to the law of the state of its creation, for the reason that the state is under no restriction from the federal Constitution or laws in regulating the rights and duties of state and municipal employees. The petitioner stoutly resists this contention, and raises many points in opposition to the theory of the respondent. For two reasons we are not disposed to enter into a consideration of the issue thus presented. The first is that the conclusion we have reached, supra, that, because of the purely local nature of Paul's employment, the exclusive features of the state Compensation Act apply to the case, renders it unnecessary to determine the second contention raised. The second reason is that, while we have been unofficially given the facts involved in the *McEntee Case*, which show a similitude to those of the case at bar, the court rendered only a "per curiam decision," dismissing the proceeding "for the want of jurisdiction" on the authority of

four of its previous decisions. None of these has any direct relation to the question we are here asked to consider. We therefore deem it unwise to attempt to apply the McEntee Case to this proceeding.

The award of the Industrial Accident Commission is affirmed.

We concur: RICHARDS, J.; SEAWELL, J.; SHENK, J.; LAWLOR, J.; CURTIS, J.; LENNON, J.

198 Cal. 216

Ex parte DAL PORTE. (Cr. 2833.)

(Supreme Court of California. Feb. 24, 1926.)

1. Holidays ⇨5.

Courts, except Supreme Court, are prohibited from transacting business on Saturday afternoon, other than that excepted by Code Civ. Proc. § 134; it being a holiday in view of section 10, amended by St. 1925, p. 225, § 1, and Pol. Code, § 10.

2. Holidays ⇨5.

Judgment rendered in police court on Saturday afternoon in criminal prosecution held void, and imprisonment thereunder, illegal.

3. Habeas corpus ⇨109—Where conviction was void because trial was on holiday, prisoner on habeas corpus will be remanded to custody of sheriff for further action.

Where conviction was void because trial was on holiday, prisoner on habeas corpus will be remanded to custody of sheriff for further action; such conviction not vitiating complaint or process issued thereunder.

4. Criminal law ⇨90(2).

Police court held to have no jurisdiction to try prisoner for sale of intoxicating liquor, since maximum punishment for such offense is over \$500.

5. Criminal law ⇨90(2).

Police court held to have jurisdiction to try prisoner for possessing intoxicating liquor.

6. Criminal law ⇨258(2)—Police court docket reciting that defendant was found guilty held equivalent to verdict of guilty on each of two counts.

Police court docket showing trial without jury in prosecution on two counts, and reciting "defendant found guilty," held equivalent to general verdict of guilty on each count.

7. Indictment and information ⇨203.

Judgment will be reversed when based on general verdict of guilty under indictment containing two counts attempting to charge two crimes, where one count was defective.

8. Habeas corpus ⇨4.

Remedy for erroneous conviction in police court because of defective count in indictment held to be appeal to superior court, and not habeas corpus.

9. Criminal law ⇨102—Count charging sale of liquor, over which police court has no jurisdiction, held not to oust court of jurisdiction of another count charging possession of liquor.

That first count of complaint charged sale of intoxicating liquor, over which police court had no jurisdiction, is not sufficient to oust such court of jurisdiction of second count, alleging possession of liquor, over which it had full and complete jurisdiction.

In Bank.

Application of Paul Dal Porte for writ of habeas corpus prayed to be directed to the Sheriff of Santa Cruz County to secure release of petitioner from custody after conviction of sale and possession of intoxicating liquor. Writ denied.

George W. Smith and Ralph H. Smith, both of Santa Cruz, for petitioner.

Stanford G. Smith, Dist. Atty., and David C. Clark, Deputy Dist. Atty., both of Santa Cruz, for respondent.

CURTIS, J. Petition for writ of habeas corpus. Petitioner was tried, convicted and sentence pronounced upon him on Saturday afternoon in the police court of the city of Santa Cruz, and was sentenced to pay a fine of \$500 and in default thereof to be imprisoned not exceeding 250 days. The fine was not paid, and at the date of the filing of the petition the petitioner was imprisoned under said judgment in the county jail in the county of Santa Cruz. Petitioner claims that his imprisonment was illegal for the reason that the court had no jurisdiction to try and pronounce judgment against him on Saturday afternoon, a legal holiday.

Section 134 of the Code of Civil Procedure provides:

"No court, other than the Supreme Court, must be open for the transaction of judicial business on any of the holidays mentioned in section ten, except for the following purposes:" (Then follows an enumeration of certain acts which may be legally performed on a holiday, but the trial of an action and the pronouncement of judgment against a defendant convicted of a crime are not included among them.)

Section 10, mentioned in said section 134, Code of Civil Procedure, obviously refers to section 10 of the Code of Civil Procedure, which was amended in 1925 to read as follows:

"Holidays within the meaning of this Code are every Sunday and such other days as are specified or provided for as holidays in the Political Code of the State of California." St. 1925, p. 225, § 1.

Prior to this last amendment to the section, section 10 of the Code of Civil Procedure was substantially the same as section 10 of the Political Code, which provides (after design-

nating Sundays and certain other days as holidays) that—

"Every Saturday from twelve o'clock noon until twelve o'clock midnight is a holiday as regards the transaction of business in the public offices of this state, and also in political divisions thereof where laws, ordinances or charters provide that public offices shall be closed on holidays."

There has been more or less uncertainty as to the legality of certain judicial business transacted on Saturday afternoon ever since the amendment of the Code making Saturday afternoon a holiday for certain purposes. In *People v. Heacock*, 102 P. 543, 10 Cal. App. 450, the court had under consideration the validity of a judgment of conviction in an action where the trial was concluded during Saturday afternoon. The judgment was reversed upon other grounds, but the court, after reviewing the authorities bearing upon the question of the legality of certain acts performed on Saturday afternoon, declined to decide the point, but made the following observation:

"But under the present state of legislation we venture to suggest to trial courts that it would be safer to treat Saturday afternoon as a legal holiday until the question has been determined."

In *People v. Maljan*, 167 P. 547, 34 Cal. App. 384, 388, it was held that if it were error for the court to proceed with the trial on Saturday afternoon that the defendant in that action could not complain of such error, for the reason that his attorney had in open court waived the right to object to the trial proceeding on said afternoon. In a later case it was held that "Saturday afternoon has been made a nonjudicial period by the Code. Code Civ. Proc. §§ 10, 133, 134." *McGrath v. Langford*, 169 P. 424, 425, 35 Cal. App. 215, 217. *California Jurisprudence*, vol. 23, page 776, treats the subject as follows:

"At one time there was some question as to whether Saturday afternoon was a legal holiday for the transaction of business in trial courts, but with certain changes made in the code provisions pertaining to the subject, such a holiday is now recognized as a nonjudicial period."

[1] From the foregoing authorities we think it must be held to be definitely settled in this state that Saturday afternoon is a nonjudicial day and that the courts, except the Supreme Court, are prohibited from transacting during said period any judicial business other than that excepted by the Code sections above referred to.

[2, 3] In the *Matter of Smith*, 98 P. 191, 152 Cal. 566, it was held that a judgment pronounced against defendant in a criminal action on a legal holiday was void. It follows, therefore, that the judgment under which petitioner is now being held is void and his imprisonment thereunder is illegal. This does not mean, however, that the peti-

tioner is entitled to be discharged absolutely from custody. The petition herein shows that the complaint was filed against petitioner in said police court, and that under said complaint a warrant of arrest was issued, under and by virtue of which petitioner was placed under arrest and held pending said trial. These proceedings are still pending against petitioner. The mere fact that the police court had no jurisdiction to try petitioner on a holiday, and for that reason all such proceedings, including the judgment rendered against petitioner, were void, does not in any manner vitiate the complaint filed therein against him or the process issued thereunder. In the *Matter of Smith*, supra. He is still subject to be tried on any valid charge made against him in said complaint. In the *Matter of Smith*, supra, the judgment was pronounced on a holiday and therefore held to be void. The court, however, refused to discharge the prisoner from custody, but remanded him to the custody of the sheriff to await further action of the superior court. The course adopted by the court in that proceeding is, in our opinion, the correct one to follow in the present one.

[4-9] A further contention is made by petitioner that the judgment is void for the reason that the police court had no jurisdiction to try the petitioner upon the charge set forth in count 1 of the complaint filed against him in said court. It appears that the complaint contained two counts. In the first of these the petitioner was charged with the sale of intoxicating liquor, and in the second with the possession of intoxicating liquor. There is no question but that said court had no jurisdiction to try the petitioner for the offense charged in count 1 of said complaint, for the reason that the maximum punishment for the illegal sale of intoxicating liquor is over \$500. It is therefore urged by petitioner that the judgment is absolutely void. It is conceded that the police court had jurisdiction over the offense charged in count 2 of said complaint. The docket in the police court shows that the trial was by the court without a jury and recites that, "Defendant found guilty." This was equivalent to a general verdict of guilty upon each count of the complaint. Upon this finding by the court judgment was pronounced. It has frequently been held in this state that the judgment based upon a general verdict finding the defendant guilty under an indictment containing two counts, where it is sought to charge the defendant with two separate crimes, but where one count was radically defective, was erroneous, and would be reversed even though the other count of the indictment was perfectly good. *People v. Turner*, 45 P. 331, 113 Cal. 278; *People v. Garnett*, 61 P. 1114, 129 Cal. 364. Accordingly, had petitioner herein appealed from said judgment, the superior court of said county of Santa Cruz was authorized to correct, and no doubt

would have corrected, the error of the police court and reversed the judgment. We are not prepared to say, however, that petitioner is entitled in this proceeding to any relief from said judgment on account of its being based upon a defective count of the complaint. As we have already seen, the charge set forth in the second count of said complaint was one within the jurisdiction of said police court, and the fact that the offense charged in the first count of said complaint was one over which said police court did not have jurisdiction would not be sufficient to oust the court of jurisdiction of the offense over which it had full and complete jurisdiction. *State v. Silhoffer*, 48 Iowa, 283. However, as we have already held that the judgment herein is void by reason of the trial having been held on Saturday afternoon, the question of whether or not said judgment is void for any other reason does not become important, but in the event there should be any further proceedings in the action before said police court, it is obvious that they should not be had under the complaint in its present form.

For the reasons hereinbefore stated, the petition is denied, and petitioner is remanded to custody to await the further action of said police court under the complaint filed therein against him.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LAWLOR, J.; LENNON, J.

198 Cal. 230

TOWN OF ST. HELENA v. BUTTERWORTH. (S. F. 11124.)

(Supreme Court of California. Feb. 25, 1926.
Rehearing Denied March 25, 1926.)

1. Licenses $\S$ 7(4)—Ordinance imposing arbitrary license tax on wholesaler, whose place of business is outside city limits, and who makes personal delivery, held not discriminatory because tax on merchants with places of business in city was computed on their sales (Const. art. 1, § 21).

City ordinance, imposing license tax of \$15 per quarter on wholesale merchant, whose place of business was outside city limits, and who made personal delivery, is not discriminatory and contrary to Const. art. 1, § 21, because tax on merchants having places of business in city was computed according to amount of their sales.

2. Licenses $\S$ 7(6)—City ordinance taxing nonresident wholesale merchant, who delivers by automobile or other vehicles, but not nonresident merchants who do not deliver by such method, held discriminatory (Const. art. 1, § 21).

City ordinance, imposing license tax on wholesale merchants, whose place of business is outside city, and who makes personal delivery in city by automobile or other vehicle, and not taxing merchants who do not deliver

goods sold within city by means specified, held discriminatory and contrary to Const. art. 1, § 21.

In Bank.

Action by the Town of St. Helena against H. J. Butterworth to collect a license tax and a penalty. From a judgment for the plaintiff, defendant appeals. Reversed.

E. L. Webber, of Napa, for appellant.

Clarence N. Riggins, of Napa, for respondent.

WASTE, C. J. The plaintiff municipality brought an action against the defendant to collect a license tax, and the penalty for nonpayment thereof, imposed under the terms of a section of the general license ordinance of the town of St. Helena. The defendant was engaged in the business of selling merchandise at wholesale to merchants of the town. He maintained no fixed place of business in St. Helena, nor was he in the employ of any person maintaining such place of business. He carried his goods into the town and to the merchants in an automobile or automobile truck, and refused to procure a license for the conduct of his business. The trial court found in favor of the plaintiff, and, from the judgment rendered, the defendant has appealed.

[1] It is not disputed that under the provisions of section 862, subd. 10, of the Municipal Corporation Act (St. 1883, p. 270), the town of St. Helena is authorized to license, for the purpose of revenue and regulation, every kind of business authorized by law and carried on in the town. The sole question presented in the court below and argued here is whether or not section 73a of the general license ordinance of the town is constitutional. It reads as follows:

"Every traveling salesman or merchant carrying his goods in a wagon, automobile, truck, or other vehicle operated over and along the streets of the town of St. Helena, selling his goods at wholesale to the merchants of said town, and who does not maintain a fixed place of business within the said town, distinct and separate from all other places of business or residence, regularly kept open with a salesman in exclusive attendance therein between the hours of 8 o'clock a. m. and 6 o'clock p. m. for at least 48 hours in each and every week, or who is not in the sole employ of the proprietor of such an established place of business, shall pay a license tax of \$15 per quarter in advance."

It is provided elsewhere in the ordinance that merchants who have a fixed place of business in St. Helena shall pay a license fee which is determined by the amount of business that such merchants transact during any one quarter year. The ordinance fixes a graduated scale for these merchants, running from \$5 a quarter, for a merchant whose sales amount to less than \$1,500 dur-

ing the period, to \$15 per quarter, for merchants whose sales amount to \$6,000, and not over \$9,000 per quarter. No license is imposed on any merchant or salesman, doing business with the merchants of the town at wholesale only, whose place of business is outside the limits of St. Helena, but who makes deliveries in any other manner than by personal delivery in a wagon, automobile, truck, or other vehicle.

The appellant contends that the requirement that he pay an arbitrary license fee of \$15 per quarter, when the amount of the tax required by other provisions of the ordinance to be paid by merchants who have a fixed place of business in the town of St. Helena is determined by the amount of business that such merchants do during any one quarter, renders the ordinance discriminatory, and the license excessive, as to him. He also invokes the provisions of section 21 of article 1 of the Constitution of California, which provides that no citizen or class of citizens shall be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens. These contentions of appellant appear to be met, in part, by the decision of this court in *Ex parte Haskell*, 44 P. 725, 112 Cal. 412, 32 L. R. A. 527. That case holds that we are not called upon to say that the ordinance is either oppressive or unreasonable by reason of the difference in the manner of arriving at the amount of the license to be paid by appellant, and the amount to be paid by one having a fixed place for the conduct of business of the same general character within the limits of St. Helena. The court there said (44 P. 725, 112 Cal. 417):

"The very power to license for purposes of regulation and revenue involves the right to make distinctions between different trades and between essentially different methods of conducting the same general character of business or trade."

The manner in which one may conduct his business, by which he avoids the payment of rent, property tax, and other local burdens, makes it an essentially different business from that conducted by regular merchants having a fixed place of business, and is a good reason for discrimination in the matter of fixing the amount of the license tax each

shall pay, provided, of course, the ordinance fixing the tax is not clearly open to the objection that it is oppressive and unreasonable. *Ex parte McKenna*, 58 P. 916, 126 Cal. 429, 432. The ordinance here in question is not open to attack because, in arriving at the amount of the license tax to be paid by appellant, it makes a distinction between essentially different methods of conducting the same general character of business. *Bramman v. City of Alameda*, 124 P. 243, 162 Cal. 648.

[2] But, for another reason we are of the opinion that the ordinance imposing an arbitrary license tax of \$15 per quarter on the business of appellant is open to attack. It discriminates between the wholesale merchant whose place of business is outside the town of St. Helena and who ships his goods to the merchants in the town by any other method than by personal delivery in a wagon, truck, automobile, or other vehicle, and the wholesale merchant whose place of business is outside St. Helena, and who uses those means of delivering his goods within the town. The wholesale merchant in the first class is exempted; the merchant in others is placed under the burden of the tax. We are unable to perceive any rational reason for such discrimination in favor of the one class as against the other. The decision in *Ex parte Haskell*, *supra*, has no application to the objection to the St. Helena ordinance we are now considering. The ordinance in that case, as was pointed out by the court (page 420), was general in its terms, and applied alike to all residents and nonresidents who did not maintain regular places of business in the city of Chico, and who sold to persons not regularly engaged in carrying on such lines of business. The ordinance here, in the imposition of the license tax on appellant and exempting other wholesalers, discriminates between persons similarly situated and exercising the same privileges. It therefore falls within the inhibition of the constitutional provision. Article I, § 21; *Bramman v. City of Alameda*, *supra*; *In re Robinson*, 230 P. 175, 68 Cal. App. 744, and cases cited.

The judgment is reversed.

We concur: SHENK, J.; SEAWELL, J.; LAWLOR, J.; CURTIS, J.; LENNON, J.; RICHARDS, J.

198 Cal. 221

Ex parte COHEN. (Cr. 2829.)

(Supreme Court of California. Feb. 25, 1926.)

1. Criminal law §995(5)—Sentence imposing fine, or imprisonment in default thereof, is valid, although uncertain as to whether imprisonment is punishment or means of collecting fine (Wright Act [St. 1921, p. 79]).

Sentence for sale of intoxicating liquors contrary to Wright Act, imposing fine or imprisonment in default thereof, is valid, even if uncertain as to whether imprisonment is punishment or means of collecting fine.

2. Criminal law §1216(2)—Specified statutes held to provide only instances in which sentences may be made cumulative (Pen. Code, §§ 105, 669).

Pen. Code, § 105, punishing escape from state prison, and section 669, relating to method of computing term of imprisonment of person convicted of two or more crimes before sentence has been pronounced on him for either, provide only instances in which sentences may be made cumulative.

3. Courts §493(1)—When state and federal courts may each take jurisdiction, tribunal where jurisdiction first attaches holds it to exclusion of other until its jurisdiction is exhausted.

When state court and federal court may each take jurisdiction of matter, tribunal where jurisdiction first attaches holds it to exclusion of other until its duty is fully performed and jurisdiction involved is exhausted.

4. Habeas corpus §85(1)—In absence of objection by federal authorities in whose custody accused was, his coming into state court voluntarily raises presumption in habeas corpus proceedings that he was properly before state court (Wright Act [St. 1921, p. 79]).

Where accused, in custody of authorities of federal court which had first assumed jurisdiction over him, voluntarily came into state court in prosecution under Wright Act, for sale of intoxicating liquors, no objection having been made by federal authorities, it will be presumed in habeas corpus proceedings that he was properly before state court.

5. Criminal law §1001—Where federal court first assumed jurisdiction of accused, staying judgment of state court imposing fine, or in lieu thereof imprisonment, during imprisonment under federal judgment, and imprisoning him thereafter under state judgment was proper (Wright Act [St. 1921, p. 79]).

Where federal court first assumed jurisdiction over accused, judgment of state court imposing fine for violation of Wright Act, by sale of intoxicating liquors, or imprisonment in lieu thereof, had to be stayed, where accused did not pay fine, pending satisfaction of federal judgment, and after his release from imprisonment by federal authorities, imprisoning him under judgment of state court was proper.

6. Criminal law §1216(2)—Statute relating to imprisonment of person convicted of more than one offense held not to apply, where federal court sentenced accused to imprisonment and state court sentenced him to pay fine with alternative of imprisonment (Pen. Code, § 669).

Pen. Code, § 669, providing for time of beginning of imprisonment for second or subsequent crimes of which accused was convicted before sentence was pronounced upon either of such crimes or for first offense, does not apply to person who was sentenced by federal authorities to imprisonment and by state court to pay fine with alternative of imprisonment.

7. Criminal law §1216(6)—After suspending execution of judgment by state court pending imprisonment by federal authorities, accused may be compelled to undergo imprisonment in pursuance of sentence by state court (Pen. Code, § 1203).

Suspending execution of judgment of state court in deference to exercise of federal jurisdiction and not intended to give accused probationary privilege provided for in Pen. Code, § 1203, on expiration or release from imprisonment by federal authorities accused may be imprisoned in pursuance of sentence by state court.

In Bank.

Original application by George Cohen for a writ of habeas corpus to be directed to the sheriff of Sacramento County to secure his release from custody upon commitment after a plea of guilty of violating the Wright Act. Writ denied.

Donald McKisick and Wallace Shepard, both of Sacramento, for petitioner.

J. J. Henderson, Dist. Atty., and Wm. A. Green, Deputy Dist. Atty., both of Sacramento, for respondent.

LAWLOR, J. The petitioner alleges that he is unlawfully imprisoned in the county jail of the county of Sacramento; that on the 14th day of March, 1924, he pleaded guilty in the superior court of the said county to a charge of violating the "Wright Act" (St. 1921, p. 79), resulting from the sale of intoxicating liquor in that county; that upon said day the superior court pronounced judgment by which it was decreed that he pay a fine in the sum of \$1,000 "or in default of payment of said fine that he be punished by imprisonment in the county jail * * * for the term of 6 months"; that a warrant of commitment on said judgment was issued out of the superior court on the 14th day of March, 1924; that, at the time of imposing said sentence and without his consent, said superior court, of its own motion, made a minute order staying the execution of said judgment for a period of 15 months; that said order of stay was made by the superior court because of the fact, as petitioner alleges, that he had, on the preceding day, to wit, March 13, 1924,

been sentenced by the Northern Division of the United States District Court for the Northern District of California, to serve a term of 15 months in the said county jail of Sacramento county; that on the 7th day of March, 1925, the petitioner was duly discharged from the county jail and the further service of the sentence imposed by the said District Court of the United States; that he remained at large until July 7, 1925; that upon said day "said sheriff, without any warrant, authority, or process of law, seized upon and imprisoned the petitioner, and has ever since held him prisoner in said county jail at Sacramento, Cal., wholly on pretense that by reason of said purported stay of execution the sentence pronounced by the superior court on the 14th day of March, 1924, has not been served and that he should be imprisoned for 6 months next after the 7th day of July, 1925"; that application for a writ of habeas corpus was first made on July 26, 1925, to the District Court of Appeal, Third Appellate District, and was denied without prejudice; that on July 28, 1925, a similar application was made to the same court and was likewise denied; that thereafter application was made to the Supreme Court, which application was denied on August 1, 1925; that on August 24, 1925, a further application was presented to said District Court of Appeal "on grounds not presented on previous applications" and was denied; that this application is made "upon the grounds last presented to said District Court of Appeal, viz.:

"(1) The sentence imposed imprisonment as a punishment, therefore that part of the sentence providing for imprisonment is void.

"(2) Unless it were a probationary measure the order affecting to stay execution of the sentence was void.

"(3) As a matter of fact there were not circumstances existing under which the court had authority to stay execution of the sentence; consequently the purported stay of execution was without effect.

"(4) The purported stay of execution was made for the purpose of rendering the sentence imposed by the superior court cumulative upon the sentences imposed by the District Court of the United States which neither the superior court nor the judge thereof had power to do.

"(5) Petitioner was imprisoned at the place appointed upon a regular commitment issued upon the sentence for more than 6 months next after the date thereof, and therefore the sentence has been fully executed.

"(6) That the only ground for petitioner's continued imprisonment is the purported stay of execution, and he is therefore deprived of his liberty without any warrant, process, or authority of law."

[1] 1. In support of this contention it is urged that:

"A sentence which imposes a fine, or imprisonment in default thereof is bad, when it cannot be determined whether imprisonment is provided as punishment or as means of collecting the fine. *Brownbridge v. Peo.*, 38 Mich. 751."

Under the authority of *People v. Magoni*, 238 P. 112, the contention is without merit. Petitioner attempts to distinguish the judgment entered in the *Magoni* Case from the one here. We find no basis for the attempted distinction. Because of the similarity between the sentence in the instant case and that in the *Magoni* Case, we will set forth the facts and holding of the latter adjudication. The defendant was there charged by information with two unlawful sales of intoxicating liquor and was convicted on each count. The judgment provided that on each of the two counts she be punished by a fine of \$1,000, and "that in default of payment thereof that she be imprisoned in the county jail * * * for the term of 6 months." The appellant in the *Magoni* Case contended, as petitioner contends here, that the provisions of the judgments for imprisonment in default of payment of the fines imposed were void. The District Court of Appeal declared:

"The question may be considered as settled in this state contrary to appellant's contention. *Ex parte Garrison*, 223 P. 64, 193 Cal. 37; *In re Kennerly*, 214 P. 857, 190 Cal. 774. * * * Appellant urges that the judgment is fatally uncertain because 'no provision is made for defendant in case a part of the fine is paid.' Judgments in substantially the same form as that in question here have been upheld. *Ex parte Riley*, 75 P. 665, 142 Cal. 124; *Ex parte Chin Yan*, 60 Cal. 78; *Ex parte Ellis*, 54 Cal. 204; *Matter of Application of Robbins*, 151 P. 14, 27 Cal. App. 677. It is proper to suggest that in such a case the judgment would be in more appropriate form if, after imposing a fine, it should provide 'that in default of payment thereof the defendant be imprisoned in the county jail of the county of — at the rate of one day for every dollars — of said fine remaining unpaid until said fine is satisfied, not exceeding — months.' [See section 1205, Penal Code.]"

The *Magoni* Case, involving as it did an appeal from the judgment, the court properly modified it (section 1260, Pen. Code) in accordance with the views expressed in the opinion. The modification, however, added nothing to the validity of the judgment. As originally entered it was valid, though perhaps lacking in certainty, which, in our view, may be said of the judgment at bar.

2-6. These several contentions, numbered 2 to 6, and set forth above, may properly be grouped, for, in effect, each attacks the validity of the order staying execution of the judgment, and declares it to be void and in excess of the jurisdiction of the superior court, thus rendering the petitioner's present confinement illegal and void.

It is contended by the petitioner that the order staying execution of the judgment is

void, for "cumulative sentences cannot be imposed except where they are authorized by sections 105 and 669 of the Penal Code." It is, in effect, urged that the provisions of section 669 do not authorize the stay, for the reason that the judgment of the federal tribunal had been rendered the day preceding the entry of judgment by the state court.

[2] We are in accord with *Ex parte Casey*, 116 P. 1104, 160 Cal. 357, 358, and other cases holding that sections 105 and 669 provide the only instances in which sentences may be made cumulative. The stay of execution, in the instant case, was not made under the provisions of section 105. In view of the language of section 669—"before sentence has been pronounced upon him for either"—it cannot be said that petitioner's contention would not have some foundation if the two judgments had been pronounced in the state court, for the question of guilt had not been determined on both charges before either judgment was pronounced. But here there is a diversity of sovereignty, and the judgment was pronounced in the federal forum before the charge was determined in the state forum. Hence the question remains whether section 669 may properly be said to have application to a case where, as here, one of the judgments is rendered by a state forum and the other by a federal forum. We do not find it necessary to decide this question, for, even assuming that section 669 does apply to such a case, the writ must nevertheless be discharged for other reasons.

As already indicated, the petitioner had been convicted and judgment entered in the said United States District Court on the day preceding his conviction and the entry of judgment in the state court. Therefore, at the time judgment was pronounced in the state court, the petitioner was a federal prisoner, and, under these circumstances, the question presented is whether the state of California could exercise jurisdiction over petitioner pending the execution of the federal judgment.

The case of *Ponzi v. Fessenden*, 42 S. Ct. 309, 258 U. S. 254, 66 L. Ed. 607, 22 A. L. R. 879, gives a negative answer to this question. The Supreme Court there declared:

"We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfill their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. * * * The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject-matter of the litigation into its control, whether this be person or property, must be permitted to *exhaust its remedy*, to attain which it assumed control, before the other court shall attempt to take it for its purpose. * * * There is no express authority authorizing the transfer of a federal prisoner to a state court for such purposes. Yet we have

no doubt that it exists and is to be exercised with the consent of the Attorney General. * * * Nor, if that be here important, is there any difficulty in respect to the execution of a second sentence. It can be made to commence when the first terminates. * * *" (Italics added.)

[3] Other federal cases affirming the rule that, "when a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted," are *Patterson v. Veasey* (D. C.) 295 F. 163, 165; *U. S. v. Twenty-Six Cases of Intoxicating Liquors* (D. C.) 287 F. 542; *Harlan v. Harlan*, 281 F. 602, 603; *Harkrader v. Wadley*, 19 S. Ct. 119, 172 U. S. 148, 164, 43 L. Ed. 399; and *U. S. v. Van Fossen*, Fed. Cas. No. 16607, 1 Dill. 406, 411.

[4, 5] In the instant case, quoting the language of the district attorney at the oral argument, the petitioner "came into court voluntarily." The petitioner having come into the state court voluntarily, and no objection having been made thereto by the federal authorities, in whose custody he was at the time, it must be presumed that petitioner was properly before the state court. But, as the federal court first assumed jurisdiction over petitioner, it follows from the principle enunciated by the foregoing authorities that the judgment of the state court had to be stayed pending the satisfaction and exhaustion of the federal judgment.

As additional reasons for the discharge of the writ we will consider two other grounds urged by the respondent against petitioner's release, namely, (1) that the provisions of section 669 do not apply where one judgment is directly for imprisonment and the other is for a fine with alternative imprisonment; and (2) that, where no part of a judgment has been served and there is no question of probation, the accused, if he be at large, may be taken into custody in execution of the judgment.

[6] (1) Assuming that section 669 applies to this case where the respective judgments were entered by different sovereignties, *Ex parte Selowsky*, 186 P. 608, 44 Cal. App. 421, properly interprets its provisions. The court there declared:

"We are of the opinion that said section [669] refers to cases where there have been two convictions and the punishment for each has been that of imprisonment. The second judgment for contempt against the petitioner was not a judgment of imprisonment in the county jail. The judgment was that she pay a fine of \$200, and, in default thereof, she should be imprisoned. * * *

"The sentence imposed upon the petitioner was that she pay a fine. Imprisonment was not the punishment inflicted, but was only to take place in the contingency that the fine was not paid or collected.

"We think the section of the Penal Code quoted [669], and upon which petitioner relies, must be limited to those cases where there have been two convictions, and the punishment for each is fixed at imprisonment, and is not applicable to a case where the punishment of one of the offenses is a fine with an alternative of imprisonment in the event the fine is not paid."

In view of *Ex parte Selowsky*, supra, it cannot be held that section 669 is applicable here, where the judgment entered by the one sovereignty (federal) imposed a sentence of confinement, but that entered by the other (state) inflicted a fine alone, with an alternative of confinement in the event the fine was not paid. This reason would seem sufficient, of itself, for a discharge of the writ.

(2) *Ex parte Clark* (Cal. App.) 234 P. 109, 110, declares in part:

"Section 1203 of the Penal Code first confers upon the court authority, in the cases to which it applies, 'to place the defendant upon probation as hereinafter provided.' The subdivision relating to suspension of imposing of sentence, or of execution thereof, is a part of the process of admitting to probation as authorized by the general provisions of the section. It does not purport and should not be construed to authorize suspension of execution of the sentence except as an incident to the granting of probation, for by implication it declares the opposite intention. Therefore, in order to reach the conclusion that the suspension was within the authority of the court, it must be determined first that the order was, in effect, an order admitting to probation. But in the present case this cannot be so determined for the two sufficient reasons: First, that the order itself states that the application for probation is denied; and, second, because it attempts to retain the defendant in actual custody. We hold, therefore, that the order suspending execution of judgment in the principal case was void, and that the judgment itself has not been satisfied by the expiration of a term of probation. This being so, there appears to be no reason why the defendant may not be taken into custody and compelled to submit to imprisonment in the state prison as required by the terms of the judgment."

[7] Keeping in view the circumstances of the instant case, it cannot be held that the order of the superior court suspending execution of its judgment was intended to extend to the petitioner the probationary privileges provided for in section 1203 of the Penal Code—the sole purpose of the order being to defer to the exercise of authority by the federal jurisdiction. It follows, therefore, that the "judgment itself has not been satisfied by the expiration of a term of probation," and "there appears no reason why the defendant may not be taken into custody and compelled to submit to imprisonment * * * as required by the terms of the judgment," or, as in this case, being retained in custody pending the execution of the state judgment.

Upon the three indicated grounds, the writ

of habeas corpus is discharged, and the petitioner remanded to custody.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; LENNON, J.

193 Cal. 233

PEOPLE v. SLOPER. (Cr. 2806.)

(Supreme Court of California. Feb. 26, 1926.
Rehearing Denied March 25, 1926.)

1. Criminal law §48—Insanity is not available as defense to crime, unless defendant, when act was committed, was so deranged and diseased mentally that he was not conscious of wrongful nature of such act.

Insanity is not available as defense to crime, unless defendant, when act was committed, was so deranged and diseased mentally that he was not conscious of wrongful nature of act committed; and, if he has reasoning capacity sufficient to distinguish between right and wrong as to particular act he is doing, he is responsible for his conduct.

2. Criminal law §49—Defendant is not relieved from responsibility for criminal act, though laboring under partial insanity, if he understands nature and character of his act and its consequences.

Though defendant may be laboring under partial insanity, if he understands nature and character of his act and its consequences, such partial insanity will not relieve him from responsibility for his criminal act.

3. Homicide §270.

Whether accused, when he committed murder, was legally responsible therefor, is question of fact for jury.

4. Homicide §237.

Evidence held to warrant finding that defendant was legally responsible when he committed murder while attempting to rob a bank.

5. Criminal law §50, 51.

Irresistible, uncontrollable impulse and moral insanity doctrines are not recognized as a defense to criminal acts.

6. Criminal law §331.

Defendant has burden of proving existence of insanity by preponderance of evidence.

7. Criminal law §823(7) — Instruction admonishing jury to examine defense of insanity with care held not prejudicial, in view of other instructions (Const. art. 6, § 4½).

Instruction admonishing jury to examine defense of insanity with care lest an ingenious counterfeit of such mental malady should furnish immunity to guilt held not prejudicial, in view of Const. art. 6, § 4½, in view of court's instructions to jury not to be influenced by any opinion that any of them might think court entertained on the evidence and requiring them not to indulge in any prejudices against defense of insanity.

8. Criminal law ⚡823(7) — Instruction that defense of insanity, when "satisfactorily established," must commend itself to sense of justice of jury, held not reversible error, in view of court's charge.

Any error in instruction that defense of insanity, when "satisfactorily established," must commend itself to sense of humanity and justice of jury, etc., held not reversible, in view of court's charge that burden was on defendant to establish insanity by preponderance of evidence.

9. Criminal law ⚡560.

To require fact to be clearly established casts on actor a burden greater in degree than would be necessary to establish it by satisfactory proof.

10. Criminal law ⚡785(16) — Instruction as to credibility to be given witness, who has shown himself to be willfully false in part of his testimony, held not erroneous.

Instruction as to credibility to be given witness, who has shown himself to be willfully false in part of his testimony as affecting his credit with reference to other matters about which he has testified, held not erroneous.

11. Criminal law ⚡981(2) — No abuse of discretion in refusal to submit question of defendant's insanity to jury when he appeared for sentence, where no showing was made that his mental condition had changed since murder was committed (Pen. Code, § 1368).

No abuse of discretion was shown, in view of Pen. Code, § 1368, in refusal to submit question of defendant's present insanity to jury when he appeared for sentence, where jury, by its verdict, impliedly found defendant to be sane at time he committed murder, and no showing was made that his mental condition had since changed.

12. Criminal law ⚡311.

Sanity is presumed to continue.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Felix Sloper was convicted of murder in first degree, and he appeals. Affirmed.

Harry A. McKenzie, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., William F. Cleary, Deputy Atty. Gen., Matthew Brady, Dist. Atty., Harmon D. Skillin, and Robert E. Fitzgerald, Asst. Dist. Attys., all of San Francisco, for the People.

SEAWELL, J. On April 16, 1925, the grand jury of the city and county of San Francisco returned an indictment against the defendant, Felix Sloper, accusing him of having unlawfully, with malice aforethought, killed one George W. Campbell, a police officer of the city and county of San Francisco, on the 9th day of April, 1925. He was subsequently placed upon trial, and the jury re-

turned a simple verdict of guilty of murder of the first degree, and the law in such cases adjudges the penalty, which is death, and that penalty was accordingly pronounced by the court upon the verdict as returned. From the judgment of conviction and the denial of the defendant's motion for a new trial this appeal was taken. It was not contended in the court below, nor is it contended here, that the defendant did not fire the fatal shot which caused the death of said George W. Campbell, but it is claimed, first, that he should be relieved of the legal consequences of his act by reason of the alleged insanity of said defendant; and, secondly, that a new trial should be ordered because of the giving of certain instructions by the trial court, which it is claimed were erroneous and were prejudicial to the defendant. The latter will hereafter be briefly referred to.

The facts are brief and the questions of law are both simple and well settled. Some time prior to the 9th day of April, 1925, defendant formed the intent of robbing a branch bank of the Mercantile Trust Company, located at the southwest corner of Pacific and Hyde streets, city of San Francisco, by overcoming by means of force and fear any resistance that might be made to his purpose by the employees in charge of said bank. Prior to the commission of the crime with which he is charged, he had purchased a Nash automobile with funds which he had acquired by engaging in the illicit sales of intoxicating liquor. A few days prior to the 9th day of April he stole a Studebaker automobile, which he planned to use in the actual perpetration of the crime. As a means of confusing the identity of this stolen car he took from it the license plate that was upon it and placed another in its stead which he had stolen from still another automobile. On the day before the attempted robbery of said branch bank he made a reconnoitering tour in said Studebaker car to that locality and explored the bank premises and neighborhood with a view of further familiarizing himself with the situation pursuant to carrying out his purpose of robbing said bank on the following day. In accordance with his plan he drove to the bank building on the next afternoon—April 9th—and bided the time when conditions would be most favorable for the execution of his purpose. The time selected was a few minutes after 2 o'clock. He parked his machine at a convenient place, with the engine running, and entered the bank at a time when no one was present except its manager and two tellers or employees. The manager of the bank was seated at his desk on the business floor with nothing but an ordinary low rail partition separating him from the business public. The defendant, in his preparation for the commission of the crime, had purchased a new satchel in which he expected to carry away the fruits of his crime,

which he carried with his left hand. Upon entering the bank he drew a Colt's 38-caliber United States Army model revolver, and pointed it at the manager, who was seated in the inclosure above mentioned, whereupon the manager raised his hands. He was ordered to put his hands down and commanded to pass through the door leading into the cages where the paying and receiving tellers were engaged. Upon entering this compartment, the defendant, closely following the manager, ordered the other two employees, one a man and the other a lady, who started to raise their hands, to put them down. He then ordered said three persons to take positions facing one another in group form, which gave them the appearance, to passers-by, who might by chance look into the bank through the glass doors and windows, of being engaged in ordinary conversation. While the manager and the employees were held in this position, the defendant proceeded to the places where the coin guards and currency drawers were, and, holding said employees under guard, placed within the satchel which he carried some \$1,300 of the bank's funds before attempting to make his escape. In the meantime the manager of the bank had stepped upon the burglar alarm which was concealed beneath the carpet and this set the alarm ringing in a nearby store. The continuous ringing of the alarm caused the occupant of said store to partly open the bank door, and, upon observing the manager standing in the position in which he had been placed, he called to him and requested him to turn off the burglar alarm, as it had been ringing for quite a while. Not suspecting that a robbery was being enacted, he departed. Presently a gentleman came into the bank to write his indorsement upon a check, and, observing no one within, went to the "shelf counter" for that purpose. While writing his indorsement upon the check, the defendant, in his attempt to make his escape, holding the satchel with his left hand and the revolver in his right, entered the main business room through one of the cage doors. He proceeded to within 5 or 6 feet of the front entrance door, when the police officer, who had been attracted to the bank by the ringing of the burglar alarm, entered the bank, and said, "Hey, fellows, what is going on in here?" In reply to this inquiry the defendant, who was facing the officer, commanded, "Get 'em up." So far as any one could observe the officer made no motion to draw a weapon. Simultaneously with his command the defendant fired. The first shot knocked the officer's cap from his head and the second entered his abdomen at a point slightly to the right of the median line. The officer, although thus mortally wounded, sprang upon the defendant and prevented him from firing further shots. Immediately the employees and the person who was already in the bank came to the assistance of the of-

ficer. A number of people and officers were soon upon the scene. The defendant was overpowered, handcuffed, and delivered into the custody of the officers a short time after the shots had been fired. While thus detained the defendant said to his captors, "I didn't aim to shoot him," and requested that he be not held so tightly. The revolver taken from the defendant contained 2 exploded shells and 4 loaded shells. The defendant also carried upon his person 16 other loaded shells which fitted his Colt's revolver. He also had upon his person \$55 of his own money.

Defendant's plan was so well timed that he would have been outside the bank and into his parked machine within a few seconds, had not the officer entered as above related. The defendant, in planning his escape, had previously parked his Nash automobile in a vacant lot at the corner of Ninth and Mission streets, replenished with gasoline for flight. It was his intention to abandon the Studebaker car at an opportune time and make his final escape in the Nash car, thus confusing and misleading the officers as to his connection with the crime. While his plan miscarried, it was a well-considered scheme and was calculated to succeed. Later in the afternoon of the same day the defendant made a statement to the officers which showed that he was fully oriented as to time, place, and person and that he attempted to excuse his crime by saying that it was an accident and that he did not intend to shoot the officer. When brought into the presence of the wounded officer the latter pointed him out as the man who had shot him and denounced him as a coward, to which the defendant replied: "I am sorry that I shot you, but I had to shoot you in order to get away." In all of his statements the defendant was lucid in expression and showed no mental disturbance. Upon the completion of the first statement made by him, which was taken down in longhand, he was requested to sign it, but declined, stating that he did not know what the officer who had purported to record what he said had written. He said he wanted to see an attorney. He was then requested to read the statement, which he did, and upon finishing it remarked that it was correct, but that he wished to make an addition to it. He was told that he was at liberty to make any addition he desired to make. He thereupon took a pen and added the following: "I accidentally shot, not knowing if I hit him." He then subscribed his name to the statement.

[1, 2] There was nothing shown in the plan or execution of the crime from its inception to its tragic end, nor in the appearance, manner, or conduct of the defendant, nor in the disclosures made by him of his connection with the crime or the history of his criminal career, as related by him to the officers of the law, that would tend to establish a case

of insanity, considered from the viewpoint of a criminal purpose. His motive, of course, is self-evident. The plan as devised by him and by which he undertook to execute his purpose is conclusive to the point that it was the creation of a deliberate, calculating mind. Within its range there is to be found system and method and the power of co-ordination and the ability to assemble and combine things and events in a congruous manner which could only be done by one who is conscious of the rule of relationism as the average man has learned it by common experience. Further, he unquestionably exhibited a sense of realization as to what he was doing and of the wrongfulness of the criminal act he had planned to commit, and he displayed a keen sense of appreciation as to the dangers attending its execution, as well as the punitive consequences which would follow apprehension. No one act of his betrayed a symptom of mental disorder which the law recognizes as a defense to the commission of crime. In order that "insanity may be available as a defense to a crime charged, it must appear that the defendant, when the act was committed, was so deranged and diseased mentally that he was not conscious of the wrongful nature of the act committed. If he has reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, knowledge and consciousness that what he is doing is wrong and criminal and will subject him to punishment, he must be held responsible for his conduct. Although he may be laboring under partial insanity, as, for instance, suffering from some insane delusion or hallucination, still if he understands the nature and character of his action and its consequences—if he has knowledge that it is wrong and criminal, and that if he does the act he will do wrong—such partial insanity or the existence of such delusion or hallucination is not sufficient to relieve him from the responsibility for his criminal acts." *People v. Willard*, 89 P. 124, 150 Cal. 543. See, also, *People v. Gilberg* (Cal. Sup.) 240 P. 1000; *People v. Perry et al.* (Cal. Sup.) 234 P. 890; *People v. Williams*, 194 P. 1019, 184 Cal. 590; *People v. McCarthy*, 46 P. 1073, 115 Cal. 255; *People v. Hubert*, 51 P. 329, 119 Cal. 216, 63 Am. St. Rep. 72; *Marceau v. Travelers' Ins. Co.*, 35 P. 856, 36 P. 813, 101 Cal. 338; *People v. Hoin*, 62 Cal. 120, 45 Am. Rep. 651; *People v. Pico*, 62 Cal. 50; *People v. Coffman*, 24 Cal. 230; *People v. Hobson*, 17 Cal. 424; 7 Cal. Jur. 862, 863. In substance the foregoing instruction was given in the instant case. Measured by the test announced in the *Willard Case*, which has been approved by this court in every case in which the question of insanity has arisen since our earliest decisions, there is no room for doubt as to the defendant's responsibility to the law.

[3] The foregoing test, known as the "right and wrong" test, and which was very early

adopted as the rule of this state, and is the rule of most of the American courts, is denounced by appellant as being an "antiquated and unscientific" test. It is his contention that the question of insanity is "a question of fact for the jury and not a question of law for the court." Whether the accused was, at the time he committed the act for which he is upon trial, legally responsible therefor, as responsibility is defined by the law, is a question of fact entirely within the province of the jury. The mental test is but a standard by which responsibility is to be measured. It would tend to weaken the safeguards that protect the lives and property of the citizen from the assaults of the vicious and lawless and to aid disorder if it should be established as the law that any mental disorder or disease, however slight, and whether such malady had any perceptible bearing or influence upon the mind of the person moved by malice to commit murder, would afford immunity to crime. The rule that prevails in this state, and, so far as we are advised, in most if not in all civilized nations, was restated, after much discussion and long deliberation in 1843, by Lord Chief Justice Tindall in response to questions propounded by the House of Lords to the judges as to the degree of reason a person should have to be responsible for crime. 16 Corp. Jur. pp. 99, 100, 101, 102. The wisdom of the rule has the approval of the highest judicial tribunals known to the Anglo-Saxon race, and no reason, resting upon experience or known to legal or medical science, has been pointed to which would justify the abolition of a test founded upon necessity and approved by experience, and which prescribes, with reasonable regard for the frailties and weaknesses of mankind, the degree, kind, and quality of mental incompetency or derangement that must be shown to exist to relieve a person of the consequences of his act which otherwise would be punished as a crime.

Counsel for defendant attempted to establish his insanity by offering evidence tending to show that a blood taint produced by syphilis had been transmitted to him from his ancestors, and further that he was a victim of congenital or inherited insanity. The defendant was confined in the state's prison at San Quentin in 1918-1919 under a commitment of burglary. The resident physician testified that he examined him physically during that period and diagnosed his case as triple positive syphilis or syphilis in the tertiary stage. He gave no testimony as to the mental condition of the defendant while confined in the prison. There was no indication of an active syphilitic condition existing in the blood stream at the time defendant was awaiting trial, considered from either a physical or neurological viewpoint. Such was the admission of one of the physicians who examined him upon the request of his counsel. An examination made shortly before trial of

the spinal fluid showed negative reaction as to the Wasserman test, negative or normal for globulin and negative for the colloidal gold test. The cell count, however, was higher than normal. A high cell count of the spinal fluid is produced by any inflammation or irritation in the nervous system and it may be caused by syphilis. It indicates some inflammation or irritation of the membrane which covers the brain or spinal cord. Tested by the several standards this was the only test which registered a positive reaction. There was no evidence that the defendant was suffering from active syphilis at the times that he was examined by the alienists, nor, as a matter of fact, were there any physical symptoms manifest that would indicate that he ever had the disease, save the cell count test above mentioned.

[4] The family history of the defendant, as related by two members of his father's family, and which largely forms the basis of the defense's theory of insanity, was placed before the jury. A judgment pronouncing the defendant's father insane and committing him to the state hospital at Agnews in 1911 was received in evidence. The father was detained in the hospital for a period of but 3 months and a few days and was subsequently discharged. He was never thereafter returned to the hospital. The superintendent of the institution testified that when the father was admitted to the hospital he was suffering from a psychosis induced by alcoholism, and that he was not afflicted with paresis. Testimony was offered by the defense and received in the case tending to show the abnormal or subnormal mental condition of the mother and sister of defendant's father, and also similar mental conditions existing as to certain other collateral relatives. Without analyzing or further commenting upon the evidence as offered it is sufficient to say that the jury gave it such weight and consideration as in its judgment it was entitled to receive. The purpose, plan, acts, conduct, and statement of the defendant, considered in orderly sequence, constitute irrefutable proof that the defendant knew and appreciated the nature and the quality of the act he was committing, and he knew that it was wrong to commit it and that it was punishable under the law. In a statement made by him after the commission of the crime, he admitted that he fully understood the act which he had committed, and also knew the law punished its commission. The defendant, doubtless unfortunately circumstanced, had persistently pursued a criminal career since he was 12 years of age. At that early age he was committed to the Preston school of industry, where he spent the larger part of 6 years. When at liberty it seems that he had no settled place of abode. He confessed to the commission of a number of burglaries, and his mental condition seems not to have been questioned until he was

placed upon trial for the crime of murder in the instant case. We feel convinced, as the jury must have been convinced, that the defendant is legally responsible for the commission of the crime of which he stands convicted.

[5-7] Prejudicial error is claimed to have been committed by the trial court in giving certain instructions tendered by the people and by refusing to give certain others proposed by the defendant as to the law of insanity. If the instructions given at the request of the people were sound expositions of the law of insanity the defendant's proposed requests, which announced a converse doctrine, were properly refused. The charge of the court, as to language and substance, was a repetition of the charges that have been approved (except in one instance, to be hereafter discussed) by this court in numerous decisions, and the law has become definitely settled as to the soundness of the principles challenged by appellant. To summarize, the attacks consist of objections made to the soundness of the "right and wrong" test which has already received attention, and to the following propositions: The refusal of the law to recognize as a defense the "irresistible, uncontrollable impulse" and moral insanity doctrines; the instruction which admonishes the jury to examine the defense of insanity with care lest an ingenious counterfeiter of this mental malady shall furnish immunity to guilt; the burden of proving the existence of insanity by a preponderance of evidence resting upon the defendant. It is not necessary to cite authorities to support these firmly established principles of law. The most serious objection is the one directed against the simulation of insanity as a defense. The instruction given in this case is in all essentials identical with the instruction approved in *People v. Dennis*, 39 Cal. 625; *People v. Pico*, 62 Cal. 50; *People v. Larrabee*, 46 P. 922, 115 Cal. 158. The principle was also upheld in *People v. Bumberger*, 45 Cal. 650. Again, in *People v. McCarthy*, 46 P. 1073, 115 Cal. 255, the same instruction was given. The court there held that the instruction had received the repeated approval of this court and refused to hold it to be prejudicial error, or an invasion of the constitutional right of the defendant. It did say, however, in admonishing trial courts to follow approved language, that—

"It would be better, in most cases, if the instruction were omitted altogether; and, indeed, if its propriety were an open question, we should be much inclined to doubt it."

It was further said that there might be some danger that the jury may construe such an instruction as expressing an intent on the part of the judge to intimate and characterize his opinion of the case on trial—a result which, in effect, would be a trespass upon the constitutional right of the jury to pass upon

facts free from the influence of the judge. In *People v. Nihell*, 77 P. 916, 144 Cal. 200, an instruction similar to the one given in the instant case as to the caution that juries should exercise in examining the defense of insanity, it was said that such an instruction has often been considered by this court, and, while it has been disapproved, yet no case has ever been reversed on account of the giving of it. While it is true that the propriety of cautioning the jury against ingenious counterfeits of mental maladies finds support in the earlier decisions of this court, the propriety of giving such an instruction has been questioned, as above pointed out, by our more recent decisions, coupled with a recommendation that it would be better not to give it lest the jury should conceive the notion that the court looked upon the defense with disfavor. A jury, doubtless, would, without being so advised by the court, examine with care the defense of insanity in cases in which the proof of the overt act is so full as to cut off all other means of avoiding conviction, and it is therefore unnecessary to quicken its sense of caution by an admonition on the part of the court. The reasons urged against the giving of the instruction do not appear with such pronounced force in the instant case as in some of those cited, for the reason that the court carefully and fully admonished the jury to guard against being influenced by any opinion that any members of the jury might think the court entertained, or had formed, as to any matter of fact or as to any inference deducible from the evidence. In this respect the court gave the additional instruction:

"Where insanity is relied upon as a defense, you are not to indulge in any prejudices against such a defense, but should give it thoughtful, thorough, and dispassionate consideration."

In *People v. Methever*, 64 P. 481, 132 Cal. 326, an instruction similar to the one under consideration in the instant case was before the court, supported by the same citations that are urged here, and the court there said:

"But whether or not the instruction was legally sound or unsound upon its face, it is apparent that no injury resulted to defendant from the giving of it."

If it was proper for the court to so state a rule prior to the adoption of section 4½ of article 6, state Constitution, we feel satisfied, from an examination of the record in this case, that the error complained of, if error it was, resulted in no miscarriage of justice or prejudice to the defendant. We hold that the giving of the instruction in the instant case, while contrary to the recommendations of this court made in the more recent cases, would not justify a reversal of the judgment. Cases may arise in which it would be a more serious question.

[8-10] In one part of the general charge the court instructed the jury that insanity is

a "defense to be weighed fully, fairly, and justly, and, when satisfactorily established, must commend itself to the sense of humanity and justice of the jury," etc. It is argued that to require the defendant to satisfactorily establish insanity is equivalent to telling the jury that the defendant must establish it beyond a reasonable doubt. Certain decisions are cited wherein it was held to be error to instruct the jury that any fact "must be clearly established by satisfactory proof." To require a fact to be clearly established casts upon the actor a burden greater in degree than would be necessary to establish it by satisfactory proof. No case has been cited which would demand the reversal of a case because of the giving an instruction so framed. In various parts of its charge the jury was simply told that the defendant was required to establish insanity by a preponderance of the evidence and the burden was upon him to do so. There is no merit in the above contention. Appellant complains of the giving of an instruction as to the rule by which the jury should be guided in judging of the credit to be given to a witness who has shown himself to be willfully false in a part of his testimony as affecting his credit with reference to other matters about which he has testified. The instruction complained of is identical with an instruction discussed by this court in *People v. Sprague*, 53 Cal. 491, and which principle of law was considered in *People v. Wells*, 78 P. 470, 145 Cal. 138, and is not open to the construction that appellant's argument would seem to place upon it.

[11, 12] When the defendant appeared for sentence, counsel moved for a stay of all proceedings on the ground that the defendant was then insane, and requested that the court submit the question of his present insanity to a jury. In support of the motion his counsel offered all of the evidence taken at the trial. The motion was denied and counsel assigned the action of the court in denying the motion as an abuse of discretion. Obviously the court did not abuse its discretion. The jury, by its verdict, impliedly found the defendant to be sane at the time he committed the murder, and no showing was made that his mental condition had since changed. The presumption was that he was still sane. But, aside from what we have said with reference to the question of presumption, the court, in its refusal to submit the question of the defendant's insanity to a jury, was acting in the exercise of a sound discretion reposed in it by the provisions of section 1368, Penal Code. *People v. Gilberg* (Cal. Sup.) 240 P. 1000.

We find no reversible error in the record. The judgment and order are affirmed.

We concur: WASTE, C. J.; LENNON, J.; SHENK, J.; RICHARDS, J.; CURTIS, J.
I concur in the judgment: LAWLOR, J.

198 Cal. 252

FIRST NAT. BANK OF REEDLEY v. REED.
(S. F. 11110.)(Supreme Court of California. March 1,
1926.)

1. Banks and banking ☞116(1)—In absence of evidence, it is assumed that cashier and manager of bank communicated his knowledge of facts material to transaction to his principal.

In absence of any evidence, it is assumed that cashier and manager of bank communicated to his principal his knowledge of any facts material to giving of note as accommodation for bank.

2. Bills and notes ☞49.

Party for whose accommodation a note is made may not sue accommodation party.

3. Principal and agent ☞181—Exception to general rule imputing knowledge of agent to principal, that principal is not bound by knowledge of agent acting in collusion with third party, ordinarily applies in cases where liability of principal to third party is involved.

Exception to general rule imputing to principal knowledge of agent, that, if agent and third party are acting in collusion to defraud principal, principal will not be bound by knowledge of agent, is ordinarily applied in cases where liability of principal to third person is involved, and is based on idea of protection to innocent principal.

4. Banks and banking ☞114—Bank, relying on note taken by cashier as accommodation, must take it on terms on which cashier took it, that maker would not be responsible.

Bank, relying on note taken by cashier as accommodation note for benefit of bank, must take it with terms on which cashier took it, that maker would not be responsible.

5. Principal and agent ☞172.

Principal, seeking to recover on contract in which agent exceeded his authority, must take the contract as a whole.

6. Bills and notes ☞49—Accommodation maker of note for bank, with express understanding with cashier that he would not be called on to pay note, cannot be held liable in suit by bank, where no rights of innocent third parties intervened.

Maker of accommodation note for bank, with express understanding with cashier and manager that he would not be called on to pay note, cannot be held liable thereon in suit wherein the bank is plaintiff and no rights of innocent third parties intervened.

7. Bills and notes ☞518(1).

Finding of trial court of no consideration for note given as accommodation to bank held supported by the evidence.

8. Bills and notes ☞98—Accommodation maker of note for bank to cover overdraft held not estopped to assert that it was not valid obligation as against bank, no rights of third persons intervening.

Defendant, giving accommodation note to bank to cover overdraft to deceive bank ex-

aminer, held not estopped to assert against bank that it is not valid obligation, where bank did not become insolvent and no rights of innocent third persons were involved.

9. Estoppel ☞61—Estoppel cannot be asserted, where agent participated in deceit and fraud, and solicited act from person sought to be estopped by principal.

Estoppel cannot be relied on to create a liability, where agent, acting solely for benefit of his principal, actively participated in deceit and fraud, and solicited act from person sought to be estopped by principal.

In Bank.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Action by the First National Bank of Reedley against E. R. Reed. From a judgment for defendant, plaintiff appeals. Affirmed.

Mark H. Edwards, of Reedley, and Frank Kauke, of Fresno, for appellant.

Everts, Ewing, Wild & Everts and Dan F. Conway, all of Fresno, for respondent.

LENNON, J. This is an action brought by the First National Bank of Reedley against the defendant, E. R. Reed, on two promissory notes, each bearing date May 3, 1921, one for \$11,000, and the other for \$440. The first note for \$11,000 was in renewal of a note dated November 3, 1920, executed by the defendant Reed; the second note represented the accrued interest on the original note. The defendant by his answer admitted the execution of the notes, but denied that the sums set forth in said notes were due or payable by the defendant, or any part thereof. The defendant, in addition, interposed a special defense which is clearly and succinctly stated in defendant's answer to plaintiff's complaint as follows:

"That more than three months prior to the 3d day of May, 1921, the said plaintiff had on its books an overdraft of the Reedley Canning Company, a corporation, for the sum of eleven thousand (\$11,000) dollars. That about three months prior to the 3d day of May, 1921, a bank examiner was in the bank and banking house of the said plaintiff in the city of Reedley for the purpose of making an examination of the books and accounts of the said plaintiff. That at said time, and while said bank examiner was in said bank, the said overdraft of the said Reedley Canning Company for the sum of \$11,000 was carried on the books of said plaintiff. That at said time and place, and while the said bank examiner was in said bank for the purposes aforesaid, M. J. Wickstrom, who was then and there the cashier and vice president of the said plaintiff, met defendant, and then and there requested defendant to make and deliver to said plaintiff his promissory note for \$11,000 in favor of said plaintiff, so that the same might be applied to and cover the said overdraft, and that the said M. J. Wickstrom then and there stated to defendant that the said plaintiff would guarantee defendant

against loss which might be sustained by reason of the making and delivering of said promissory note. That the said M. J. Wickstrom then and there stated and represented to defendant that the said bank had honored overdrafts of the Reedley Canning Company to the amount of about \$11,000. That bank examiners were about to make an examination of the affairs of the bank. That the officers of the plaintiff were desirous of cleaning this account up and that they wanted defendant, as an accommodation to the said bank, to execute his note to the bank for \$11,000, and that the said Reedley Canning Company would receive credit therefor, and that it would be simply a temporary affair, and that the bank would guarantee to protect defendant against loss by reason of giving the said note. That on the date of the delivery of said promissory note to said bank by said defendant the said bank then and there credited the amount thereto, to wit, \$11,000, on the said overdraft of the Reedley Canning Company, and the said bank retained the said note.

"That the defendant, then and there believing the statements and representations made as aforesaid that the plaintiff would guarantee to protect him against loss by reason of giving said note, and as an accommodation to the payee named in said note, did then and there make and deliver said note to the plaintiff. Defendant alleges that he did not receive at said time, or at any time, any consideration for said note, and was not given anything of value or credit therefor.

"That on the 3d day of May, 1921, M. J. Wickstrom, who was then and there the cashier and vice president of the said plaintiff, stated and represented to defendant that the bank had not been able to raise funds to replace defendant's note, and then and there requested plaintiff to execute a new note in the sum of \$11,000; also another note in the sum of \$440. That, if defendant executed and delivered to plaintiff the two notes just described, the bank would deliver to defendant the original note for \$11,000. The said M. J. Wickstrom then and there stated and represented to defendant that it was necessary for the bank to carry these notes, because the bank had not been able to raise the \$11,000, the amount of the overdraft of the Reedley Canning Company. That the said M. J. Wickstrom represented then and there and stated to defendant that the plaintiff would guarantee the defendant against loss which he might sustain by reason of making delivery to said bank of said promissory notes. That the bank needed said notes as an accommodation, and that he would not look to defendant for the payment of said notes, or either of them, and that the said bank would guarantee to protect defendant against any loss by reason of giving the said note.

"That the said defendant, then and there believing the statements and representations, made as aforesaid, that the plaintiff would guarantee to protect him against loss by reason of giving said notes, and as an accommodation to the payee named in said notes, did then and there make and deliver said notes to the said plaintiff. Defendant alleges that he did not receive, at the time of the delivery of said notes or at any other time, any consideration for said notes, and was not given anything of value or credit therefor."

Upon the issues thus raised the cause was tried before the court without a jury. The court found that there was no consideration for the notes and rendered judgment in favor of the defendant, from which judgment the plaintiff has prosecuted this appeal. It is plaintiff's contention that (1) the findings are not supported by the evidence; and (2) the defendant is estopped to assert that there was no consideration for the notes. A review of the record before us clearly shows that the defendant's statement as to the facts and circumstances surrounding and attending the original execution of the note for \$11,000 in November, 1920, and the renewal thereof, together with another note for accrued interest, in May, 1921, is amply supported by the evidence.

At the time of the original execution of the note many persons living in the vicinity of Reedley were interested in the success of the Reedley Canning Company as a community enterprise, and were stockholders in said company. Mr. J. J. Eymann, the president of the plaintiff bank, was a stockholder in the canning company, as was also Mr. Krehbiel, a director of the bank. Mr. Wickstrom, cashier and manager of the plaintiff bank, was a stockholder to the extent of \$11,000, and Mr. Reed, the defendant, owned stock in the company to the extent of \$2,500. On November 3, 1920, the canning company had overdrawn its account with plaintiff's bank to the extent of \$11,000, which was in excess of the credit which plaintiff might under the law extend to any one person or corporation. On that date a national bank examiner commenced an examination of the affairs of the bank. The bank had been previously criticized by reason of the amount of its overdrafts, and in the words of Mr. Wickstrom, cashier of the bank, "the overdraft had to be covered." "It was illegal * * * and had to be taken care of."

Mr. Wickstrom, on opening up the bank that morning, saw Mr. Reed out in front of the bank, and spoke to Mr. Eymann, president of the bank, of the possibility of getting Mr. Reed to sign a note until such time as stock in the canning company could be sold to take care of the note. Mr. Eymann said it was a "mighty good idea," and Mr. Wickstrom went out and asked Mr. Reed to execute his note in the sum of \$11,000. Mr. Reed, so Mr. Wickstrom testified, "had always been an awful good friend of mine, all my life, and I usually got all I wanted out of him." According to Mr. Wickstrom's own testimony, he explained to Mr. Reed that the bank needed a note for \$11,000 to cover the overdraft while the bank examiner was there, and assured him that he would not have the note to pay; that it was simply an accommodation note, to help the bank out. Mr. Wickstrom explained to Mr. Reed that the bank could take care of the note by selling subscriptions to stock in the canning

company. Mr. Krehbiel, a director of the bank, was also in the bank on the morning that the bank examiner was there; but the entire negotiations with regard to the execution of the note were carried on between Mr. Reed and Mr. Wickstrom, cashier and manager of the bank, on the sidewalk in front of the bank. Mr. Reed testified that, although he understood that his note was to cover an overdraft of the Reedley Canning Company, he had no intention or thought of loaning his credit to the canning company, but gave the note as a matter of favor to the bank, and gave it upon the express promise of the cashier that the bank would take care of the note, and that he would not be out on it whatever.

That Mr. Reed had no intention of loaning his credit to the canning company is substantiated by the testimony of Mr. George H. Rogers, the manager of the canning company, who testified that on the same day, before the execution of the note, the cashier of the bank stated to him (Rogers) that Reed was about to execute his note to cover the overdraft of the company, and requested Rogers to transfer to the bank, as security therefor, certain stock of the canning company owned by Rogers, and that Reed at that time stated to the cashier:

"I don't want the stock. If you want the stock, it is up to you. I am doing this for the bank, and not for the canning company. It is an accommodation note."

Mr. Rogers also testified that later in the day he brought into the bank, as security, stock in the canning company to the extent of \$45,000. Upon the execution of the note, credit was entered to the account of the canning company on the books of the bank for \$11,000.

Mr. Reed testified that, prior to the execution of the second notes in renewal of the first, he had asked Mr. Wickstrom for his original note back, but that Mr. Wickstrom had said that it was impossible at the time, because they were still carrying overdrafts, and wanted that note to cover them.

Mr. Reed further testified that in May, 1921, Mr. Wickstrom again approached him on the street, and said that the bank examiner was liable to be there at any time, and that the original note was overdue, and he would like to have him renew it under the same conditions, at the same time positively assuring him that the bank would take care of it, and that he would not be out on it whatever.

The canning company became insolvent, and suit was instituted by the bank against the defendant for the recovery upon the two promissory notes.

The respondent contends that the facts present in this case bring it within the application of the rule laid down by this court in *Bank of Orland v. Harlan*, 206 P. 75, 188 Cal. 413. The evidence might well support a

finding that would bring the case within the rule there laid down, but we deem it unnecessary to consider it from the point of view there suggested, because of the finding of the trial court that "respondent received no consideration whatever for such promissory note, and it is true there was no consideration whatever for the making or delivery of said promissory note."

The appellant suggests that the cashier, Wickstrom, had no authority to bind the bank in the negotiations with Reed as to the purpose for which the note was executed. It is admitted by the plaintiff, that, if the sole purpose on the part of the plaintiff in taking the note was to cover up a deficit in the bank's assets and deceive and mislead the bank examiner, then, notwithstanding the fact that defendant participated with the bank officers in a fraudulent transaction, the court would not aid either party, and the plaintiff could not recover. But it is insisted that the directors of the bank had no knowledge of the criminal nature of the transaction, and believed that the giving of the note was a strictly legitimate transaction.

[1, 2] Respondent testified that Wickstrom was vice president and manager of the bank. Wickstrom himself testified that he was, at various times, vice president, manager, and cashier of the bank, and that he acted as such cashier or manager could. He was such cashier at the time the original note in this transaction was executed. Appellant concedes in its brief that Wickstrom was "cashier and manager" of the institution. The evidence justifies the assumption that, as such cashier, he had general charge of the business of the bank as such cashier and manager. In the absence of any evidence on the point, it would be assumed that Wickstrom communicated to his principal his knowledge of any facts material to the transaction. *McKenney v. Ellsworth*, 132 P. 76, 165 Cal. 326. Wickstrom testified that he explained to the board of directors of the bank "how the note was taken, and how it was to be taken care of." Both he and the respondent testified that Reed executed the note as an accommodation to the bank, upon the assurance of Wickstrom that Reed would never be called upon to pay the same. The party for whose accommodation such a paper is made may not sue the accommodation party. *Williams v. Hasshagen*, 137 P. 9, 166 Cal. 386, 390; *Coghlin v. May*, 17 Cal. 515.

Mr. Wickstrom testified that both Mr. Eyermann, president of the bank, and Mr. Krehbiel, one of the directors, were present on the morning of the execution of the note, and knew that the bank examiner was there. Mr. Wickstrom also testified that he explained to the directors, at a meeting subsequent to the taking of the note, that the note "was taken to cover an overdraft of the Reedley Canning Company, to be taken care

of by stock subscriptions, as the stock was sold, the note brought into the bank and placed to the credit of the cannery, or used otherwise whatever we saw fit to use them, and it was explained to the board of directors." Mr. Wickstrom could not remember, however, directly telling the directors that the note of Mr. Reed was for the accommodation of the bank, and that Mr. Reed was not to be held liable.

[3] It is also insisted by plaintiff that the knowledge of the cashier could not be imputed to the principal—in this case the bank—for the reason that this rule was established for the protection of those who deal with the agent in good faith. It is true that there is an exception to the general rule imputing to the principal the knowledge of the agent, which exception is to the effect that, if the agent and the third party are acting in collusion to defraud the principal, the principal will not be held bound by the knowledge of the agent. Obviously, the purpose of this exception is to protect the innocent principal against the fraud of his agent, acting in collusion with the third person. It is to be noted that the exception to the rule is ordinarily applied in cases where the liability of the principal to a third person is involved, and is based upon the idea of protection to the innocent principal.

[4, 5] The exception, holding, as it does, that the principal is not bound by the knowledge of his agent, has no application to a situation such as presented here, wherein the principal is seeking to establish the liability of a third person. In the situation presented here, the sole representative of the bank was the cashier and acting manager. The bank cannot claim anything, except through him, and therefore, if it claims through him, it must accept his agency, with its attendant notice of his knowledge of the facts as they actually existed. The bank cannot in one breath be heard to say that the cashier was without authority to bind itself as its agent, and accept the note upon condition that it was an accommodation note, for which the defendant should not be liable, and in the next breath insist that it can avail itself of his act in taking the note. It cannot avail itself of only so much of the transaction as was beneficial to it, and repudiate the rest. If it relies upon the note, it must take it with the terms upon which the cashier took it, namely, that the defendant should not be responsible. The bank must take the burden with the benefits, and by demanding performance of the contract the bank assumes responsibility for the instrumentalities—that

is to say, the representations, promises, and conditions—through which the act was induced.

The law is well settled that, in case a principal seeks to recover upon a contract in which the agent exceeds his authority, he must take the contract as a whole. 1 Mech- em on Agency (2d Ed.) § 448; Central Bank of Bingham v. Stephens, 199 P. 1018, 58 Utah, 358; Simmons v. Thompson, 51 N. Y. S. 1018, 29 App. Div. 559. The fact that the principal was mistakenly under the impression at the time the agent made the contract with the third person that the contract was of a certain nature cannot transmute the contract made between the agent and the third person into the contract which the principal mistakenly thought had been made. The contract must exist as made between the agent and the third person, or not at all.

[6, 7] It follows, from what we have said, that, Reed having given his note with the express understanding with the cashier and manager of the bank that he would not be called upon to pay the note, he cannot now, in a suit wherein the bank is plaintiff, and no rights of innocent third parties intervene, be held liable. The finding of the trial court that there was no consideration for the note, based as it undoubtedly was upon the theory that Reed had loaned his credit to the bank, and not the canning company, is correct, and supported by the evidence.

[8, 9] We find no merit in plaintiff's contention that, the defendant having given his note with the purpose and intent to deceive the bank examiner, he is now estopped to assert that it is not a valid obligation. Those cases which hold that he is so estopped are distinguishable from the instant case. Those cases present situations wherein the bank became insolvent, wherein the rights of innocent third persons were involved, or wherein a consideration for the note was expressly found. The plea of estoppel is primarily for the protection of innocent third persons, who would suffer injury if the defendant were permitted to set up the true state of facts. Estoppel cannot be relied upon to create a liability in a situation where, as here, the agent, acting solely for the benefit of his principal, actively participated in the deceit and fraud, and solicited the act from the person sought to be estopped by the principal.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; LAWLOR, J.; CURTIS, J.; SEAWELL, J.

76 Cal. App. 264

GRECIAN v. JACKSON. (Civ. 5357.)

(District Court of Appeal, First District, Division 1, California. Jan. 18, 1926. Hearing Denied by Supreme Court March 18, 1926.)

1. Appeal and error — 1011(1).

Finding, based on conflicting testimony not inherently improbable, is conclusive on appeal, and all reasonable inferences will be indulged in its support.

2. Appeal and error — 1041(2).

Permitting amendment to complaint on day of trial *held* not ground for reversal, where it did not mislead or prejudice defendant.

Appeal from Superior Court, City and County of San Francisco; J. L. Hudner, Judge.

Action by H. Grecian against John M. Jackson, also known as J. M. Jackson, individually and doing business under the firm name of J. M. Jackson & Co. From an adverse judgment, J. M. Jackson appeals. Affirmed.

John E. Bennett, of San Francisco, for appellant.

John P. Beale, of San Francisco, for respondent.

CASHIN, J. An action by respondent upon certain assigned claims for legal services and expenditures alleged to have been rendered

to and made on behalf of appellant. The complaint alleged in separate counts an express agreement to pay a sum stated for a portion of the services, the reasonable value of others, with a further count for money paid at the request of appellant. The court found that the services and expenditures alleged were rendered and made at the special instance and request of appellant; that the reasonable value of a portion of such services was the sum of \$175; that for others appellant had agreed to pay the sum of \$1,500, of which \$1,374.50 remained unpaid; and that there had been expended the sum of \$63 as alleged. Judgment was entered for the amounts found to be unpaid, aggregating the sum of \$1,612, from which judgment the appeal was taken. As stated by appellant, the question presented on appeal is the sufficiency of the evidence to sustain the findings of the trial court.

[1] According to the testimony of appellant, the payment of compensation for the services for which was claimed the sum of \$1,500 was, by agreement, to be contingent upon the success of a certain corporation in the organization of which the services were rendered. The attorneys by whom the claims were assigned testified to conversations with appellant which preceded the rendition of the services, from which the inference might reasonably have been drawn that the agreement was made as found.

Contrary to the contention of appellant, we find no inherent improbability in the latter testimony, and, the evidence being conflicting, such finding is conclusive, and all reasonable inferences will be indulged in its support. *Treadwell v. Nickel*, 194 Cal. 243, 261, 228 P. 25; *Steinberger v. Young*, 175 Cal. 81, 84, 165 P. 432; *Levi v. Chesley*, 178 Cal. 145, 172 P. 607.

The findings as to the third count are fully supported by the evidence; and, while no direct evidence was offered with respect to the value of the services rendered as alleged in the first count, the character of the services in connection with certain litigation in which appellant was interested was shown, from which the court might, in the exercise of its independent judgment, determine such value; and we cannot say that its conclusion was unsupported or unreasonable. *Patten v. Pepper Hotel Co.*, 153 Cal. 460, 96 P. 296; *Spencer v. Collins*, 156 Cal. 298, 104 P. 320, 20 Ann. Cas. 49; *Kendrick v. Gould*, 51 Cal. App. 712, 197 P. 681.

[2] Appellant complains of an order of the court permitting respondent to amend his complaint on the day of the trial by alleging an express agreement to pay the sum stated for the services alleged in the second count in lieu of the allegations of the original complaint as to the reasonable value thereof; it being stipulated that the allega-

tions of the amended complaint should be considered as denied by appellant.

It appearing that all of the evidence as to the agreement alleged in the latter count consisted of conversations between the parties thereto, and, it not having been suggested then or at the conclusion of the trial that testimony or evidence other than that adduced by appellant was available, he was not misled or prejudiced by the filing of the amendment.

The evidence being sufficient to support the findings, and no error appearing, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

76 Cal. App. 369

CITY OF STOCKTON v. VOTE. (Civ. 3010.)

(District Court of Appeal, Third District, California. Feb. 2, 1926. Hearing Denied by Supreme Court April 2, 1926.)

1. Evidence ⇨333(1)—Admission in eminent domain proceeding of flood control report, on theory that witness had referred to maps and tabulations therein, held error, where report was not a state document.

In action of eminent domain to condemn land for flood control purposes, admission of flood control report, on theory witness had referred to maps and tables contained therein which were copies of government maps and tables, held error, where report showed upon its face it was not a state document, but a mere compilation of statistics and opinions of engineer making it.

2. Evidence ⇨318(4)—Report of engineer, not made pursuant to duty, enjoined by law, and constituting nothing more than private compilation and opinion of engineer, held inadmissible in eminent domain proceeding (Code Civ. Proc. § 1918, subd. 6).

In eminent domain proceedings to condemn land for flood control purposes, report of engineer, which was not made pursuant to any duty enjoined by law, but was mere private compilation of theories and opinions of writer, held inadmissible as an official document, under Code Civ. Proc. § 1918, subd. 6; opinions and statements therein being mere hearsay.

3. Evidence ⇨333(1)—No section of Political Code makes report by subordinate officer to his superior a public document, admissible in controversies between independent parties.

No section of the Political Code relating to the department of public works makes the report by a subordinate officer or field officer to his superior a public document, admissible in evidence in controversies between independent parties.

4. Evidence ⇨318(4)—That report of city manager was adopted by council as to portion dealing with flood control did not authorize its admission in eminent domain proceedings as to other portions, which were hearsay arguments and opinions of city manager.

In eminent domain proceedings by city to condemn land for flood control purposes, the fact that city council had by resolution adopted a report of city manager dealing with flood control did not authorize its admission in evidence as to purely hearsay arguments and opinions of city manager as to feasibility of using impounded water for irrigation or power purposes.

5. Evidence ⇨237.

It is a cardinal principle of an admission that the party speaking must be in a position of authority to speak.

6. Evidence ⇨245—Resolution of council adopting report of city manager as to flood control did not make report admissible in eminent domain proceedings as admission against interest of city, where council at time of passing resolution had no authority to undertake work contemplated.

In eminent domain proceedings to condemn land for purposes of flood control, resolution of city council adopting report of city manager respecting flood control held not admissible as admission against interest of city, where council at passage of resolution had no authority with respect to work contemplated.

7. Eminent domain ⇨202(1)—Purposes for which water is to be used by plaintiff in eminent domain and beneficial purpose to be derived therefrom are not to be considered in determining market value of flowage easement.

In a proceeding to condemn flowage easement, purposes for which water is to be used by plaintiff and beneficial uses to be derived therefrom are not to be taken into consideration in determining market values.

8. Eminent domain ⇨202(1)—Testimony as to speculative uses to which impounded water might be put held erroneously admitted in determining market value of land sought to be condemned.

In eminent domain proceedings to condemn land for purposes of flood control, reports unfolding speculative purposes to which impounded water might be put held erroneously admitted on question of market values of land sought to be condemned.

9. Eminent domain ⇨202(1)—Necessities of public are never to be taken into consideration in fixing value of land to be condemned.

In eminent domain proceedings to condemn land for purposes of flood control, necessities of public are never to be taken into consideration in fixing value of land to be condemned.

10. Eminent domain ⇨202(1)—Growth of city as respecting need for future water supply held not to be considered in determining market value of land sought to be condemned.

In eminent domain proceedings to condemn land for flood control purposes, growth of city

as respecting need for future water supply held not to be considered in determining market value of land sought to be condemned, and evidence respecting such growth was inadmissible.

11. Eminent domain ⇨202(4)—Value in use of land sought to be condemned is inadmissible in eminent domain proceedings in determining its market value.

In eminent domain proceedings, evidence of value in use of land sought to be condemned is inadmissible, the present market value being measure of damages rather than value in use.

12. Eminent domain ⇨202(1)—Market value of land sought to be condemned is not to be determined by fact that party seeking to condemn it has already determined to build a reservoir thereon.

Market value of land sought to be condemned is not to be determined by the fact that party seeking to condemn it has already determined to build a reservoir thereon.

13. Eminent domain ⇨202(1)—Matters which any one contemplating a purchase of land might well take into consideration in determining value of land which he was about to buy are proper matters to be considered by jury in condemnation proceedings.

Matters which any one contemplating a purchase of land might well take into consideration in determining its value are matters which are proper to be laid before jury in determining value of land sought to be condemned in eminent domain proceedings.

14. Eminent domain ⇨202(1)—Capabilities of watershed, and nearness of irrigable lands, cities, and municipalities, held proper matters to be considered by jury in determining value of reservoir site sought to be condemned.

In proceeding to condemn reservoir site for flood control purposes, capabilities of watershed to fill reservoir, nearness of irrigable lands, cities, and municipalities were proper to be laid before jury on question of damages; being matters which one contemplating purchase of property might take into consideration in determining its value.

15. Eminent domain ⇨202(1)—That highest use of land to which it was adapted would be subserved by a 200-foot dam held admissible on value of land sought to be condemned for reservoir site.

In eminent domain proceeding to condemn reservoir site for flood control, the fact that highest use of land to which it was adapted for such purposes would be subserved by a 200-foot dam held admissible upon the value of land sought to be condemned, and testimony of persons qualified to speak on such subject was properly laid before jury.

16. Eminent domain ⇨202(1)—That party seeking to condemn land was not proposing to make highest use of land to be condemned was not to be considered in determining value thereof.

That party seeking to condemn land was not proposing to make highest use of land to be condemned was not to be considered in determining value thereof.

17. Eminent domain ⇨202(4).

Value in use of property to condemnor is not to be considered in determining its value.

18. Eminent domain ⇨202(4)—Adaptability of defendant's land for reservoir purposes may be considered in eminent domain proceedings, though his land alone does not constitute complete entire reservoir site.

Adaptability of defendant's land for reservoir purposes may be considered in determining value of land to be condemned, though such use would require joining of his land to other tracts.

19. Eminent domain ⇨202(4)—Question of value for reservoir purposes of land sought to be condemned, should be eliminated, where it appears that defendant's land does not constitute entire site, and that defendant does not own and cannot acquire other tracts necessary.

In proceeding to condemn land for reservoir site for flood control purposes, value of land for reservoir purposes should be eliminated from consideration, if it appears that it does not constitute entire site, and that defendant does not own and cannot acquire other necessary tracts.

20. Eminent domain ⇨202(1)—Practicability of uniting lands in one ownership for reservoir purposes, and costs, expenses and time consumed in doing so, are elements bearing on market value on premises sought to be condemned.

In eminent domain proceedings to condemn land for reservoir site, where defendant's land did not constitute entire site, held that practicability of uniting lands in one ownership and costs and expenses of doing so were proper elements to be considered by jury under proper instructions in determining whether market value of land was enhanced by reason of its adaptability for reservoir purposes when joined to other land.

21. Appeal and error ⇨1048(3) — Permitting hypothetical question to be answered, where questions simply set forth as a basis the hearing of testimony of other witnesses by the expert, if error, held not to warrant reversal of judgment in eminent domain proceedings.

In eminent domain proceedings, permitting hypothetical questions to be answered, where the questions simply set forth as a basis the hearing of testimony of other witnesses by the expert, and upon whose testimony the opinions were based, if error, held not to warrant reversal of judgment.

22. Appeal and error ⇨1170(7)—Inadmissible testimony by experts as to value in use of land sought to be condemned held prejudicial as against contention that jury disregarded values fixed by experts (Const. art. 6, § 4½).

In eminent domain proceedings to condemn reservoir site for flood control purposes, admission of inadmissible expert testimony as to value in use of land sought to be condemned held prejudicial, as against contention that error was harmless under Const. art. 6, § 4½, in that jury must have disregarded values fixed by ex-

perts, in that they set a valuation of \$240 per acre, whereas the jury only allowed \$100 per acre.

23. Eminent domain  265(4)—Landowner is entitled to full value of his land condemned, when finally ascertained, exclusive of costs, and hence costs of appeal will be charged to condemnor.

Landowner is entitled to full value of his land condemned, when finally ascertained, exclusive of costs, and hence costs of appeal by condemnor will be charged to condemnor, though judgment was reversed.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Action in eminent domain by the City of Stockton against Jacob G. Vote. From the judgment awarding compensation, plaintiff appeals. Reversed.

J. Le Roy Johnson and Thos. S. Louttit, both of Stockton, for appellant.

F. J. Solinsky, of San Francisco, Nutter, Hancock & Rutherford, of Stockton, and Joe Huberty, of San Andreas, for respondent.

PLUMMER, J. Pursuant to certain resolutions passed by the city council of the city of Stockton and the affirmative result of an election participated in by the qualified electors of the city of Stockton, the plaintiff in this action proposes to erect a restraining dam, or a dam to control the flood waters of the Calaveras river at a point on said stream in the county of Calaveras about three miles from the town of Valley Springs. The defendant in this action is the owner of a tract of land lying easterly of the site of the proposed restraining dam, and a portion of whose land lies within the basin that would be submerged in the operation of the dam herein referred to. By its amended complaint in this action the plaintiff seeks to condemn or acquire a flowing easement for the flood waters restrained by the proposed dam over 66.6 acres of the lands belonging to the defendant, and sought a judgment of the court fixing the price of said easement, damages to be allowed for the improvements situated on the said 66.6 acres, and also such sum as should be justly awarded on account of the severance of said area of land from the larger acreage belonging to the defendant.

Upon the trial of this action had before a jury, the value of the land proposed to be taken by the city of Stockton for flowage purposes was fixed at the sum of \$6,606, the value of the improvements taken \$10,000, and the damages due to the severance assessed at the sum of \$3,400, aggregating the total sum of \$20,000. Judgment was entered accordingly. From this judgment the plaintiff appeals. In support of its appeal the appellant alleges, among others, that the trial court erred in the following particulars: (1) In consider-

ing the term "market value"; (2) that testimony was improperly admitted showing possible value of property in use by condemnor; (3) that testimony concerning the value of the defendant's land under altered conditions was improperly admitted; (4) that the court erred in admitting evidence concerning the reasonable value of defendant's land, assuming that other necessary lands had been and would be joined to that of the defendant; (5) that witnesses not properly qualified were permitted to give opinion evidence concerning the value of the defendant's land; (6) that witnesses were allowed to answer hypothetical questions based upon the testimony of other witnesses; (7) that the court erred in admitting a report made by Charles E. Ashburner to the city council of the city of Stockton, and also a report on flood problems of the Calaveras river, signed by one Harry Barnes.

The record shows that the city of Stockton proposes to erect a restraining dam of the height of 144 feet on the Calaveras river at the site above mentioned; that by means of spillways and floodgates it proposes to control the flood waters of the Calaveras river during the rainy season in such manner as to avoid the danger of periodical flooding, to which the city prior to the year 1911 was subject; that just prior to the year 1911 a diverting canal had been built to the east and north of the city of Stockton, by means of which the flood waters of the Calaveras river were diverted around the city and inundation avoided; that the diverting canal, however, throws the flood waters back upon adjoining agricultural lands and does not afford the city of Stockton sufficient immunity from the flood waters coming down from the watershed of the Calaveras river; that by means of the proposed restraining dam the flood waters gathered by the Calaveras river would be allowed to escape from the reservoir created by the dam in such quantities only as would not endanger the flooding of the city of Stockton or any of the adjoining territory. Between the city of Stockton and the site of the proposed dam there are several thousand acres of land, called the "plainland," before the foothills, which gradually merge into the Sierra Nevada mountains, are reached. The ascent from the plain lands just referred to to the site of the proposed dam is more or less gradual, so that the elevation of the foot of said dam is estimated to be at about 530 feet above the level lands lying to the west of the foothills referred to herein. The dam proposed to be erected by the appellant, when completed, will have a maximum elevation of 680 feet, and the 680-foot contour line mentioned in the testimony is the maximum flood line that would be reached by the waters impounded by the proposed dam, and is the maximum line to which

and for which the flowage easement was asked for by and awarded to the plaintiff in this action.

The testimony introduced on the part of the defendant, in most part, had reference to and directed to a possible dam, 200 feet in height, that might be erected on the site selected by the city of Stockton, placing the maximum flood contour line at an elevation of 730 feet. Four expert witnesses were placed on the stand by the defendant, and severally proceeded to testify as to the possibility of erecting a 200-foot dam, also as to 394 square miles of watersheds lying easterly of the dam; that such a dam would have a reservoir capacity of about 350,000 acre feet, and would afford water for irrigation purposes of from 34,000 to 50,000 acres of land situate in the foothills and plain lands of Calaveras and San Joaquin counties; that such a reservoir would afford water for domestic purposes for the cities of Lodi, Stockton, Antioch, and other places, and also might be used for power purposes at a point near Jenny Lind, in the county of Calaveras, where a drop of 200 feet might be had. The reports of Ashburner and Barnes go into detail of the projects mentioned by the expert witnesses and the possibilities attendant upon the construction of such a dam; the Barnes report going into detail as to estimated costs. A consideration of the questions presented upon this appeal necessitates the setting forth of sufficient testimony to illustrate the points involved. All of the testimony hereafter set forth was introduced and admitted over the objections of the plaintiff, and the testimony will therefore be set forth, omitting the several objections. The testimony of the experts was along the same general lines, and therefore the testimony of one expert will illustrate the testimony of all, save and except as may be necessary to supplement the general recital in order to properly consider the objections raised.

Mr. M. O'Shaughnessy, of San Francisco, a witness called on the part of the defendant, after detailing at length his qualifications and experiences as an engineer, testified partly as follows:

"I have been on this reservoir basin three times; I know the portion of the reservoir that is at the western outlet of this river, and which has been testified to, and designated the dam site, where the structure to hold the waters will be constructed; I have observed at what height a dam or embankment can be constructed on that site; I believe it could be economically built up to a height of 200 feet. * * *

"Q. What purpose would such an embankment built at that point serve so far as you can judge from your examination of that locality? A. That dam would serve to impound a very large body of water behind it, which has a value for many purposes. It has a value for domestic use for cities; it has a value for irrigation use for farming; it has a value also

for power use to take the energy out of it; and it is also of a subsidiary value for a regulating reservoir, provided enough spillways will pass through the dam to pass the floods.

"Q. Do you know the location of this dam to any irrigable lands upon which the water from this dam could be used? A. Yes.

"Q. Where are such irrigable lands located? A. From the foothills where the stream discharges on the San Joaquin valley over towards Stockton; all those lands adjacent to the stream are capable of development by irrigation.

"Q. Do you know whether or not they are subject to gravity irrigation? Which are now being irrigated by the flowing of water on to those lands from any ditches or aqueducts? A. I would say in a moderate way by wells.

"Q. In your opinion as an engineer what would be the economical manner of irrigating those lands if such a reservoir as you have mentioned could be constructed and filled with water? A. The water would be allowed to flow down the stream bed, released from the dam, to a lower level, and then lead out by canals on each side of the river, one canal flowing north-erly and the other southerly to main line canals, such as are constructed on the Stanislaus river and on the Tuolumne river for irrigating those lands; a canal on each side of the river bed.

"Q. Have you obtained data as an engineer as to the contents of water in this dam constructed to the height of 200 feet, assuming that sufficient water would be running in the Calaveras river into the canal? A. I have.

"Q. And what does that data show, the data to be the contents of that dam when it was built to the height of 200 feet, the contents of the reservoir? A. The volume behind a 200-foot dam will amount to 350,000 acre feet of water at an elevation of the 730-foot contour.

"Q. 730-foot contour, as I understand, gentlemen, is an elevation of a 200-foot dam; 530 is the bed of the river, and 730 foot to the crest of the dam would be a 200-foot embankment. Now, Mr. O'Shaughnessy, I show you here Defendant's Exhibit C which is table 93, showing the seasonal run-off data of the Calaveras river with a drainage area of 394 square miles, and ask you to examine that. A. I have seen this report before.

"Q. Will you state to the court and jury whether, in your opinion, the runoff of water in the Calaveras river as shown thereon would be sufficient to fill this reservoir on the Calaveras river to the height of 200 feet during many, if not all, of the years? A. From this table of estimated seasonal runoff in acre feet, it looks as if that size reservoir could be filled practically half the years between 1871 and 1921. In some years, like 1888, 1889, the runoff is 1,003,000 acre feet; another year, I am familiar with the year 1889 and 1890.

"Q. Now, speaking of this reservoir from the standpoint of its irrigation value, in your opinion, would it be sufficient at a height of 200 feet carrying a volume of 350,000 acre feet to carry over two years of irrigation if that became the proper plan of using it for that purpose? A. Well, there are two factors entering into that. The first, the extent of area you would irrigate, and, secondly, the amount of water you would apply.

"Q. So you would be obliged then to first

determine the quantity of land that could be economically irrigated from this reservoir and the quantity of water that you would apply to each acre of the tract so selected? A. You would have to have those two factors to determine the total volume of water you would need, and also the losses in transmission; the aqueducts leak and the ditches leak, and you have got to have a percentage to take care of that leakage.

"Q. Now, state, in your opinion, whether that leakage would become of a serious nature considering the location of this reservoir and its relation to the irrigable lands, and taking into account the distance. A. It wouldn't be any more difficult than the problems met by the successful irrigation districts immediately to the south.

"Q. Referring to what districts? A. South San Joaquin irrigation district; the Oakdale irrigation district; the Modesto irrigation district; the Turlock irrigation district; the Merced irrigation district.

"Q. Have you made any determination in your own manner as an engineer as to what quantity of land on the San Joaquin valley plains could be economically irrigated with water from this reservoir, taking into account these factors of the amount of land or quantity of water on it to be used for irrigation and taking into account the seasonal flow of water as determined from Defendant's Exhibit C that you have just read? A. I have.

"Q. Will you state what your opinion is in answer to that question? A. There are about 34,000 acres of land available for irrigation immediately below this river.

"Q. And state whether or not in your opinion, following that question up, that that 34,000 acres could be economically irrigated by this dam under conditions I have stated? A. That area can be economically irrigated.

"Q. And in your opinion, on the opportunities you have had of examining the data of this stream, would you say that on such a stream such a reservoir would hold enough water to irrigate 34,000 acres of property each year? A. That is my opinion.

"Q. Will you state to what other uses the water stored in this reservoir could be used? A. The water is at a high enough level above the sea, or over 500 feet elevation, so it can be conveyed by gravity through pressure pipes to towns in the San Joaquin valley conveniently accessible, and this is a very great value, because lots of the valley water used by those present towns at present is objectionable in character.

"Q. I will direct your attention particularly to the city of Stockton as one of those municipalities on the plain: Are you familiar with the city water of Stockton that is now being used? A. I am. Three years ago I examined the water situation in Stockton, examined the little sumps or reservoirs that they pump water into, and went up to one of those reservoirs and found a boat there with a rake to rake the moss off the water, green moss, green scum, and this scum formed as the water was pumped from the lower levels. The wells, I think, were 600 or 700 feet in depth, and this scum formed on the reservoirs and had to be raked off; so that a body of water of this kind—pure, soft mountain water—would certainly be a

great value to the city of Stockton or to any other city."

It does not appear that any motion was made to strike out this particular answer.

"Q. For domestic use? A. For domestic use. I estimated the fall or drop from the reservoir to the plain lands to be about 500 feet.

"Q. Will you explain to what use that fall of water could be put to? A. Possibly 250 feet of head could be taken out by means of an aqueduct and pressure pipes and the energy taken out of the water in the shape of power, hydroelectric energy, such as is now being done on the Don Pedro dam on the Tuolumne river, and as is proposed to be done on the Exchequer dam on the Merced river; that latter dam or water district have sold the energy from the dam for practically \$450,000 a year, contracted for a number of years, and I think at least a third of that energy could be taken out of this water, or \$150,000 a year from the power feature."

No motion appears to have been made to strike out this particular answer.

"Q. Will you state again whether in your opinion the use of this dam for the storage of water to the 200-foot height of the dam is or is not an economical use of such dam and the water flowing therein? A. It is the greatest economical use that can be made of that dam site and this reservoir by building a dam to the 200-foot level.

"Q. Then I will ask you whether in your opinion the building of a dam and the storage of water as indicated by the blue shading, a dam to the height of 144 feet, is the greatest economical use that could be made of that reservoir site? A. It is not."

The witness then referred to the additional area that would be flooded by the erection of a 200-foot dam.

"Q. Then when this reservoir is built and devoted to this highest economical use and value of a 200-foot embankment and storing the water, this particular 160 acres of land would be largely submerged; is that true? A. Over 100 acres of the 160.

"Q. Mr. O'Shaughnessy, are you able to state by an examination of the exhibits and maps that are before you where the 200-foot contour line would intersect or affect that south 160 acres? A. Here is the 160 acres in question, and here is the 730-foot contour in the northeast quarter of that 160 acres, and it practically covers about one-third of a quarter of a mile, or about 400 or 500 feet in depth, running east and west from the easterly line, and practically the same depth north and south."

The witness here further described the effect of raising the water to the 730-foot contour, and also stated that raising the water to the 680-foot contour line would flood the improvements on the defendant's lands. The witness was then asked the following question:

"Mr. O'Shaughnessy, this is an action brought by the city of Stockton, a municipal corporation, to condemn a perpetual easement and right to flood that portion of the Vote tract of land, of which you are already acquainted and by reference to these exhibits, lying below the 680-foot contour line for the purposes of protecting the city against flood and for the use of impounding waters for such purposes as shall not be inconsistent with flood control. Do you know what the market value of that land lying below the 680-foot contour line of the Vote land, within improvements, was on the 27th day of August, 1924, when this action was commenced; by market value I mean the value that it would be sold for for cash in the market, giving the owner of the land, Mr. Vote, a reasonable time in which to make such sale? A. I do.

"Q. Will you then state to the court and jury, what, in your opinion, was the market value of this Vote land, without improvements, lying below the 680-foot contour line on the 27th day of August, 1924, when this action was commenced, and by market value meaning what I have been stated before? A. Taking all conditions of the land into account, the elevation of the land above the sea, I would say that land is worth \$15,000."

Mr. Galloway, a witness called by the defendant, after detailing his experience as an engineer, testified:

"A dam erected at the point referred to, 200 feet in height would impound 350,000 acre feet; that the water could be used for domestic consumption, irrigation, power and the reservoir site could be used for flood control; that the waters could be used for municipal purposes in any of the cities in the immediate vicinity; that it has been proposed to store water in that reservoir site and carry it out to Oakland; the water could be stored in the reservoir, flown down the stream to certain distances, taken out by canals on each side of the river, and delivered to the lands adjacent to the river; this reservoir is similar to others along the foothills of the Sierras; the usual procedure is to allow the water to flow a certain distance down the natural channel of the stream, pick it up with a diverting dam, because the lands all lie below the reservoir; therefore, the water will flow by gravity through canals on to the lands; the fall between the reservoir and the first lands to be irrigated is in the neighborhood of 400 feet; a power plant could be erected so as to use the waters from this reservoir; the power plant could be placed somewhere in the vicinity of Jenny Lind; the uses to which I have referred are the ordinary and usual and practicable uses of the water.

"Q. Mr. Galloway, you stated that one of the uses that could be made of this reservoir if constructed to the height of 200 feet and containing the volume of water that has been testified to, 350,000-acre feet maximum, what, in your opinion, as an engineer, would such a reservoir take charge of or supply in the way of irrigation and the number of acres? A. The answer to that question involves a statement that there is a certain watershed above the reservoir site from which the water will flow to fill the reservoir, and under the conditions of the Calaveras reservoir site, the reservoir

could and is adapted to be used to irrigate some 35,000 or 40,000 acres of land.

"Q. Do I understand you, as an engineer, to state that the use of the water for both irrigation and for power can be made at the same time? A. The same idea of the use of water for irrigation and power are carried out in developing plans in the Merced district on the Merced river.

"Q. When you say the same idea, I think you have already testified that you have prepared the plans for the construction of the Merced dam and the development of electricity before the water reaches the Merced plains for irrigation purposes? A. Yes; that was the answer that was intended.

"Q. You may go right along and explain your answer. A. I am referring to the Exchequer dam; they are building it, it is more than proposed; it is under construction. I located the power plant there that would give a certain output of energy during the irrigation season, at the time the water was being released from the reservoir for irrigation. The system of the San Joaquin Light & Power Corporation at that place had an electrical demand, a demand for power for pumping for irrigation that came on at the same time, and for the same purpose that the Merced irrigation district is releasing water from its reservoir for its own purposes, with the result that when the water was taken out of the reservoir for the irrigating season in different amounts we used it to generate energy, and that energy in the form of electricity was transmitted over the line of the power company, and they purchased it, so that when the proposition is built it will return to the irrigation district about \$500,000 revenue per year. There are some parts of the state where that cannot be done; that depends on the market for power, and I say, I think, that anywhere from the American river south, wherever there is an irrigating reservoir proposed, a power plant can be built at the base of it and developed, and there is a market for that power; so that the two things working together are feasible, practicable propositions.

"Q. Now, I will ask you again, in your opinion, whether those two uses of water stored in the reservoir contemplated here, the development of power the same time the use of the water that develops the power, for irrigation—is that feasible and practicable? A. It is.

"Q. Assuming that it, has been answered, would you state approximately the amount of water that would be used or could be drawn from that reservoir for municipal supply, and whether or not that water would be lost for irrigation? A. Naturally the water would be lost for irrigation if used for domestic supply. The balance of the question is wholly on the matter as to how much water you would want to take for domestic consumption; in the case of the city of Stockton, the amount taken for domestic supply as compared to the amount required for irrigation is relatively small."

The witness then proceeded to state he knew the Vote lands, and was then asked the following question:

"The action is brought by the plaintiff in this case to obtain a perpetual easement on the Vote lands lying below the 680-foot contour to

flow and flood that part of the land for the purposes of protecting the city of Stockton by flood control from floods, and for the purpose of using the impounded waters in such a reservoir for such purposes as shall not be inconsistent with the purposes of flood control. I will ask you now with that explanation, what, in your opinion as an engineer, or do you know what the market value of the Vote land lying below the 680-foot contour line, without improvements, was on the 27th day of August, 1924, explaining to you that market value means the price in cash that could be obtained for that portion of the land in the market, giving a reasonable time to the owner of the land to find a purchaser?"

—which question the witness answered: "16,000."

The witness further testified that the 680-foot contour would cover a reservoir basin covering 2,900 acres, and the 730-foot contour would include an area of about 3,540 acres.

M. C. Polk, a witness called for the defendant, after stating his qualifications and experience as an engineer, testified along the same general lines as testified to by the witness O'Shaughnessy, and testified, in part, as follows:

"Q. I will ask you again, to what uses, in your opinion, as an engineer, can be made of this proposed reservoir, or a reservoir on this site filled with water? A. The water impounded in the reservoir could be used for four different purposes: Municipal purposes, domestic uses, flood control, and most important in my mind is for irrigation and for power.

"Q. I will ask you again if the quantity of water that could be stored in this proposed reservoir would be adequate for the city of Stockton, assuming that they have a population of 55,000 people? A. 55,000, being the present population, would use about 10,000 acre feet from the reservoir a season. One year instead of a season; that is not allowing anything for future growth.

"Q. Assuming that the population of Stockton would be growing and increasing in population at the rate of 10 per cent. per annum, not per annum, no; wouldn't it be, for a period of ten years, normal growth? (Johnson interposing): Increase of 84 per cent.

"Q. What would be the quantity of water necessary to be stored for municipal purposes for a city of such growth? A. In round numbers it would probably be necessary to double that amount, figure on 20,000 acre feet, for not a decade, for two decades probably."

The witness Pope further described the power possibilities that might be developed from the reservoir holding 350,000 acre feet of water, and then answered the following question:

"Q. Will you now state to the jury in a general way your views as to the use of this water in this dam when constructed to a height of 200 feet for irrigation purposes? A. My engineering work for a number of years has been particularly along the line of irrigation and investigation for water supply for irrigation purposes, and I found and know that all the natural flow

of the stream, particularly in the Sacramento and San Joaquin Valley, have been located and in fact over located, and there is none for irrigation; that there is an endeavor to get storage water almost all over the entire valley area for irrigation, an extreme endeavor you might say, and the site available for storage of water for irrigation, all the available economical sites are practically all used, and I know in fact none as admirably situated as this for irrigation with lands along side needing the irrigation; this being an elevation of about 400 feet above the plains and only a few miles away, relatively speaking, makes it admirable for that purpose, not only on the plains, but, more or less, on the foothill lands of Calaveras and San Joaquin counties both, for lands upon which this water can be used, and being situated below the reservoir site, and being capable of storing 350,000 acre feet, providing for sufficient holdover to take care of the low years, perhaps not with a full irrigation, or extreme low years, to provide for a safety factor. It seems to me at least 50,000 acres could be irrigated from that amount of water at an economical operation.

"Q. Will you tell be how many acre feet to the acre you devote in the irrigation of these lands? A. On similar types and considering conditions, I have in my investigations allowed three acre feet of stored water for one acre of land to be irrigated on ordinary crops; that is, such as orchards, alfalfa, the ordinary crops. For rice irrigation it requires a great deal more.

"Q. Now, the other use that you mentioned that could be made of this reservoir constructed to the height of 200 feet, was flood control? A. Yes; that is true.

"Q. As an engineer what will you state as to such a use of this reservoir when constructed when devoted to flood control? A. The capacity of the reservoir would seem to me with regulating the holdover would probably take care of the flood control, although there is a little question in that as to the peak floods which might come, but as the factor of safety, I think, they will be safe on that. I haven't worked out the details on that; however, it would require a great deal of study."

This witness estimated the value of the 66.6 acres over which the plaintiff was seeking an easement of \$16,000.

N. Randall Ellis, a witness called by the defense, after stating his qualifications and experiences, testified along the same general lines as that of the other experts. He testified as to his experience with the installation of power plants, the uses of water for irrigation and power purposes, the situation of the reservoir in question, that he had given consideration to the subject of the use of a portion of the waters impounded by a dam 200 feet in height erected on the site in question, and was asked the following questions:

"Q. Will you state what consideration you gave to that particular use? A. Yes sir; with my familiarity with the growing demands for water throughout California, throughout all municipalities, some familiarity with the existent situation in Stockton and in all valley towns, I believe that a municipal water supply could

be supplemented quite economically for water withdrawal from this proposed reservoir without any appreciable interference with its function either as an irrigation reservoir or with a power by-product."

This witness, in answer to a question as to the market value of the land sought to be condemned, answered:

"A. I would say \$16,000 as a minimum value, with a possible differential above that between 10 and 15 per cent.

"Q. That would mean \$16,000 with 10 per cent. differential above that, would be \$1,600 more, or 15 per cent. above that would be \$2,400 more; is that what you mean? A. Yes, sir. In other words, my idea being this, if I may explain my answer: I consider \$16,000 as a minimum reservoir value; not being absolutely susceptible to a fine mathematical analysis I consider that there is some differential in there; that differential probably would not exceed 15 per cent. above the basic figure that I have stated."

The testimony set forth in the transcript shows that the land over which the plaintiff was seeking an easement is the ordinary grazing land found in the canyons in the foothills before reaching the higher altitudes of the Sierras. The testimony also show that the Calaveras river is a "flash stream," not having its source in the perpetual snows of the higher Sierras. Following days of successive rainfall, the Calaveras takes on a turbulent character, but when the rains have ceased, the Calaveras river, as a river, has also ceased. Except during the rainy season, it is a river only by courtesy, and carries a volume of water so small as to be negligible for any practical use.

During the cross-examination by the defendant of the witness Hogan, the defendant offered, and, over the objection of the plaintiff, the court admitted in evidence, a report signed by Harry Barnes, purporting to deal with flood problems of the Calaveras river, dated October 31, 1919. This report takes up and gives the opinion of the writer upon the subject of controlling the flood waters of Calaveras river, it sets forth a description of the country involved, its physical characteristics, the improvements in the way of levee building, and other matters relating to the waters passing over San Joaquin county, contains tables showing annual rainfall, as compiled by the United States gauging station covering the period of years referred to by the witnesses and also plats or maps, copies of which were elsewhere admitted in evidence. This report is too lengthy to be set out in extenso, and the following excerpts are taken therefrom to illustrate the general character of the report:

"The interest of the federal government is primarily that of navigation on the San Joaquin river, and the maintenance of navigable waters to the city of Stockton. The San Joaquin river has a difficult debris problem to contend with.

For maintaining a necessary deep water channel in that stream, thousands of dollars are spent annually for dredging, straightening channels, etc., and upon the assumption that prevention is better than cure, it is realized that the ideal way to control the debris is to prevent it from reaching the river at all, if such a scheme be economically feasible. Prior to the construction of the Stockton diverting canal, completed in 1910, the government had expended for dredging in a period of 23 years, up to 1908, the sum of \$233,000 to maintain open channels in Stockton and Mormon sloughs. The debris thus dredged came principally from the Calaveras river floods, and the expenditure of about \$10,000 per year for this purpose, capitalized at 5 per cent., represents interest on \$200,000. While it is true that since the construction of the canal the government has been relieved of much of this dredging work in Stockton and Mormon channels, due to the fact that silt has been deposited in the canal and the lower Calaveras river, such use of the diverting canal cannot be considered as a permanent solution of the debris problem. The canal is now filled several feet deep with sediment and its capacity greatly reduced, and it is apparent that a continuation of its effectiveness will necessitate extensive and regular dredging of the canal and lower Calaveras river before many years elapse. * * *

"The city of Stockton lies directly in the path of the Calaveras flood waters. Levees have been built around the city to keep out the high water of the Calaveras and San Joaquin rivers, but these levees do not afford complete immunity from danger. The levee built in connection with the construction of the diverting canal saved the city from a most disastrous flooding from the east side in 1911, but the city continues to be menaced by Calaveras water from other directions. Aside from the actual saving of property due to keeping out the flood waters, it is unnecessary to enlarge upon the advertising value to a city to be able to assure investors and prospective residents that flood dangers have been removed. As an instance of this, it is stated that a considerable portion of the growth of Stockton's population and industries of recent years has been due to the partial security afforded by the presence of the diverting canal levee east of the city.

"It should also be emphasized that the prosperity of a city is in direct ratio to the prosperity of the surrounding country, tributary to that city. Stockton's interests are inseparable from the interests of the agricultural country surrounding her, of which territory she is the business and shipping center, and to the extent that flood control on the Calaveras river contributes to the upbuilding of that country. Stockton has an indirect but very definite interest in the project. * * *

"The flood of 1911 was the highest of which we have record, and is stated to have been the greatest within the memory of old settlers—since that of 1862. Aside from the flood of 1911, however, it will be seen that floods of between 30,000 and 40,000 second feet may be considered of possible occurrence during any season. After the March rains the discharge rapidly decreases, and during the summer and autumn months the flow is practically nothing, and does not pick up until the storms of the following winter.

"Although the records of the U. S. Geologic Survey only extend from 1907 to date, it is fortunate that within that period have occurred seasons of both maximum and minimum runoff. As stated above, maximum conditions obtained in 1911, while the successive seasons of 1912 and 1913 comprised the dryest two-year period experienced in California for many years. 1908, which was also a dry year, was immediately preceded and followed by seasons of abnormal rainfall, and so the scarcity was not so noticeable as in the case of the two-year period of 1912-1913. * * * The specific location of the above area, comprising some 34,000 acres between the diverting canal and Bellota, is noted simply to give an idea of the magnitude of a feasible-sized irrigation project which could utilize the reservoir in conjunction with flood control. The use of the water is not limited by the topography to this area, however. If the farmers of this region do not wish to use the water there is plenty of land otherwise north of the Calaveras river and south of Mormon slough that would be benefited by a gravity irrigation supply, and might perhaps be glad to get it.

"In an irrigation project comprising 34,000 acres of good land it is probable that 90 per cent. or 30,600 acres will be under irrigation when fully developed. Figures are based upon the assumption that half the area goes into alfalfa and other crops requiring considerable water, and half put into fruit trees or vines. It is assumed that 2½ acre-feet per acre net per year will be required for the alfalfa, and 1.0 acre-foot net will be used on trees or vines. This gives a net requirement for the project of 1.75 acre feet per acre, totaling 53,550 acre-feet, or practically 54,000 acre-feet annually. Estimating that losses between the reservoir and the land to which the water is applied amount to 40 per cent. of the amount of water available, the gross requirement for the district will be 90,000 acre-feet per year. The water should be available for a season of six months. Using about 25 per cent. of the total during each of the months of maximum demand would require a canal with a capacity of 375 cubic feet per second at the head, or 15,000 statute miner's inches.

"This additional to the dam and reservoir will add to the cost of the project as outlined for flood control alone by the following amount:

Additional masonry in dam, 60,000 cubic yards at \$8.....	\$480,000 00
Additional acreage in reservoir, 1,000 acres at \$25	25,000 00
	\$505,000 00
Contingencies, 15 per cent.....	75,750 00
Total	\$583,750 00

"For the irrigation of a tract of 34,000 acres this is at the rate of \$17.17 per acre. Construction of canals and laterals to this tract will probably cost close to \$25 per acre, making the cost for irrigation about \$42 per acre. This latter estimate of canals and laterals is a general figure, and can only be determined accurately by a survey of the ditches proposed and ascertaining the yardage of material involved, but the figure given above is considered conservative.

"The details of the administration of the combined interests of flood control and irrigation

would depend considerably upon whether the irrigation area lay within or without the flood control district. In any case it would doubtless be better to have two separate organizations, although the duties of the officers could often be combined and certain overhead expense thus eliminated.

"Following is a brief summary of the matter of the foregoing report:

"(1) The interests involved in the question of Calaveras river flood control are, United States government, state of California, county of San Joaquin, city of Stockton, public utilities operating within the flooded or menaced territory, and agricultural lands flooded or menaced.

"(2) The Calaveras river watershed extends to an allottee of 6,000 feet with a mean elevation of about 2,000 feet. It embraces 500 square miles above Bellota, 395 square miles above the Jenny Lind gauge of the U. S. Geologic Survey, and 368 square miles above the Valley Springs dam site.

"(3) Records of the flow of the Calaveras river kept by the U. S. Geologic Survey are available from 1907 to 1918. The record of the big flood of 1911 of the U. S. Geologic Survey is accepted as the best data available thereon, and matter of this report is based upon that record. The above period of observation of the river includes the consecutive dry seasons of 1912 and 1913, upon which figures of storage requirement for irrigation are based.

"(4) A comparison of a by-pass plan of flood control with that of utilizing the Valley Springs reservoir indicates the latter plan to be the more feasible.

"(5) An analysis of the reservoir requirements finds as follows, for full flood control: Capacity of channels below reservoir placed at 12,500 cubic feet per second. Capacity of reservoir, outlets, 7,500 cubic feet per second. Capacity of reservoir, 163,000 acre feet. Area of reservoir, 2,900 acres. Maximum height of dam, 151 feet.

"(6) Diamond drill borings made at the Valley Springs dam site indicate a feasible and sufficient foundation thereat.

"(7) Figures on a partial protection scheme are offered, based upon reservoir capacity to accommodate yearly or normal floods, but not the unusual flood such as that of 1911. For this plan is found as follows: Capacity of reservoir, 89,000 acre-feet. Area of reservoir, 2,100 acres. Maximum height of dam, 121 feet. Estimated cost of full protection plan, \$1,613,450. Estimated saving in first cost of partial protection over full protection plan, \$477,000.

"(8) It is not considered that this saving is justified on account of the great damage that would be caused by the abnormal floods.

"(9) The proposed flood control district includes 90,800 acres flooded or menaced by the Calaveras river water. The status of respective sections of this district is explained in the body of the report.

"(10) It is not assumed that all lands within the proposed district will be equally assessed. It is expected that some plan such as that used by the state reclamation board in large districts will be applied to determine the rates of taxation on different lands for benefits conferred by flood control.

"(11) It is considered that the problem of lands flooded or menaced by the present operation of the Stockton diverting canal is a ques-

tion separate and apart from the general flood control scheme, and one that logically should be settled by the parties at interest without involving the proposed district further than that the general relief offered by such a district may make differences between those parties easier to settle.

"(12) A capacity of 284,000 acre-feet in the Valley Springs reservoir will provide storage for sufficient water to irrigate 34,000 acres through a two-year dry period such as 1912-1913, in addition to reserving sufficient capacity to safely control any flood of the magnitude of that of 1911. Such additional storage is estimated to add to the cost of the flood control project \$583,750, or at the rate of \$17.17 per acre on a 34,000-acre tract for irrigation storage alone. A canal and lateral system to these lands will bring irrigation costs up to about \$42 per acre."

This report refers also to the diverting canals built by the United States government to protect the city of Stockton from overflow and its insufficiency in that respect, also takes up the subject of constructing a by-pass, and finally concludes with the general summary which we have herein set forth. The defense also offered, and, over the objections of the plaintiff, the court admitted in evidence, a report made by Charles E. Ashburner to the city council of the city of Stockton on the subject of flood protection for the city of Stockton and its vicinity. This report includes copies of tables showing the runoff of the waters of the Calaveras river for a number of years, also takes up the subject of irrigation, the organization of possible irrigation districts, and the writing off of the initial expense of the cost of building the restraining dam for flood control purposes by the values created in the stored water. This report is also too long to be inserted herein, but we copy therefrom the following excerpts:

"We recognize that Stockton is menaced by flood waters from two sources, the Calaveras and its tributaries, and the Little John Creek (including other small streams having their sources between the Calaveras on the north, and the Stanislaus on the south). The greatest menace confronting us to-day, however, is from the flood waters of the Calaveras river. The plan submitted proposes to protect the city from all flood menace and to furnish water for beneficial uses. Keeping the fiscal situation in view, it is proposed to eventually write off a large portion of the initial expenditure for flood control by the values created in the stored water; to initiate the work and to share these waters with adjoining communities upon fair and equitable terms. The dedication of irrigation water upon lands immediately adjacent to Stockton provides for all time the municipal supply of such area when later annexed by the expansion of the city. The dedication of water on neighboring lands and communities assures the growth of a higher and more productive contributory territory. Having in view the ultimate prosperity of the community, the question of flood control, water supply, and irrigation will be treated under the following chapters: * * *

"Damsite is located on the southwest quarter of section thirty-one (31) in township four (4) north, range eleven (11) east, M. D. B. & M. The site is in a narrow canyon between hills that rise about 200 feet above the bed of the river. The south bank rises steeply at an angle of about 30 degrees, while the north bank is flatter. The distance from hill to hill at the 690 foot elevation being approximately 1275 feet. The site is well adapted for storage purposes, and has a maximum capacity of 350,000 acre-feet. The dam is described, 160 feet in height, in addition to affording regulating capacity against flood waters to the extent of 163,000 acre feet, which is the amount estimated to be necessary to reduce the flood waters to 7,500 cubic feet per second, also furnishes storage for 37,000 acre-feet of water to be put to beneficial uses, such as domestic water supply and irrigation.

"The surplus water insures for all times a water supply for the city of Stockton, but will not be needed for several years, and can be used in the interim for irrigation purposes, thereby reducing the cost of flood prevention. The matter of augmenting the irrigation supply in order to release water for the municipal purposes is treated in subsequent chapters. The analysis of the matter is thus: We have flood protection and storage space for water for municipal purposes and for irrigation. * * *

"To any one who has studied conditions in the San Joaquin Valley, it is unbelievable that, with water available at the above cost, that an irrigation district that would use all this water would not be formed within a very short time. * * *

"It should not be necessary to direct one's attention to the value of water to the lands in this community, or to the lands which could be irrigated from this source of supply. One need only look at the marvelous results which have been accomplished in the South San Joaquin, Oakdale, Turlock, Modesto, and other irrigation districts of the San Joaquin Valley. All irrigable land below the 600 foot elevation lying between the Mokelumne river on the north, and the South San Joaquin and Oakdale districts on the south, are within the economic reach of this supply.

"In the foothill district of the Sierras lies a thermal belt where mild and equitable temperatures prevail throughout the winter, and on which citrus fruits thrive. The soils in the valleys of this foothill region in Calaveras county are of a sandy loam character, and are well adapted to the raising of deciduous, as well as the citrus fruits. One need only to look to the marvelous development of the fruit industry in Placer county around Loomis and Auburn. Lying in San Joaquin county below the 150 foot elevation is a vast acreage which should be under irrigation. North and east of Stockton in the vicinity of Lodi and Lockeford is a highly developed territory where land values of \$1,000 to \$1,500 an acre are not uncommon, and upon which irrigation by pumping is expensive and increasingly so with a falling water table, which has been very noticeable of late. Unless an economical gravity supply of water can be obtained for these lands, there must be a great depreciation in the value of the land and in the crops derived from the same.

"It is very noticeable that the crops raised in

this section of San Joaquin county are seasonal, and do not bring in the steady monthly returns that would be derived from a more extensive dairy industry, which fact, coupled with the condition that makes it necessary for the state of California to import a large portion of its dairy products, would lead us to believe that, with sufficient water, an industry can be built up in this section of the state that will be reflected in the general business of the community. Lying between the Calaveras river and the Mormon channel is a large acreage of high productivity and increasing land values. In this territory the deciduous fruit and nut industry is rapidly developing. This territory like the territory in the vicinity of Lodi and Lockeford must of necessity resort to irrigation if productivity and land values are to be maintained. It is inconceivable that the residents of Stockton and vicinity and those of the foothill districts of Calaveras county should fail to see the enormous community benefit derived by us all from taking advantage of a situation which gives us too much water at one time in the year and too little at another.

"It is believed by some that water can be stored in the Mokelumne river for the purpose of developing electric power and irrigation. It is only necessary to make a thorough study of the situation to be convinced that, although these things may be done, the enormous cost of storage of water per acre-foot on the Mokelumne, when compared with the Calaveras, makes the Mokelumne project financially unsound. * * *

"Is it possible that further indorsement of this method of control could possibly be required by any one? It seems hardly necessary to speak of the small ultimate outlay for this project as security for the property and peace of mind of the citizens of Stockton."

[1] The theory upon which the Barnes report was admitted appears to be that it was referred to by the witness Hogan, in his testimony, in that he had copied certain tables therein contained, which were copies of tables made by the United State gauging officers, showing the run off of the Calaveras river, and also had copied certain of the maps contained in said report, which were, in turn, copies of government maps, and also that upon cross-examination counsel for the defense had questioned the witness as to certain portions of said report. The maps and tables concerning which the witness was examined were admitted without objection, and specific portions showing the area of the watershed were likewise admitted. The remainder of the report, which includes all the excerpts which we have set forth, were admitted over the plaintiff's objection. It is further argued that the Barnes report is admissible under subdivision 6 of section 1918 of the Code of Civil Procedure. We do not find any of these reasons tenable. The Barnes report does not purport to be a state document. It shows upon its face (page 6) that it was denied legal authority by the state Legislature. It also shows upon its face that it is a compilation of statistics and is the opinion of an engineer by

the name of Harry Barnes, based upon the investigations conducted by him, under his statement that it was made by him at the direction of W. F. McClure, state engineer.

[2, 3] No objection was made to the introduction of this report on the ground that it was not properly authenticated; but that fact does not make the opinions and theories contained in the report admissible in evidence in this case, because of the further fact that the report is not an official document as that term is used in section 1918. It was not made in pursuance of any duty enjoined by law, but, as therein stated, shows that it was expressly undertaken in the absence of such authority, and therefore constitutes nothing more than the private compilation, theories, and opinions and estimates of the writer, Harry Barnes. Had it been made in the line of official duty, in pursuance of an investigation directed by the Legislature or some of the Code provisions of the state, then, and in that case, the authorities cited by the respondent would be applicable, but as it expressly appears to be the contrary, nothing has been called to our attention that would justify the admission of the results of the investigation, conclusions, opinions, and statements of the writer of said report. The case of Vallejo, etc., R. Co. v. Reed Orchard Co., 147 P. 238, 169 Cal. 545, is not authority for the admission in evidence of the Barnes report. A reference to page 571 of the opinion in that case shows the report therein referred to to have been specially authorized by the provisions of the Political Code. Referring to section 332 of article 12 of the Political Code, it will be noted that provision is made for the reports of certain officers of the state to the governor. The officers therein referred to are to all intents and purposes the heads of the respective departments of the state government. These reports are then submitted to the state board of examiners, which board may, in its judgment, direct the publication thereof. The report in question was not made by the head of any department; was not made by the state engineer, as head of the department of public works. No section of the Political Code relating to the department of public works has been called to our attention that would make the report by a subordinate officer or field officer to his superior, or whatever designation may be applicable to the position occupied by Mr. Barnes, a public document admissible in evidence in controversies between independent parties. These considerations show the opinions and statements of Mr. Barnes to be mere hearsay so far as this case is concerned, and wholly inadmissible.

We will next consider the report made by Charles E. Ashburner, city manager of the city of Stockton, to the city council of the city of Stockton, bearing date of February, 1924. Respondent is in error in stating that only a

general objection of incompetency, irrelevancy, and immateriality and hearsay was made to the whole of said report. If such were the case and any portion of the report were admissible, then it might be that a general objection would be insufficient, but an examination of the transcript shows that between five and six pages are covered by the special objections urged by counsel for plaintiff. These objections take up the Ashburner report chapter by chapter and page by page, particularly specifying the portions of the report so specifically objected to, and calling the attention of the court to the particular portions of the report so objected to. Under these circumstances, if any of the chapters, paragraphs or pages of the report are inadmissible, the court erred in its rulings.

[4-6] In support of the admissibility of the Ashburner report, the respondent urges two propositions: (1) That it was included in and made a part of certain resolutions adopted by the city council of the city of Stockton; and (2) that it is admissible as being an admission against interest by the city of Stockton, the plaintiff in this action. The first resolution referred to adopted by the city council April 24, 1924, among other things, contains the following, "That it concurs in that portion of the report of the city manager providing for a dam to control the flood waters of the Calaveras river and for a levee protecting the city against the waters of Little John Drainage System"; and a further resolution adopted May 5, 1924, by the city council of the city of Stockton reciting the formal resolutions and containing the following section:

"That the public interests and necessity demanded the acquisition, construction and completion by the city of Stockton of certain municipal improvements, to wit, the construction of a restraining dam on the Calaveras river in the southwest quarter (S.W.¼) of section 31, township four (4) north, range eleven (11) east, Mount Diablo Base and Meridian, for the protection of the city of Stockton from floods and for the use of said impounded water for such purposes as shall not be inconsistent with the purposes mentioned in said resolutions."

Another one of these resolutions purported to adopt the Ashburner report further than the first resolution concurs in that portion thereof relating to flood control of the waters of the Calaveras river for protective purposes, and if the first resolution which does concur in the Ashburner report in so far as flood control is concerned be treated as an adoption thereof and as a part of the resolution of the city council, that would not admit the other portions of the report, which are merely arguments and opinions relating to other matters and which therefore became purely hearsay statements and opinions by Mr. Ashburner. Nor can we agree with counsel that the Ashburner report, extracts from which we have set forth herein, constituted admissions by the city council. At the time in question,

neither Ashburner nor the city council was in a position to make any admissions against the interest of the city. They had no authority at that time to undertake the work contemplated. It was a matter subsequently to be passed upon by the electors of the municipality. It is one of the cardinal principles of an admission that the party speaking must be in a position of authority to speak. The cases relied upon by the respondent in his position upon this question do not seem to us to be in point. In the case of Los Angeles City Water Co. v. Los Angeles (C. C.) 88 F. 720, argued at length in respondent's brief, the question presented was primarily the data upon which the water rates of the city of Los Angeles were fixed. It appears that the committee examining and passing upon the schedule of rates had taken as its guide data and rates theretofore fixed. The court said:

"A corporation, municipal as well as private, is bound by the declarations of its officers, where such declarations accompany, and are explanatory of, an act done by the officer in the scope of his authority."

The committee were in the performance of duty expressly enjoined upon them by the city, and the statements in their reports that they had followed the rates charged in July, 1868, were explanatory of the rates they had established. These matters were therefore held admissible, as data upon which the committee had acted. Likewise are the cases relating to declarations made by a state commissioner when engaged in the performance of some particular duty to show knowledge of what might result from the performance of that particular duty. Admissions which show knowledge on the part of officers, as in the case of *Weir v. Plymouth*, 148 Pa. 566, 24 A. 94, have frequently been admitted, where it is necessary to bring home knowledge to an officer charged with neglect of duty, or a defective street or sidewalk or instrumentality under the control of or belonging to a municipality. These cases are entirely beside the question, as presented in the consideration of the admissibility of the Ashburner report. The city council, by its resolutions, explicitly excluded every other consideration than that of flood control in its resolution concurring in the report made to the city council. The fact that the city council in a subsequent resolution used the words, "for the protection of the city of Stockton from floods and for the use of said impounded water for such purposes as shall not be inconsistent with the purposes mentioned in said resolutions," does not open the door for the admission of hearsay testimony or the opinions or conclusions of Mr. Ashburner as to the feasibility of using the impounded waters for irrigation purposes, or as to the revenue that might be derived for power purposes, or for purposes of irrigation. The sale of such waters might possibly, as said by Mr. Ashburner, "eventual-

ly write off a large proportion of the initial expenditure for flood control by the values created in the stored waters"; but this statement, in addition to being hearsay, as introduced in this case, is pure speculation, and is entering upon a field condemned by an almost unanimous current of authorities dealing with eminent domain proceedings. While the general objection to the introduction of this testimony, that it is incompetent, irrelevant, immaterial, and hearsay, might not have been sufficient to exclude that portion of the Ashburner report concurred in by the resolutions of the city council of the city of Stockton relating to flood control, as heretofore stated the record shows that the report was objected to, page by page, chapter by chapter, so as to call the attention of the court to the specific parts of the report which could not, under any view of the case, be considered as relating merely to flood control. The figures relating to what it would cost per acre to furnish water for irrigation purposes were withdrawn from the offer of the report in evidence; but the fact of profit hoped to be derived from the venture was left before the jury for its consideration, as shown by the excerpt above quoted relating to the writing off of the initial expense. In this particular, we may again refer to the Barnes report where the cost of furnishing water for irrigation under the plan proposed by the testimony of the defendant's experts, above referred to, is estimated at \$42 per acre. The Barnes report differs from the testimony of the experts only in that the proposed dam is given an altitude of only 190 feet instead of 200 feet. From these reports and the testimony of the experts, the entire project was before the jury as clearly as could be in the form of a completed enterprise. The dam was there before them, 200 feet in height, canals on either side of the river came into being, conducting water down to a point near Jenny Lind, where, through penstocks, the water was being dropped from 200 to 250 feet upon waiting water wheels, which, in turn, gave motion to great dynamos, producing a current carrying light and heat to thriving cities in the valley while the impounded waters, having discharged this duty, were carried forward through diverting ditches to some 34,000 acres of lands lying below the foothills at an approximate cost of \$42 per acre, a limited portion of the water being taken through conduits to the cities needing impounded water for municipal purposes, the cost of the enterprise being gradually written off by the revenue derived from the sale of the impounded waters for power and irrigation purposes. It is true that this picture existed only on paper, but the reports referred to enabled the jury to visualize the speculative project as an actuality and measure the market value of the flowage easement sought over the defendant's lands according

to the standard thus presented. These reports follow directly in line with the predicate set forth in the question asked of some of the expert witnesses, which we have heretofore quoted, and again insert here the following excerpt:

"Q. This is an action by the plaintiff in this case to obtain a perpetual easement on the Vote lands lying below the 680-foot contour for the purposes of protecting the city of Stockton by flood control from floods and for the purpose of using the impounding water in such a reservoir for such purposes as shall not be inconsistent with the purposes of flood control," etc., and unfolded to the jury a speculative purpose of using the impounded waters.

[7, 8] All the authorities agree that the purposes for which the water is to be used by the plaintiff in eminent domain and the beneficial purpose to be derived therefrom are not to be taken into consideration in determining market values. Availability may be shown, but the purposes and uses, necessity and values of or to the plaintiff in such actions are wholly irrelevant matters. These matters all tend to base the estimate of market value on what the plaintiff can afford to pay rather than forego the exercise of the right of eminent domain.

Again, in the testimony of the witness Polk, the same speculative testimony appears where reference is made to the possible growth of the city of Stockton and the estimated quantity of water that would be necessary to supply the wants of that city 20 years hence. The same is true of the testimony of the witness Ellis, where he describes his familiarity with the growing demands for water by the municipalities in the valley, and stating the situation in the city of Stockton which injects also the needs of said city into the question of determining market values.

The voluntary statements of the witness O'Shaughnessy as to the condition of the municipal water supply of the city of Stockton, and as to the revenue that might be derived by the city of Stockton from the sale of the energy contained in the impounded waters for power purposes, not having been made the subject of a motion to strike out, are not considered herein, but this does not obviate the errors in the admission of testimony covering practically the same subjects over the objection of appellant, as elsewhere referred to in this case.

Both parties to this controversy place reliance upon the opinion in the second appeal of the case of San Diego Land, etc., Co. v. Neale, 25 P. 977, 88 Cal. 50, 11 L. R. A. 604. This case has been considered in subsequent decisions of the Supreme Court, notably in Sacramento, etc., R. Co. v. Heilbron, 104 P. 979, 156 Cal. 408. The court, in the Neale Case, thus sets forth its views of the law applicable to situations such as are presented here:

"The cost of works necessary for the utilization of the land for reservoir purposes was an element in the calculation as conjectural and speculative as would be the cost of a railroad and running stock necessary for the operation thereof in fixing the value of land condemned for railroad purposes. The quality and condition of the lands to be affected was as foreign to a legitimate estimate of the market value of the land as the size and growth of a city on the line of the railroad would be in fixing the value of land taken for railroad purposes. The necessities of the public are never taken into consideration in fixing the value. They are an element which must be proved before the land can be taken, but are never an element of the question as to compensation. The proportion which the defendants' land bore to the remainder of the plaintiff's reservoir, and the quantity of water which would be stored by use of the defendants' land in connection with the land of plaintiff, and the value of the water as a salable commodity, were clearly improper elements to be considered. *Tide W. Canal Co. v. Archer*, 9 Gill & J. [Md.] 481, and other cases.

"The question was, not what the property was worth to a person intending to acquire it and the dam site and the remainder of the reservoir by purchase or condemnation for the purpose of supplying water over the territory tributary to the system, but what was the market value of the property itself. In other words, what the defendants could have obtained for their land if it had been offered for sale in the market, a reasonable time being given within which to make the sale. The plaintiff must compete in the market with bona fide purchasers generally, but its necessities cannot be taken advantage of. So far as the value of the land in controversy may have been increased to purchasers generally by the construction and use of the plaintiff's dam and reservoir, or as a part of the entire reservoir site, such fact should be considered, but the value of the land when used in connection with the plaintiff's land cannot be taken as a criterion, for this would be taking the value to the plaintiff as the measure of compensation. The jury had a right to consider the fact, in determining the market value, that the land in controversy was in proximity to a dam site, and to consider its adaptability for reservoir purposes, and to determine whether or not its market value had been enhanced by improvements put upon adjoining property; but for the reasons stated its adaptability for reservoir purposes should not have been considered 'in connection with such dam site and other adjacent lands.' * * *

"It is sufficient to say that any facts showing the nature of the land in controversy, and its adaptability for reservoir purposes, may be shown. The area of the watershed and amount of water were matters proper to be considered; for a reservoir would be useless without water. That there was land irrigable from the reservoir, and cities and towns which were being supplied with water from wells, were matters not only tending to show that it was a practical reservoir site, but bearing directly upon its value. The condition of the property, the uses to which it may be put, having regard to the existing advantages for making a practical use of the property, and such advantages as may be reasonably expected in the immediate future,

are all matters for consideration in estimating the value of the lands (*Boom Company v. Patterson*, 98 U. S. 403 [25 L. Ed. 206]); but to attempt to ascertain the value by estimating the cost of works necessary for its use for a particular purpose, the cost of operation, prospective sales and estimated profits, increased demands through growth of population, etc., requires 'a degree of refinement in the measure of values which seem to us totally incompatible with the gross estimates of common life. * * * The gross estimates of common life are all that courts and juries have skill enough to use as a measure of value. All other measures are necessarily arbitrary and fanciful.' *Searle v. L. & F. R. R. Co.*, 33 Pa. 64."

In the *Heilbron Case*, after a review of a number of the preceding authorities and of the opinions in the *Neale Case*, the law applicable is thus stated:

"The present market value of the land is the measure of damages, and not its value in use to the owner or to the parties seeking to condemn. There is nothing in the *Neale Case* indicating a different rule. The availability of the property for any particular use may be shown, and in the present case all the facts bearing on the use to which the building was adapted and for which it was being used were shown.' It is seen, therefore, that this court by its latest utterances had definitely aligned itself with the great majority of the courts in holding that damages must be measured by the market value of the land at the time it is taken, that the test is not the value for a special purpose, but the fair market value of the land in view of all the purposes to which it is naturally adapted; that therefore while evidence that it is 'valuable' for this or that or another purpose may always be given and should be freely received, the value in terms of money, the price, which one or another witness may think the land would bring for this or that or the other specific purpose is not admissible as an element in determining that market value. For such evidence opens wide the door to unlimited vagaries and speculations concerning problematical prices which might under possible contingencies be paid for the land, and distracts the mind of the jury from the single question—that of market value—the highest sum which the property is worth to persons generally, purchasing in the open market in consideration of the land's adaptability for any proven use."

A reference to the testimony which we have heretofore set forth and the predicate contained in the questions asked, as well as the answers of the witnesses, show that their estimated market value of the land was really an estimate of what they thought the land was worth for a specific purpose. The two purposes were set out and the statement incorporated in the question propounded to the witnesses relative to market value.

[9-11] The opinion in the *Neale Case* shows that "the necessities of the public are never taken into consideration in fixing the value." The necessities of the city of Stockton were presented to the jury in this case, as shown by the testimony, relative to its water supply, as hereinbefore set forth. Likewise, the

growth of the city of Stockton is a subject held inadmissible by the Neale Case. The Heilbron Case is directly in point in holding that the value in use of the land sought to be condemned is inadmissible. The reports which were admitted in this case set forth the value in use, as we have heretofore shown.

[12] As said in the concurring opinion of Justice Harrison in *Spring Valley W. W. v. Drinkhouse*, 28 P. 681, 92 Cal. 528:

The land "may be adapted for a reservoir site, but its value for such a purpose would be qualified by the prospect, greater or less, of any one seeking to build such a reservoir. Its market value is affected by such contingency, but is not to be determined by the fact that the party seeking to condemn it has already determined to build a reservoir. To allow that element to enter into the computation would be to make the plaintiff's necessity the owner's opportunity."

[13-17] Excluding the Ashburner report and the Barnes report and the elimination of the speculative parts of the testimony given by the experts, to which we have herein specifically referred, we do not find anything in the record in this case which violates the rule laid down by the Supreme Court in the Neale Case as limited and applied by the Heilbron Case. The fact that there was a watershed upon the Calaveras river capable of affording a runoff of rainwater sufficient to fill a reservoir containing 350,000 acre-feet of water, that there were lands susceptible of irrigation lying within a reasonable distance of the reservoir site and also cities or municipalities in the San Joaquin Valley, were matters which any one contemplating a purchase of the premises in question might very well take into consideration in determining the value of the land which he was about to buy, and, if these are matters which an intending purchaser might consider, they are proper matters to be laid before the jury. The fact, also, that the highest use of the land to which it was adapted for such purposes would be subserved by a 200-foot dam, we think, is also admissible. Testimony on the part of persons qualified to speak on such subjects was also proper to be laid before the jury. The fact that the party seeking to condemn was not proposing to make the highest use of the condemned property is not a matter to be taken into consideration in determining values, any more than the value of the use of the property to the condemnor is likewise not to be considered. Both of such elements are inadmissible. The rule for determining values is set forth in the Heilbron Case, *supra*, is also fully set forth in the case of *Brack v. Mayor and City Council of Baltimore*, 93 A. 994, 125 Md. 378, Ann. Cas. 1916E, 880, following the rule laid down in the Heilbron Case.

[18, 19] The Brack Case, *supra*, is also authority for the proposition that adaptability of a defendant's land for reservoir purposes

may be taken into consideration, although his land alone does not constitute an entire reservoir site and a complete reservoir site requires the joining of his land to a number of other tracts of land belonging to different owners. The record in this case shows that the lands included within the proposed reservoir site are owned by at least 32 different persons; but we do not find in the transcript anything further that would lead to the declaration, as a matter of law, that it is impractical to join all of the lands with the lands of the defendant to form such reservoir. In the case of *Medina Valley Irr. Co. v. Seekatz*, 237 F. 805, 151 C. C. A. 47, the court, in its opinion, sets forth an apparently contradictory ruling. It was there said:

"The defendant was entitled to be paid the value of his land as it was held and owned by him, but was not entitled to a proportion of an advance in value of a much larger tract due to a union of his land with the lands of a number of other proprietors. The contest in this case was enough to show that it was not to be assumed that it was reasonably practicable, without an exercise of the power of eminent domain, to bring together into one ownership the sundry parcels of land required to constitute the reservoir site, the value of which was deposited to. The defendant was not entitled to share in an enhancement of value attributable to an expected exercise of that power"—citing a number of cases.

The facts upon which this holding is predicated are not very clearly set forth in the opinion. It does appear, however, that a different rule as to ascertaining values in such cases was followed than that prevailing in this state, in that the value of the lands for the purposes for which it was being condemned, and not its market value, was really being considered. It appears also that the testimony admitted covered such questions as the estimated returns upon the land when used for reservoir purposes. What the facts were tending to show that the lands could not be joined in one ownership does not appear. In the case of *Board of Water Supply*, 109 N. Y. S. 1036, 58 Misc. Rep. 581, and authorities having to do with the Ashokan reservoir site, cited by appellant, the number of property owners was so great and the interests in the lands necessary to be taken and united in one interest to constitute a reservoir site were so diversified, contingent, and far-reaching, it was apparent to the court that the value of any particular site, lot, or tract of land as part of a reservoir could not be enhanced in its market value by reason of the obstacles necessary to be overcome in uniting the lands in one ownership. The facts of this case are so dissimilar from the one at bar that we think the conclusions there reached are not controlling here. We think the true rule applicable to this case is set forth in the case of *Gearhart v. Clear Spring W. Co.*, 51 A. 891, 202 Pa. 292. There the Supreme Court

of Pennsylvania holds this question to be one of fact. We quote from the opinion of the court in that case:

"The location alone fixed the value. Whether the land was available for the use testified to was a question of fact, and the argument directed to the court against the admission of the testimony should have had great weight with the jury in determining the value. The question was submitted with instructions that if the land, by itself, could not be used for building a reservoir, an estimate of its value for that use in connection with other properties which the plaintiff did not own, and could not acquire, should be disregarded by the jury."

[20] If it should appear in the case at bar that there are other lands which the defendant does not own and cannot acquire, then and in that case, which is a fact for the jury to pass upon, the value of the land for reservoir purposes should be eliminated. In other words, the practicability of uniting the lands in one ownership for reservoir purposes, and the cost and expenses thereof, and the time consumed in so doing, are elements of fact which would bear upon the market value of the premises in question, and, we think, would be considered by any bona fide purchaser of the land purchasing for any purpose for which the land is reasonably adapted, and where the land is only a part of a larger tract owned by a number of individuals, all of these facts should be submitted to the jury under proper instructions to take into consideration whether the location of the land does or does not add to its market value by reason of its adaptability for reservoir purposes when joined to other lands. It is apparent that in and of itself the tract of land belonging to the defendant is not adapted for reservoir purposes, and hence no market value was affected by such adaptability. It is only when such union has been effected and the practicability of such union is a matter of fact. These questions, we think, were substantially covered by instruction No. 29, given by the court to the jury. Which instruction sets forth the law as favorably for the plaintiff as the testimony and the transcript warranted.

[21] We do not think it necessary to go into the question of alleged errors by the court in permitting hypothetical questions to be answered, where the question simply set forth as a basis the hearing of testimony of other witnesses by the expert, and upon whose testimony the opinions were based, further than to say that the better practice is to set forth

in the hypothetical question the facts upon which it is sought to illustrate the opinion of the witness being examined. In other words, if error has been committed in this particular, it is not sufficient, in and of itself, to warrant reversal.

[22] Our attention has been called to section 4½ of article 6 of the state Constitution, in support of the verdict rendered by the jury. It is set forth that the jury must have disregarded the values fixed by the experts in that they set a valuation of about \$240 per acre upon the 66.6 acres, while the jury allowed only \$100 per acre. There is some testimony to the effect, outside of the testimony of the experts introduced by the defendant, that the land was worth \$100 per acre. Some of the witnesses testified it was worth \$150 per acre. On the part of the plaintiff in rebuttal much testimony was offered to the effect that the land was grazing land and was worth but little over one-fourth of the sum allowed by the jury; that the improvements were not worth anything like the sum awarded by the jury, and that the total valuation was only about one-half the damages awarded by the jury. Under these circumstances, we do not very well see how it can be held that the inadmissible testimony to which we have referred to be other than prejudicial to the rights of the plaintiff in this action. The testimony of the experts, which we have hereinabove set forth and referred to, except as to the limited parts specified, we think admissible, but, when supplemented by the Ashburner and Barnes reports, an entirely different and completed picture was presented, carrying with it the semblance of official or state authority. We have not discussed the question as to the qualification of the experts or others to give opinions, as the law on that question seems well settled and may not be presented in any subsequent trial. What we would have to say could not be other than a repetition of the rules of law already well established.

[23] The errors set forth necessitate a reversal. Under the law, a landowner is entitled to the full value of his land, when finally ascertained, exclusive of costs. For that reason costs on appeal herein must be charged to the appellant.

It is hereby ordered that the judgment herein be and the same is hereby reversed, and the respondent will have and recover his costs on appeal.

We concur: FINCH, P. J.; HART, J.

76 Cal. App. 352

PEOPLE v. GIMINIANI. (Cr. 1251.)

(District Court of Appeal, Second District, Division 1, California. Feb. 1, 1926.)

Jury 116—Refusal to dismiss panel because judge had reprimanded juror who voted not guilty in trial for similar offense a few days before was not error (Pen. Code, § 1059).

Refusal to dismiss panel from which jury was selected in part because judge had publicly reprimanded juror who voted not guilty in trial for similar offense a few days before was not error, there being no contention that challenge to any individual juror was improperly denied, as the fact that some jurors do not possess the requisite qualifications is not ground for the challenge to the panel under Pen. Code, § 1059.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

William Giminiani was convicted of contributing to the delinquency of a minor, and he appeals. Affirmed.

Charles A. Barnhart, of Los Angeles, and Rollin Laird and Rowen Irwin, both of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., and Irwin W. Widney, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendant was convicted of the crime of misdemeanor, to wit, contributing to the delinquency of a minor. His appeal is from the order denying his motion for a new trial, and also from the judgment. The same action was before this court on a former appeal. *People v. Giminiani*, 232 P. 993.

When the case was called for trial, and before any juror was sworn, the defendant moved "to dismiss the present panel of jurors and draw another, on the ground of prejudice arising from the trial of Benjamin C. Bellomi by the same panel on the same charge as that on which the present defendant is being tried, and because of the statements of the court during and subsequent to such trial." The motion was supported by an affidavit which set forth certain facts concerning the Bellomi Case, which was tried a few days before the trial of the Giminiani Case, and by a jury drawn from the same panel. The substance of the matter was that Bellomi was charged with an offense similar to that charged against Giminiani; that the Bellomi jury was discharged without rendering any verdict, because one John Nord, one of the jurors, voted "not guilty," although the other eleven were in favor of conviction; that the judge of the court, being of the opinion that Bellomi should have been convicted, publicly reprimanded Nord, and discharged him from the panel. The evidence produced before the court on the motion in the present action consisted of said affidavit, plus a statement by the judge. It does not show how many of

the jurors in the Bellomi Case were present when Nord was reprimanded. It does appear that the jury had been discharged, and that the remainder of the panel was not present. The affidavit also shows that the Nord incident was given conspicuous publicity in the newspapers of the county.

The sole ground of appeal is that the court erred in refusing to dismiss the panel from which (in part) the jury was selected for the trial of this action.

"A challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury in civil actions, or the intentional omission of the sheriff to summon one or more of the jurors drawn." Pen. Code, § 1059.

The challenge as offered by the defendant did not relate to any of the matters described in this section. The objections comprised in the challenge were in the nature of a general charge that the jurors composing the panel, or some of them, had become so far prejudiced or unduly influenced by the statements of the judge relating to a similar action that they would not be fair jurors for the defendant in this action. But there is no contention that in the further progress of the trial any challenge of the defendant directed toward any individual juror was improperly denied.

"The fact that some of the jurors selected do not possess the requisite qualifications is not a ground of challenge to the panel, even if such ground had been stated in the challenge." *People v. Richards*, 82 P. 691, 694, 1 Cal. App. 566, 573; *People v. Harris*, 188 P. 65, 45 Cal. App. 547, 550.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

76 Cal. App. 333

GODEAU v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.
(Civ. 5399.)

(District Court of Appeal, First District, Division 1, California. Jan. 29, 1926. Rehearing Denied Feb. 26, 1926. Hearing Denied by Supreme Court March 29, 1926.)

1. Master and servant 405(6)—Evidence held to show employer's refusal to furnish medical treatment to injured employee.

Where employer furnished first treatment 12 days after injury, partial treatment only for a month, and thereafter employee was treated by own physician, evidence was held sufficient to show that employer refused to furnish treatment reasonably adequate to cure and relieve.

2. Master and servant 385(16)—Employer refusing to furnish medical treatment is liable for reasonable expense incurred by employee in securing same.

Upon refusal of employer to furnish reasonably adequate medical treatment, employee

is justified in seeking relief elsewhere, and employer is liable for reasonable expense in securing such treatment.

Application for certiorari by Julius S. Godeau, doing business as the Pacific States Casket Company, against the Industrial Accident Commission of California and another, to review an award under the Workmen's Compensation, Insurance and Safety Act, made to Jesus Yanus, claimant. Award affirmed.

J. Clark Benson and Dunne, Brobeck, Phleger & Harrison, all of San Francisco, for petitioner.

Warren H. Pillsbury and Frederick W. Crawford, both of San Francisco, for respondents.

TYLER, P. J. Certiorari to review an award of compensation benefits made by the Industrial Accident Commission to one Jesus Yanus for injuries received in the course of his employment.

Yanus was engaged as a laborer by petitioner Julius S. Godeau to perform certain services in his casket factory. Both employer and employee were subject to the provisions of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831, as amended). On April 7, 1924, Yanus, while performing his duties, was injured by reason of a board falling upon his left foot, which caused a serious fracture of two of the metatarsal bones.

On July 7, 1924, he filed with the Industrial Accident Commission his application for adjustment of a claim for compensation growing out of said injuries. Several hearings were had thereon, and on March 5, 1925, the commission entered its award. It found, in substance, that the employer had notice of the injuries received by Yanus, and had furnished him, in part, the medical treatment required. It further found that the applicant was entitled to further medical treatment which the employer had tendered, but which was refused by the applicant, in consequence of which his disability was aggravated, but, considering the seriousness of the injury, such aggravation was inconsiderable. It also found that the refusal to receive the additional treatment was unreasonable, and further compensation was discontinued until such time as the applicant should submit to the offered treatment. With reference to the result of the injuries it was found that they caused temporary total disability continuing from the date thereof to and including the 13th day of May, a period of $4\frac{1}{4}$ weeks, exclusive of the waiting period of 7 days, entitling the employee to \$11.12 per week, amounting to \$46.07.

Beginning with the 14th day of May, 1924, the employer furnished to the employee light work at full wage which he was able to per-

form. The commission found that the employee was not entitled to any compensation beginning with the last-mentioned date, or until such time as he should submit to the offered treatment above mentioned. On the 25th day of March, 1925, Yanus filed a petition for rehearing, which was granted on April 15, 1925.

Thereafter the matter again came on for hearing. Further testimony was had, and on July 6, 1925, the commission entered its decision finding that the employer, Godeau, had neglected to seasonably furnish applicant with the medical treatment reasonably required to cure and relieve him from the effects of his injury, thus in effect revoking its former finding that the disability was due to the refusal of Yanus to accept treatment. It further found that the injury caused temporary total disability beginning from its date to and including February 16, 1925, entitling the employee to \$11.12 a week during said period, exclusive of the waiting period of 7 days, and an additional three days during the month of May, 1924, while Yanus was re-employed by Godeau. The amount accrued was found to be the sum of \$484.51 for $43\frac{3}{4}$ weeks. Of this amount \$46.80 had been paid to Yanus, leaving a balance due him of \$437.71, for which amount an award was made. It further found, in substance, that the refusal of Godeau to furnish the required treatment compelled Yanus to seek such treatment elsewhere, for which Godeau was liable, and the commission declared that a supplemental award would be made upon the filing of itemized bills with the commission approved by the medical department thereof.

From this award a petition for rehearing was filed by the employer on July 24, 1925, upon the grounds that the commission acted without or in excess of its powers; that the evidence did not justify the findings of fact; that such findings did not support the decision; and that the award was unreasonable.

The petition for rehearing was denied by the commission, whereupon the present proceeding was instituted, and the same grounds are here urged against the award as were urged before the commission upon rehearing.

It is claimed in support of these contentions that the record discloses that for a period of time after the injury the respondent Yanus refused to accept medical attention which was tendered to him by petitioner, but finally did so, and, in consequence of the treatment received, he was making all reasonable progress toward a permanent and satisfactory cure and recovery under the care of an experienced and competent physician furnished by petitioner, when without notice or a request for a change of doctors, he discontinued taking treatment, and employed a physician of his own, who removed certain supporting bandages, with the result that

the injured foot was subjected to severe and unwarranted strains, causing a pulling apart of the bones of the foot and resulting in an aggravation of the injury. Under these facts it is urged that Yanus was at no time justified in deserting the physician furnished by petitioner without first advising him of any dissatisfaction he may have had to such physician, and requesting a change in doctors.

Conceding that an employer has the right in the first instance to designate the surgeon or physician who shall attend an injured employee, the controversy is not affected by this question, but rather is entirely controlled by the facts of the case, upon which there is a decided conflict.

There is evidence to show that when Yanus was injured petitioner was acquainted with the fact, and told him to go home and write to him concerning his progress. The injury occurred on April 7, 1924. On the following day Yanus advised his employer in writing that he was unable to walk. No attention was paid by Godeau to this communication. On April 16, 1924, Yanus again wrote informing his employer of this fact, whereupon Godeau directed a physician to call upon him. The visit was made on April 19th, a period of some 12 days following the accident. The injured foot was bandaged, but no fractures were discovered by this physician until May 5, 1924, when an X-ray picture disclosed the same. During the period from April 19 to May 5, 1924, Yanus was not directed to refrain from using the foot, nor furnished appliances to keep the foot at rest. There is also testimony to show that the physician furnished by Godeau directed Yanus to return to work on May 14th, a period when his injured foot should have been at rest, as the fractures had not united; that he did so return and worked 3 days, when he was compelled to quit, and in consequence of this wrong advice the disability was prolonged. On May 19th or 20th Yanus called upon Godeau to receive compensation payments and wages for the period of disability and the 3 days' work. On this occasion, according to the testimony of Yanus, Godeau called him a faker, and told him to get out and not call again. Godeau denied that any such incident had happened, but the statement of Yanus finds some support in the testimony of the physician furnished by Godeau, for he testified that he had discovered that there was some trouble between Godeau and Yanus. There is also testimony to show that Yanus was induced to again call upon this physician by an officer of the commission. He did so, and was informed that he was to be sent to a hospital, but later the physician told him that Godeau had concluded to fight the case. There is, therefore, evidence to show that the employee received no treatment from the date of his injury to April 19,

1924. After that time, and until May 20th following, when the trouble occurred, he did receive but partial treatment from his employer. There is also evidence to show that subsequent to May 20th he was under the care of a physician of his own selection until June 20th, when he again visited his employer's physician and was informed that nothing further would be done for him.

[1,2] There is, therefore, ample evidence in the record to show that petitioner refused to furnish treatment reasonably adequate to relieve and cure the employee.

Having refused to do so, the employee was justified in seeking relief elsewhere, and his employer is liable for the reasonable expense incurred in securing the same. The evidence as a whole is not without conflict, but this is a matter with which we are not here concerned.

The award is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

76 Cal. App. 310

PEOPLE v. PEPPA. (Cr. 1306.)

(District Court of Appeal, Second District, Division 2, California. Jan. 26, 1926. Hearing Denied by Supreme Court March 25, 1926.)

Larceny §40(6) — Accused, who procured check with intent, subsequently executed, of converting proceeds thereof to his own use, held guilty of larceny of check as well as of money.

Accused, who procured from witness check for payment of stock, with intent, subsequently executed, of converting proceeds thereof to his own use, held guilty of larceny of check as well as of money.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Rocco Joseph Peppa was convicted of grand larceny, and he appeals. Affirmed.

Frank W. Allender, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. Defendant appeals from a judgment of conviction of grand larceny and from an order denying his motion for a new trial.

The amended information upon which the trial was had contains four counts. Upon only one of them was defendant convicted and sentenced. This count charges defendant with the larceny of a check of the value of \$300, the personal property of the complaining witness, one Bernard Erb, and alleges that it was stolen by defendant on February 24, 1925. It is claimed that the verdict convicting defendant of this charge is contrary to law and to the evidence.

There was evidence tending to establish these facts: The complaining witness, before his first meeting with defendant, was the owner of a few shares of the capital stock of the Gold Ridge Mining Company, an Arizona corporation maintaining offices in the city of Los Angeles. Two or three days before the complaining witness met defendant the latter was introduced to the secretary of the Gold Ridge Mining Company. Defendant represented to the secretary that he (defendant) was a man who had acquired experience in promoting mining corporations, and that he could be of some assistance to the company in selling shares of its capital stock. He told the secretary that he knew some Italians whom he said he thought he could interest in the purchase of the company's stock. The secretary then informed defendant that, while the corporation had a permit from the state of Arizona to sell in that jurisdiction 5,000 shares of stock, no permit to sell its stock had been issued in California by the corporation commissioner of this state. The secretary testified that defendant had "a sort of tentative agreement" with the company to sell its stock in Arizona under the Arizona permit. Later, on February 20, 1925, at the company's office in Los Angeles, defendant asked the secretary for some of the corporation's blank certificates of stock. He told the secretary that he had succeeded in interesting in the company the Italians of whom he had spoken in his first interview with that officer, and stated that these men wanted to see "this stock." The secretary then said to defendant, "You can't use them [the certificates] in the state of California. * * * You can't sell them." To this defendant replied, "The only thing I want to do is to show them." Thereupon the secretary delivered to defendant two blank certificates of stock. The secretary's signature was subscribed to each of these documents, but neither of them was signed by the president of the corporation. When these blank certificates were delivered to defendant, the secretary told him that they "were not any good because they were not signed by the president." On the day preceding that upon which defendant thus succeeded in securing possession of these two blank certificates, i. e., on February 19th, defendant was introduced to the complaining witness at the latter's place of business in Los Angeles. He was introduced as a mining promoter who was interested in financing the Gold Ridge Mining Company. Defendant subsequently visited the complaining witness at the latter's store on the 24th day of February. This visit was made for the ostensible purpose of interesting Erb in the purchase of additional shares of the company's capital stock. Defendant falsely represented himself to be a stock salesman under a \$5,000 bond, authorized to sell the company's stock. It would seem that upon this occasion defendant offered to sell Erb 100

shares of the company's stock for \$300. Such an offer was evidently made and accepted, for at that time Erb gave to defendant the check for \$300, and also signed a written contract entitled "Agreement to Purchase Stock," whereby he subscribed for, and agreed to purchase, 100 shares of the company's stock. The check was drawn by Erb on a Los Angeles bank, and was made payable to the order of defendant, who, upon receiving the check, delivered to Erb a written receipt for \$300. It is a fair inference from all the evidence in the case that the 100 shares for which Erb subscribed, and for which he gave defendant his personal check in the sum of \$300, were represented by defendant to be, and were understood by Erb to be, a part of the company's treasury stock. Defendant did not deliver the check to the company or to any officer thereof. Instead, he indorsed it and cashed it on the day it was given to him. The money which he received from the bank on cashing the check he converted to his own use. Nor did defendant ever deliver to Erb any certificate or certificates for the 100 shares for which the latter had subscribed. A few days after receiving the check defendant again called at Erb's place of business. Upon that occasion he delivered to Erb the two stock certificates which the company's secretary had handed to defendant a few days previously, but which had not been signed by the president. In each of these certificates the words "five hundred" had been written, so that each purported to be a certificate for 500 shares of the company's stock. But, since these pieces of paper had not been signed by the president, each of them was utterly worthless as a stock certificate.

It is difficult to determine from appellant's argument what are his specific reasons for making the broad and comprehensive claim that the evidence is contrary to the law and to the evidence. From the authorities cited by him it would seem that his main reason for this contention is that the evidence, so it is claimed, shows that, if any offense was committed by him, it was not larceny, but the crime of obtaining the check by false pretenses. There is no merit in the contention. From the facts as we have stated them it is apparent that the jury was justified in finding, as implied by its verdict, that appellant procured possession of the check by trickery and chicanery, and that at the very time when he thus succeeded in getting that instrument into his hands he intended, after cashing it, to convert the proceeds to his own use. It also appears from the facts as we have recited them that the jury was warranted in finding that Erb never intended to vest in appellant the title to the check, or to invest him with title to the money which appellant was to receive from the bank when he cashed the check. That instrument was not delivered to appellant as his property.

It was delivered to him to be used for and on behalf of Erb, and for one specific purpose, namely, to cash it at the bank, and then to deliver the money thus received to the mining company in payment of the 100 shares for which Erb had subscribed. Erb was not buying stock from appellant. His agreement with appellant was to buy the stock from the mining company through appellant. Possession of the check was delivered by Erb to appellant for the sole purpose of purchasing this stock from the company; it evidently being Erb's intention and belief that the proceeds of the check would be delivered by appellant to the mining company in payment for the 100 shares. Erb evidently intended that these acts, cashing the check and paying the proceeds to the company, should be done for him by appellant as Erb's agent. In using the check as a means to secure, and to convert to his own use, the money represented by that instrument, appellant misappropriated the check as well as the money. It doubtless is true that Erb intended that appellant should cash the check at the bank after indorsing it. This is, perhaps, the only reasonable inference which is deducible from the fact that the check was made payable to appellant's order. But, even so, it does not necessarily follow that it was the money, and not the check, which was feloniously stolen by appellant. Under the circumstances here disclosed there could be a larceny of both the check and the money. As we already have stated, the check was delivered to appellant for the specific purpose of using it for Erb's benefit; and, though it doubtless was Erb's intention that appellant should cash the check, it also was his intention that the latter should pay to the mining company the money thus received by appellant from the bank. The check was intended to be a link in a chain of facts terminating in the payment of the money by appellant to the company. In other words, the procuring of the check was but a step which appellant took toward procuring the money. When, therefore, appellant secured possession of the check by trickery and deceit, and with the previously conceived intent to employ it as a medium that would enable him to misappropriate its proceeds, and followed these acts with one of actual conversion of such proceeds to his own use, he was guilty of larceny of the check as well as of the money. In *People v. Arnold*, 20 Cal. App. 39, 127 P. 1062, the court says:

"* * * Although the evidence shows that the prosecutrix gave her check to the codefendant of appellant, it also shows without contradiction that such check was promptly cashed, and the money (\$1,000) obtained thereon without resort to any other trick, device, or fraud than such as had resulted in procuring the check, which was but a step toward procuring the money. Under such circumstances defend-

ant might be guilty of larceny of both the check and the money. If the check was obtained by larceny thereof, no right or title to the money was acquired thereby. In this case, under the evidence in the record, if the defendant was guilty of a larceny of the check he was necessarily also guilty of a larceny of the money obtained thereby."

For the foregoing reasons we are satisfied that the check was the subject of larceny by appellant, even though Erb did voluntarily give it into the latter's possession, and that the misapplication of that instrument to appellant's own base purpose, coupled with his pre-existing design to defraud Erb in the manner we have stated, constituted the crime of larceny by trickery and deceit. *People v. Delbos*, 146 Cal. 737, 81 P. 131; *People v. Arnold*, 17 Cal. App. 68, 118 P. 729; *People v. Harold*, 17 Cal. App. 426, 119 P. 949; *People v. Sichofsky*, 58 Cal. App. 257, 208 P. 340.

The judgment and the order denying a new trial are affirmed.

We concur: WORKS, J.; CRAIG, J.

76 Cal. App. 315

In re MASON'S ESTATE. (Civ. 5410.)

(District Court of Appeal, First District, Division 2, California. Jan. 27, 1926. Hearing Denied by Supreme Court March 25, 1926.)

1. Executors and administrators ⇐178 — Allowance of \$75 per month to widow as family allowance pending filing of inventory and appraisal, and administration, and setting apart exempt property, of testator's estate, held not abuse of discretion.

Allowance of \$75 per month to widow as family allowance pending filing of inventory and appraisal, and administration, and setting apart exempt property, of testator's estate worth \$11,000, held not abuse of discretion, in view of widow's small income.

2. Homestead ⇐150(1).

To establish homestead, where testator has made no declaration, it is essential to show that property asked for is community property.

3. Homestead ⇐150(1).

Evidence held to show property set aside by probate court as homestead of widow was purchased and improved with community funds.

4. Homestead ⇐150(1).

Under Code Civ. Proc. § 1465, court must set apart a homestead to widow; it having discretion merely in selection of the homestead.

5. Homestead ⇐141(1).

Homestead may be set aside to widow, notwithstanding estate is insolvent, and that property so set apart constitutes whole estate.

6. Homestead §136—Testator's power to dispose of property by will is subject to statutory duty of court, to which heirs, devisees, legatees, and creditors are all subject (Code Civ. Proc. § 1465).

Testator's power to dispose of his property by will is subject to the duty placed by Code Civ. Proc. § 1465, on the court to select a homestead, and heirs, devisees, legatees, and creditors are all subject to that duty.

7. Constitutional law §70(3).

Any argument against setting aside of homestead to widow is matter properly to be addressed to Legislature and not to court (Code Civ. Proc. § 1465).

Appeal from Superior Court, Napa County; Percy S. King, Judge.

In the matter of the estate of Z. A. Mason, sometimes known as and called Zina A. Mason. From three separate orders, two of which granted family allowance, and the third set apart to the widow a probate homestead, Elizabeth Boling and Clara Rees, as legatees and devisees, appeal. Affirmed.

D. L. Beard and L. A. Maynard, both of Napa, for appellants.

Clarence N. Riggins, of Napa, for respondent.

NOURSE, J. Elizabeth Boling and Clara Rees, as legatees and devisees under the will of Z. A. Mason, deceased, have taken three separate appeals from three separate orders of the probate court in the above-entitled estate. All three appeals are presented to the court on a single typewritten record consisting of the clerk's and reporter's transcripts.

The first appeal is from an order granting to the widow of the deceased a temporary family allowance pending the filing of inventory and appraisal. The second appeal is from a similar order granting to the widow a family allowance pending administration, and also setting aside certain exempt property to the widow. The third appeal is from an order setting apart to the widow a probate homestead which was claimed to be community property.

[1] The only ground urged by the appellants on their appeals from the two orders relating to family allowance is that the allowance of \$75 per month was unreasonable and excessive. The argument is that inasmuch as the appraised value of the estate was but \$11,000 and that the income therefrom was about \$64 per month at the time of the order the effect of the order is to give to the widow a part of the corpus of the estate under the guise of a family allowance. It is conceded by the appellants that the amount to be allowed in cases of this kind is wholly within the discretion of the probate court and that this discretion cannot be disturbed by

the appellate court, unless it can be shown to have been abused. In the record before us it appears that the widow is sick and infirm and requires the aid of a nurse or other attendant and that outside of the allowance made by the probate court she has an income of but \$52 a month, consisting of \$22 in rentals from her own private property and \$30 as a pension from the federal government as a widow of the deceased, who was a Civil War veteran. We are not prepared upon this record to say that the trial court abused its discretion in the actions complained of.

As to the third appeal, it appears that the deceased had some private property prior to his marriage to the surviving widow and that since their marriage (which occurred in 1903) he had purchased several lots of land in the city of Napa, had erected some houses thereon, and had received the rents therefrom; that during all of this time he had been engaged as a carpenter and builder and was receiving from the federal government the sum of \$12 per month as a pension for his services in the Civil War. It appears also that his greatest source of income was his wages. It appears also that the property which the probate court set aside to the widow was purchased for \$300 in the year 1907 and that in 1910 he erected a home thereon. He then moved his family to this home and continued to occupy it as his home until the date of his death. There is no dispute that the cost of the erection of this home was borne by community funds, but it is appellants' contention that the lot itself must have been purchased from the separate property of the deceased and that the improvements thereon must follow the character of the land. The respondent relies upon the presumption that property purchased after marriage is community property and that the burden of proof rested upon the appellants to prove otherwise. This burden the appellants undertook to assume by the offer of the decedent's will, in which he stated that this property was his own separate property, and by the cross-examination of the widow wherein she contradicted herself as to her knowledge of the source of the funds. It appears, however, that in her direct examination she testified positively that at least part of the purchase price of the lot came from the decedent's wages and that she was uncertain as to the balance. The situation is, therefore, that as against the presumption that the property was community, the appellants set up the conflict in their own evidence, and ask the court to give greater weight to that conflict than to the presumption. We are satisfied that the learned trial judge gave a correct interpretation of the law in the opinion which he filed on the granting of the application, and we therefore adopt as the opinion of this court so much of that opinion as is applicable to the

order relating to the setting apart of the homestead, and reading as follows:

"In this matter application has been made for a family allowance, for the setting apart to the widow of the property exempt from execution, and for a homestead. Objection is made to the setting apart of a homestead and to the making of a family allowance. No objection having been made to the application for the exempt property to be set apart to the widow, and the widow being legally entitled to it, that application will be granted.

[2,3] "As to the petition for a homestead: That a homestead may be set apart absolutely, it is essential to show that the property asked for is community property; no declaration of homestead having been made during the lifetime of the testator. A consideration of the evidence presented on this subject shows that at the time of the marriage the testator had as his separate property some \$3,800, with which he came to California and settled in Napa.

"He bought a place on Franklin street in Napa, December 29, 1903, the day after their marriage, taking the deed in the name of husband and wife. For this he paid either \$1,100 or \$1,200, and made improvements and alterations costing about as much. He was a carpenter and did most of the work himself. Therefore, when this property was improved, he probably had about \$1,500 left. As he was working on his own place, they probably lived on his capital.

"January 28, 1905, he bought the place on Seminary street for \$300, and thus apparently had but \$1,200 of his separate property left. February 7, 1905, he bought a place on Levee street, paying \$800, and thus leaving but \$400 of his original capital. With this and other funds he built a seven-room hard-finished house and a three-story tankhouse on the Seminary street place. Doubtless the \$800 which he received from the sale of the first lots in Chickasha about October, 1906, went also into this. At this time he had been married between two and three years, and the only separate property he had was the original \$3,800, this \$800, received in October, 1906, and the sum of \$500 received from an old debt, at a time not specified, making a total of \$5,100. He drew a pension, probably at this time of \$12 a month, and was an industrious man, receiving when he worked as a carpenter, \$2.75 to \$3 a day. Having built two houses and a tankhouse for himself during the period of say three years from December, 1903, date of his marriage, it is more than probable that the living expenses for even this frugal family partly came from his capital.

"Then April 2, 1907, he bought the Wilson street property, and improved it, and the funds with which this was done must have been the

savings from his pension, rentals, and earnings. On this he paid \$300 purchase price and erected a good house, into which he and his wife moved in 1910, and in which she still lives. This is the house asked as a homestead. At this time his separate property must have been exhausted, and it was doubtless bought and improved from his earnings. At any rate it is impossible to trace any separate funds into it. The rentals of his improved property were negligible up to the time of buying the Wilson street lot, because he had only one place till 1905, and only the Levee street property was available for rental purposes then, until he completed the house on the Seminary street lot, some time during that year. He thus had for rent only one or at most two houses for a period of less than two years prior to buying the Wilson street property. It does not appear definitely when the first house on Wilson street was completed, but it was probably not until 1910 when they moved into it.

"I am therefore satisfied that a fair showing has been made that the Wilson street property, a portion of which is the subject of the application for homestead, was purchased and improved with community funds, constitutes the community property of the decedent and his surviving wife, and is suitable property for a homestead.

[4-7] "As to the law regarding a probate homestead: Section 1465 of the Code of Civil Procedure explicitly provides: That, if no homestead has been selected, designated, and recorded, 'the court must select, designate and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife and the minor children.' The former law on this subject used the word 'may' instead of the present wording 'must,' but the courts then held that the duty was imperative. The court has no discretion, except a discretion in the selection of a fit and proper place to be set apart as a homestead. A homestead may be set aside, even though the estate is insolvent and the property set apart constitutes the whole estate. The power of a testator to dispose of his property by will is subject to the duty placed upon the court in such cases, and heirs, devisees, legatees, and creditors are all subject to this duty of the court, which 'must' set apart a homestead. As a higher court once said in discussing this subject, 'Any argument against setting aside the homestead is properly addressed to the Legislature in support of an amendment to the law.'"

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

76 Cal. App. 326

DUSIS v. KARNEZIS et al. (Civ. 2897.)

(District Court of Appeal, Third District, California. Jan. 28, 1926.)

Master and servant — 80(9).

Evidence of amounts paid plaintiff for services held not to support finding of total sum due.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by Peter Dusis against T. Karnezis and others. Judgment for plaintiff against defendant named, and latter appeals. Reversed.

J. E. Ebert, of Marysville, for appellant.

Harry L. Huston and Arthur O. Huston, both of Woodland, for respondent.

HART, J. The action is for the recovery of the total sum of \$1,489.85, alleged to be the balance due plaintiff for personal services alleged to have been performed, and moneys advanced and expended by plaintiff for defendants "at their special instance and request."

The facts, taken in part from plaintiff's testimony, generally stated, are: That the three defendants and one Eron, in the year 1920, jointly owned a band of some 1,500 head of sheep which they were keeping and pasturing on a tract of leased grazing land in Yolo county. In June, 1920, they employed plaintiff to herd and take care of said sheep, at a monthly wage or salary of \$100 per month. Plaintiff worked for the four defendants from the 26th day of June, 1920, until about the 26th day of October, 1920, at which time or thereabouts defendants divided the sheep between themselves. Immediately after such division was made, and the defendants were no longer jointly interested in the sheep business, appellant, who was then residing in the city of Marysville, and consequently not stopping at the sheep ranch, engaged plaintiff to continue to take care of his (appellant's) sheep, and to take charge of the sheep camp, agreeing to pay plaintiff the sum of \$125 per month for his services, and to reimburse him for any moneys he (plaintiff) might advance in purchasing groceries, provisions, etc., necessary for living purposes at the camp, and for any expense he might incur in procuring pasturage for the sheep. The plaintiff worked for appellant, upon the terms stated, from the 26th day of October, 1920, until June 13, 1921. The total number of months during which the plaintiff was so employed by and for the defendants and for the appellant was 11 months and 18 days.

The complaint, which is in two counts and unverified, alleges, in the first count, that defendants are indebted to plaintiff as for labor performed in the aggregate sum of \$1,-

346.06, of which the sum of \$750 had been paid, leaving a balance unpaid, on account of labor performed, of \$596.06. In the second count it is alleged that plaintiff advanced and expended the sum of \$893.79 for the defendants in the purchase of provisions, supplies, pasture, feed, etc., and incurred and paid "other expenses in connection with the care of a band of sheep" belonging to defendants.

The answer interposed a general denial of the allegations of both counts of the complaint.

The court found that defendant Karnezis was indebted to plaintiff on the first count in the sum of \$406.66, being the balance due and owing for labor after the payment to plaintiff on that account of the sum of \$750, and that on the second count the same defendant was indebted to plaintiff in the sum of \$608.17. It was further found that neither the defendant Fundulakis nor the defendant Koralis was indebted to plaintiff on either count. Eron, it will be observed, was not made a party defendant.

Judgment was awarded plaintiff as against Karnezis in the aggregate sum of \$1,014.83, and, a motion for a new trial by him having been denied, he appeals from said judgment.

The appealing defendant, among several points upon which he relies for a reversal, contends that the findings are not supported by the evidence. This contention must be sustained upon the plaintiff's own testimony, which, in part, is as follows:

"Mr. Eron paid me first time \$100 and Mr. Thero Karnezis paid \$200 and Mr. Fundulakis paid \$50 on February 15, 1921. On December 24, 1920, I received a check from Mr. Allan for \$68.40. The check was made to the order of Pete Dusis, and signed by M. G. Allan. On February 3, 1921, I received a check payable to myself for \$300 from M. G. Allan, and I indorsed it with my mark and cashed it for Nick Koralis, but I did not get the money. The money was for sheep that Mr. Karnezis sold to Mr. Allan, the butcher. I took the check and went to Sacramento, and got the money and gave it to Mr. Koralis. On April 6, 1921, a check signed by T. H. Karnezis, payable to Harry J. Demis, for \$100 was not given to me, or cashed by me, and Mr. Demis did not give me the money. I received \$240 by check dated January 31, 1921, signed by T. H. Karnezis, and made payable to myself, and on December 24, 1920, I received the money from a check for \$100, signed by T. H. Karnezis, and payable to Pete Dudasher. On March 5, 1921, I received a check from T. H. Karnezis for \$100. On February 26, 1920, or 1921, I received another check from T. H. Karnezis for \$100 and cashed the same and received the money. I also received \$150 from T. H. Karnezis on March 7, 1921, by check. I did not receive any other money from these defendants other than the checks which you have shown me. Mr. Karnezis did not pay me \$100 in cash on or about May 23, 1921, at Marysville. He gave me a check for \$100 in his saloon. The time

Mr. Karnezis went to Marysville he said he would pay me \$125 per month."

On redirect examination the witness testified as follows:

"Mr. Eron did not give me \$200; he just gave me a check for \$100."

On recross-examination the witness testified as follows:

"This man Eron paid me \$200; he gave me two checks; the check for \$68.40, I spent for myself. I am not sure whether Mr. Eron gave me \$200 or whether there was another check for \$30, I am not sure."

Leaving out of the computation the check referred to by plaintiff in his testimony as above given herein as having been issued by appellant to and in the name of one Harry J. Demis for the sum of \$100, which check, or the money thereon, plaintiff stated he did not receive, also excluding the \$300, which he said he received in the form of a check from one Allan, but which, he further said, he cashed and delivered the money to Koralis, and assuming that Eron paid him the sum of \$100 only and including the \$100 in the computation of the amounts paid plaintiff, as shown by his own testimony, the defendants were entitled to be credited with the total payment of \$1,208.40 in the place of the sum of the \$750 found by the court to be the total amount paid by defendants to plaintiff. But it will be noted that the plaintiff stated that he was not sure whether Eron paid him \$100 or \$200. As is to be seen, once he unequivocally stated that "this man Eron paid me \$200; he gave me two checks," but subsequently declared that he was not certain that Eron paid him \$200, "or whether there was another check for \$30." In any event, it is clear that plaintiff could not deny, and apparently did not attempt to deny, that he could not positively say whether Eron did, or did not, pay him more than the sum of \$100. Thus the testimony of Eron as to the payment made by him to plaintiff becomes important. He positively testified that he paid plaintiff over \$200; being uncertain, however, as to the amount in excess of \$200. It therefore stands undisputed in the record that Eron paid at least \$200 to plaintiff, and hence the further sum of \$100 must be added to the total sum which should be allowed or credit-

ed defendants on account of payments made to plaintiff by them. Thus the total amount which appellant is entitled to be credited with as payments to plaintiff, as found by the court, is the sum of \$1,308.40, instead of \$750, as likewise found. Subtracting said item of \$1,308.40 from the total amount of the said indebtedness, as found by the court, viz. the sum of \$1,764.83, and the result is that, at the most, the plaintiff is entitled to judgment for the sum of \$456.43 only, or the sum of \$558.40 less than the sum awarded plaintiff by the judgment. It obviously follows that the findings as to the total sum due plaintiff from defendants are not supported, for which reason, of course, the judgment must be reversed.

The point made by appellant that the evidence shows that whatever indebtedness was due the plaintiff was the joint obligation of the three defendants and Eron, and that the finding that the defendants Fundulakis and Koralis were not indebted to the plaintiff by reason of the latter's employment as alleged in the complaint and for moneys advanced, as likewise alleged, is without support we cannot say is well grounded. The evidence as to that matter is so confusing and unsatisfactory that it is difficult for this court to say how far or to what extent, if to any, the three defendants and Eron were jointly liable for the indebtedness counted on in the complaint. The court below was of the opinion that appellant alone was liable for the total amount which it found was due plaintiff, and, as there was evidence that the parties were joint owners of the sheep, and jointly employed plaintiff for 3 months only of the 11 months that plaintiff was employed, that some payments were made prior to the business separation between the parties, and that the court did not allow the full amount claimed by plaintiff, we cannot say but that the court was warranted in finding that the appellant was solely liable for any balance due plaintiff. The real fact as to this matter could, we think, and should, be more clearly shown than it appears to have been at the trial of which this appeal is the culmination, and probably will be on a retrial of the case.

The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

76 Cal. App. 216

PEOPLE v. NOWAK et al. (Cr. 1272.)

(District Court of Appeal, Second District, Division 2, California. Jan. 15, 1926. Hearing Denied by Supreme Court March 15, 1926.)

1. Burglary ☞45.

Court *held* not warranted in saying as matter of law that defendants could not have been present at time of burglary charged.

2. Burglary ☞41(1).

Evidence *held* sufficient to sustain conviction for burglary in the second degree of defendant, who was caught crawling from window of building.

3. Criminal law ☞1159(4).

Direct testimony of people's witness, if believed by jury, must receive credence on appeal.

4. Criminal law ☞1159(3)—Appellate courts will not disturb verdict on conflicting evidence unless it clearly appears there was no substantial evidence.

Appellate courts will not disturb a verdict on conflicting evidence, particularly after motion for new trial has been denied, unless it clearly appears that there was no substantial evidence to support trial court's conclusion.

5. Burglary ☞41(1).

Evidence *held* insufficient to sustain conviction of particular defendant for burglary in second degree.

6. Criminal law ☞200(1).

Defendants' conviction for vagrancy, under Pen. Code, § 647, *held* not to preclude their prosecution for burglary, committed on same occasion.

7. Criminal law ☞1171(6)—Conduct of district attorney in asking defendant if he had not been convicted of felony under another name held not ground for reversal.

In prosecution for burglary, conduct of district attorney in asking defendant if he had not been convicted of felony under another name *held* not ground for reversal, where, notwithstanding defendant was permitted to answer in the negative, district attorney withdrew question and stated jury should disregard it.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Frank J. Nowak and Andrew H. Nowak were convicted of burglary in the second degree, and they appeal. Affirmed as to Frank J. Nowak, and reversed as to Andrew H. Nowak.

Benjamin V. Elconin, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

CRAIG, J. The appellants and one Max Fenski were jointly charged by information

with having committed the crime of burglary in the county of Los Angeles on or about the 26th day of February, 1925. Appellants were convicted of burglary in the second degree, but the jury failed to agree upon a verdict as to the defendant Fenski. A motion for new trial was presented in behalf of the former, which was denied, and they appeal from the order of the trial court upon such motion, and from the judgment. The principal ground urged for reversal is an alleged insufficiency of evidence to sustain the verdict and judgment as to each appellant.

The testimony offered by the people was substantially as follows: Shortly after midnight of February 26, 1925, police officer Kunzman, of the city of San Fernando, while making his rounds, discovered a man, who gave the name of Charles Larkin when arrested, but who thereafter proved to be Frank J. Nowak, one of the appellants above named, emerging from a window of the Studebaker salesroom and shops, in the Studebaker building, at the corner of Celis avenue and Brand boulevard, in said city. Kunzman observed Nowak go to the sidewalk, stop, look, then return to the building, tap on a window, and immediately walk away. Kunzman pursued Nowak, calling upon him to stop, whereupon the latter started to run, but finally was arrested. At about that time a door of the Studebaker building slammed, and the officer saw another man run across Brand boulevard; Kunzman conducted his prisoner back to the said building and asked him where his partner was, to which Nowak replied that he had no partner, but that he had a friend down the street about two blocks; the officer then took him to a nearby hotel and telephoned the police station for assistants. He then asked Nowak who helped him "do the job," and he denied that he did it, or that he had any partner, but later, when pressed, he said: "I did it; you find out who my partner is." The officer and Nowak then returned to the Studebaker building, and were soon joined by the chief of police and other officers, two of whom were instructed to search the immediate vicinity, and to arrest any one whom they might find on the streets.

The Studebaker building was divided by a partition, consisting of brick and cement, which separated the automobile salesroom, on the east, from the office of the American Railway Express Company, on the west. The express agent in charge testified that at about 6:30 p. m. on the 26th he locked the office, leaving it in order. It appears from the testimony of the officers that a hole large enough to permit the passage of an ordinary-size man had been cut or broken through the partition from the salesroom into the express office, and a door had apparently been taken from its hinges; the floor

of the express office was littered with books, files, drawers, and cards from interstate shipments, trunks had been opened, and the dial was battered off the safe.

Police Officers Fairfield and Rich, who were dispatched to patrol the neighborhood, testified that after some little reconnaissance they found a Studebaker machine standing at the curb near the corner of Wolfskill and Pico streets; that when their spotlight was thrown on the car a man was seen crouching down in the rear seat; that they placed him under arrest, and returned to the Studebaker building with the machine and its occupant. This man gave the name of Andrew H. Nowak, and stated that he and his brother had traveled from Buffalo, N. Y., through Ohio, Georgia, Florida, Texas, and Arizona to Los Angeles, for the purpose of seeing the country; that they begged rides, walked, and rode stages until they arrived at Yuma, where Frank and a boy by the name of Max Fenski, whom they picked up along the road, bought tickets and completed their journey by train. One of the officers testified that appellant Andrew H. Nowak later contradicted part of such statement, saying that all three men left Buffalo together; that they picked up another fellow somewhere in Arizona, and that all four rode into Yuma in a Ford coupé; that Frank and Fenski then came to Los Angeles by train, and that Andrew and the fourth man finished the trip in the Ford; that when asked why their stories conflicted, the two brothers engaged in a heated argument, wherein Frank asked Andrew, "For God's sake, what is the use of lying about it? Tell it all; tell the truth. Why are you lying?" and that one of them then insisted that they rode into Yuma on a train.

In the Studebaker automobile in which Andrew H. Nowak was arrested were found a suitcase, clothing, flashlights, hammers, two caps and an overcoat; and on the street in the direction of this car from the building which had been rifled was found a revolver, which the express agent swore had been taken from a shipment in his office. No stolen property was found in the possession of either of the appellants, and each of them strenuously denied having any knowledge of the robbery. They stated that they had purchased the Studebaker in Los Angeles, and that they were intending to return to Buffalo therein, but had lost their way in the night, and had parked in San Fernando to await daylight; that it was cold, and that Frank left his brother in the car and went in quest of a cheap lodging house.

[1] Officers of the police department and sheriff's office instituted thorough investigations as to the verity of appellants' statements regarding their past history and as to their whereabouts immediately preceding their apprehension. In the latter respects it was found that they had told approximately the truth; that appellant Frank J. Nowak

had purchased the automobile as he claimed; that they had registered at a hotel which they had named and had attended a vaudeville and picture show on the afternoon or evening of the 26th. One or more of them had registered at said hotel under an alias, and Frank Nowak testified that he had worked in the East for a number of years under the name of Larkin. It was appellants' contention that, having attended the theater in Los Angeles until late in the evening of the 26th of February, it would have been impossible for them to have been at San Fernando at the time of the robbery. It appeared, however, that the distance between the two cities was but about 22 miles, and that they could have made the trip in about 45 minutes. They were arrested after midnight, and there is no evidence in the record as to the time of the robbery; it is therefore impossible for us to say, as a matter of law, that appellants could not have been present when the offense was committed.

[2-4] We think the evidence may well have been deemed by the jury as amply sufficient to justify them in finding the appellant Frank J. Nowak guilty of burglary in the second degree. Each appellant vigorously protested his innocence, and maintained that the charges were the result of a "frameup" on the part of Officer Kunzman; but appellants were not charged with the crime for a period of about two weeks after their arrest, in order that a searching investigation might be made of the officer's movements. It is apparent that their accusation of the officer was groundless. The direct testimony of the people's witnesses at the trial of the case, if believed by the jury, must receive credence upon appeal. People v. Lamb, 67 Cal. App. 263, 227 P. 969. It was for the jury to decide whether or not a man caught crawling from the window of a building in the middle of the night, which building admittedly had been ransacked and the walls broken after 6:30 p. m., had entered with intent to commit grand or petit larceny or any felony. Throughout his protracted story of innocent travels, sightseeing, amusements, preparations to return East, and alleged persecution, appellant Frank J. Nowak nowhere attempted to deny that he came from the window of the Studebaker building in San Fernando, except to contend that he must have been elsewhere, and that it was all a "frameup" on the part of the officer. But it is an incontrovertible fact that he was arrested at San Fernando at the time alleged, which alone is sufficient to refute any claim of an alibi if the jury believed that he was in the building at the time. At all events, the evidence raised an issue of fact for the jury, and appellate courts will not disturb a verdict based upon conflicting evidence, particularly after a motion for new trial has been reviewed and denied by the court below, unless it be made clearly to appear that

upon no hypothesis whatever is there substantial evidence to support the conclusion reached by the trial court. *People v. King*, 65 Cal. App. 306, 223 P. 1001.

[5] Apparently conflicting stories of appellant Andrew H. Nowak, his suspicious act of crouching down in the machine upon approach of the officers, and the fact that he was a brother of Frank J. Nowak, and was in the latter's automobile, constitute about all that can be said as to evidence of his guilt. There was no evidence of Andrew Nowak having been the man who ran from the Studebaker building, or that he had any knowledge of the robbery or as to his brother's whereabouts, other than that he supposed he had gone in search of lodgings. The jury may have believed that it was this appellant who dropped the revolver upon the street, but we are unable to find in the record any proof whatever that he had not remained in the machine from the time his brother left until the officers arrived. No witness saw him until the officers found him in the car, and it did not appear that he had possession of any property claimed to have been stolen from said building. We think, therefore, that the record is devoid of that degree of substantial evidence of guilt necessary to an affirmance of the judgment as to Andrew H. Nowak.

[6] When appellants were arrested they were charged with vagrancy in the justice's court at San Fernando, and sentenced to serve six months in jail. It was contended at the trial of this case that they had previously been placed in jeopardy in the vagrancy case, and could not therefore be prosecuted for burglary alleged to have been committed at the same time and place. There is no merit in this contention. Section 647 of the Penal Code provides that a known pickpocket, thief, burglar, or confidence operator, or a person who wanders

about the streets at late or unusual hours of the night, without any visible or lawful business, is a vagrant. We know of no rule which precludes the prosecution of a vagrant for burglary upon discovery of evidence of his guilty connection with the latter offense. We are not authorized to decide, nor does the record indicate, that the appellants were not afforded the opportunity for a fair trial upon the minor charge; we must assume that they were legally found guilty and committed therein, and it appears that while they were confined upon that charge they were formally accused of the crime of burglary.

[7] Another point attempted to be advanced for reversal is that the district attorney should have been reprimanded by the court for misconduct in asking the last-named appellant, Andrew H. Nowak, if he had not been convicted of a felony in the state of New York on August 3, 1917, under the name of Thomas Larkin. Notwithstanding the fact that this appellant was permitted to answer the question, to which he replied in the negative, the district attorney withdrew it and stated that the jury should disregard it. The contention, we think, is untenable.

Finally, it is said that the trial court erred in instructing the jury that the prior conviction of vagrancy did not constitute former jeopardy in this case. We have heretofore discussed this question, and, upon the reasoning already expressed, we hold that the instruction was proper.

The judgment and order appealed from are affirmed as to appellant Frank J. Nowak and reversed as to appellant Andrew H. Nowak.

We concur: FINLAYSON, P. J.;
WORKS, J.

76 Cal. App. 278

J. B. COLT CO. v. FREITAS. (Civ. 2999.)

(District Court of Appeal, Third District, California. Jan. 21, 1926. Rehearing Denied Feb. 20, 1926. Hearing Denied by Supreme Court March 22, 1926.)

1. Evidence $\S$ 135(2)—To prove false representation inducing sale, testimony of another buyer as to similar representation to him held admissible.

In proving false representation of seller which induced buyer to buy carbide generator, testimony of another buyer that seller made same representation to him was admissible.

2. Evidence $\S$ 434(11) — Parol evidence of "fraudulent representation," inducing purchase of carbide generator, held admissible in action to recover purchase price.

Parol evidence that seller of carbide generator fraudulently represented that operation of plant was more economical than use of wood at \$2 a cord, thereby inducing defendant to buy it, held admissible in action to recover purchase price, though contract stipulated that no representations were made modifying or adding to its terms and conditions; "fraudulent representation" being antecedent statement made as inducement to contract, but not part or element thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fraudulent Representation.]

3. Fraud $\S$ 11(1)—Representation by one possessing superior knowledge, though only expression of opinion, is actionable.

Representation made by party possessing or assuming to possess superior knowledge or special information to one so situated that he may reasonably rely on such knowledge or information will not be excused if it be false, though only an expression of opinion.

4. Sales $\S$ 176(5) — Buyer held not to have elected to treat contract as valid, where seller made repairs until and after buyer elected to rescind.

Buyer of carbide generator held not to have elected to treat contract of sale as valid, where seller made repairs and adjustments in effort to overcome defects of which buyer complained for more than a year after sale, continuing even after buyer refused to pay for plant and offered to return it.

5. Election of remedies $\S$ 9.

Rule of estoppel, which is basis of doctrine of election of remedies, will not be as strictly applied where fraud exists as in other cases.

6. Sales $\S$ 38(9).

Exact amount of damages suffered by buyer where sale was induced by fraudulent representation need not be shown, if it is appreciable sum.

7. Contracts $\S$ 98—Limitation of actions $\S$ 40(2)—Neither limitations nor laches will bar defense of invalidity of agreement for fraud.

It is not incumbent on one who has been defrauded to go into court and seek relief, but he

may abide his time and when enforcement is sought excuse himself from performance by proof of fraud, and neither limitation of statute nor doctrine of laches will operate to bar defense.

8. Fraud $\S$ 31—One defrauded may obtain cancellation, compensation for injury, or defensive relief.

Party defrauded may obtain cancellation or rescission, affirmative relief by action to recover compensation for injuries sustained, or defensive relief, whereby fraud is set up to defeat action brought to enforce apparent obligation.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by the J. B. Colt Company against J. I. Freitas. Judgment for defendant, and plaintiff appeals. Affirmed.

Cook & Nichols, of Turlock, for appellant. F. W. Henderson, of Merced, for respondent.

FINCH, P. J. The plaintiff sued to recover the amount of a promissory note, dated May 29, 1922, alleged to be due from defendant. The note was given by defendant in consideration of the purchase by him from plaintiff of a carbide generator and equipment. The answer alleges in the usual form that the defendant was induced to make the purchase by plaintiff's false and fraudulent representations. The representations alleged to be false are:

"That on or about the 22d day of May, 1922, plaintiff offered to sell to defendant one carbide generator with fixtures and one stove with pipes and fittings for the sum of \$388.10, and stated and represented to defendant that the said generator and equipment mentioned above would be and were more economical for heating, cooking, and laundrying than a wood stove burning wood at a cost not to exceed \$2 a cord; that the generator and equipment worked automatically, required only slight attention; that 400 pounds of carbide, which would make two fillings of the generator, a year would be all that would be required for the operation of the equipment; * * * that if he would pay for installing said generator and equipment and give it his note for \$388.10 payable in one year, that it would supply the generator and equipment and install the same on trial, and if the same did not prove satisfactory it would take it out, cancel his note, and that he would be under no further obligation to it."

The case was tried before a jury, which returned a verdict in favor of defendant, and he was given judgment for his costs of suit. The plaintiff has appealed from the judgment.

The sale of the plant to defendant was negotiated by a salesman of the plaintiff. The contract provided:

"This order shall become a contract between the purchaser and the company upon acceptance

thereof in the space below by an officer or credit manager of said company."

It was subsequently signed by "C. C. Shepley, Credit Manager," and the plant was thereafter installed. The contract contained the following provisions:

"Warranty: It is agreed that in accepting this order the company warrants the apparatus furnished to be automatic in action, and of good material and workmanship, and that it is on the permitted list of the National Board of Underwriters. * * * It being understood that this instrument, upon such acceptance, covers all of the agreements between the purchaser and the company, and that no agent or representative of the company has made any statements, representations or agreements, verbal or written, modifying or adding to the terms and conditions herein set forth."

[1] The defendant and his wife both testified that the plaintiff's salesman made the alleged representations. The plaintiff sold and installed several other plants of the same kind in the defendant's neighborhood during the year 1922. Three of such purchasers testified at the trial. One of them testified that something was said to him by the selling agent "about it being cheaper to operate than wood on a basis of \$2 a cord." On objection of counsel for the plaintiff, the witness was not asked anything further as to any representations made to him by the agent. Another purchaser was asked if the agent represented to him that the operation of the plant for heating and cooking was cheaper than wood at \$2 a cord. The court sustained plaintiff's objection to the question. The objection should have been overruled. 12 Cal. Jur. 831; Thompson v. Modern School, etc., 183 Cal. 112, 121, 190 P. 451; Kornblum v. Arthurs, 154 Cal. 246, 248, 97 P. 420; Bone v. Hayes, 154 Cal. 759, 767, 99 P. 172. A third purchaser testified that the agent who sold him a plant said that it would cost less to operate than wood at \$2 a cord. On motion of plaintiff the answer was stricken out. On cross-examination, however, counsel for plaintiff brought out the fact that the agent made the representation. In order to save time, it was stipulated that a fourth purchaser, if called as a witness, would testify "substantially to the same effect" as the third, subject to the same objection that had been made to the introduction of such testimony. These witnesses testified that the cost of operating the plant was from six to ten times as much as the cost of wood for the same purpose at \$2 a cord. The testimony as to the making of this representation to the defendant, as well as to the other purchasers, and as to its falsity stands uncontradicted. For the purposes of this opinion, it may be conceded that the other alleged representations are, some of them, mere expressions of opinion, others, in the nature of warranties not included in the

written agreement, or that the evidence fails to show that the same were substantially false, or that they were a part of the oral negotiations which were not embodied in the written contract.

The defendant testified that he knew nothing about carbide plants at the time of the purchase except what the agent told him; that he believed the representations made by the agent and was induced thereby to make the purchase; that after about 15 days' use of the plant he had trouble with it; that about a month or a month and a half after the plant was installed, a representative of the plaintiff inspected it; that he told this representative that "that thing would bust a man up in business to operate it"; that the representative did some work upon it, but no improvement resulted therefrom; that "not very long" thereafter another representative was there "looking over" the plant; that he made a similar complaint to this second representative; that defendant could not operate the plant and ceased to use it about 2½ months after it was installed; that thereafter a third man connected with the company appeared and tested the pipes. About June 18, 1923, the plaintiff's credit and collection manager called upon defendant. The former testified that the defendant complained about the plant; that witness told defendant he would send a man to make adjustments, and that in the following July he did send a man to make "repairs or adjustments on the plant"; and that the plaintiff later sent defendant "a hopper and a bell for his plant, and he later on * * * refused to remove it from the depot." Another representative of the plaintiff testified that in the late spring of 1924 he went to the defendant's home "to make an adjustment on his plant and replace any defective parts, if there was any"; that "I asked him about a settlement, and we did not seem to get together, as far as a settlement was concerned, and Mr. Freitas said that if we would ship him a gas bell and a hopper, as was recommended, he would put it in operation and settle for his plant." Relative to such hopper and bell, the defendant testified:

"They was to send me a hopper and bell, but it was a different kind, a late improvement, and when it came here it was not what they was to send; I found out it was the same kind I had, so I did not take it; that was the reason. * * * It was to be a different kind of a hopper, it would be a later model."

The defendant further testified that he did not promise to pay for the plant if plaintiff would send another hopper and bell.

On June 28, 1923, the defendant wrote the plaintiff:

"The expense of operating it (the plant) is so great that I have had to discontinue its use entirely. I was given to understand that it was cheaper to operate than operation with wood at

\$2 a cord, and, further, that the plant would require only occasional attention, whereas in fact unless it is watched constantly I can get no service from it. Besides the agent told me that I was to have the plant on trial for one year, and if the same was not satisfactory it could be returned. If you will tell me what to do with it and where to ship it I will send it back to you. As it is the plant is of no value to me."

In reply to this letter the plaintiff wrote defendant, under date of July 6, 1923, in part as follows:

"We note your remarks as to the many promises which you claim our salesman made to you at the time of purchase, but as the writer explained to you personally, our only guaranty is that the plant be automatic in action and of good material and workmanship. * * * Relative to the trouble which you are experiencing with your plant: We are referring this matter to Mr. Fears, 105 Bacon Bldg., Oakland, our California state manager, and requesting him to give it his immediate attention, having utility man call and make any adjustments which may be necessary."

July 17, 1923, defendant's attorney wrote the plaintiff that the defendant would crate the plant and put it on board the cars at Merced subject to plaintiff's shipping instructions, but that the defendant would not pay any part of the purchase price or of the promissory note. July 24, 1923, the plaintiff wrote defendant's attorney stating, among other things:

"We are willing to make any adjustments to his plant which may be necessary, but we have absolutely no intention whatever of accepting the return of it."

[2] The chief point upon which appellant relies for a reversal is that "testimony cannot be admitted as to alleged prior misrepresentations where a proven written contract stipulates that none have been made other than those set forth in the written contract, and the party is not deceived as to the contents of the written contract." It is not stipulated in the contract that no representations other than those set forth in the contract were made, but only that no other representations were made "modifying or adding to the terms and conditions herein set forth." If it be conceded that the stipulation precludes proof of an oral promise to let the defendant have the plant on trial for a year and of any oral warranty other than those specified in the written contract, it does not follow that the defendant is barred thereby from proving false representations which induced him to enter into the contract and without which it would not have been executed by him.

"There is a definite distinction between a fraudulent representation and a warranty. A fraudulent representation is an antecedent statement made as an inducement to the contract, but is not a part or element of the con-

tract." *Griswold v. Morrison*, 53 Cal. App. 93, 99, 200 P. 62, 65.

Appellant relies upon the case of *Munn v. Earl C. Anthony, Inc.*, 36 Cal. App. 312, 171 P. 1082, where a somewhat similar stipulation was held to be a waiver of the right to prove that the execution of the contract there in question was induced by false representations. In *Mooney v. Cyriacks*, 185 Cal. 70, 82, 195 P. 922, it is said that the decision in the *Munn Case* "is opposed to the authorities we have cited and hence cannot be followed." The stipulation in the contract considered in the *Mooney Case* was much more comprehensive than that here under consideration. It provided:

"It is expressly understood and agreed that no statements, agreements, understandings or representations of any kind or nature, have been made, or exist, other than those in this agreement contained."

Appellant there contended that "the writing itself is the only admissible evidence upon the issue of fraud." The court said:

"The contention ignores the well-established rule of law that 'parol evidence is always admissible to prove fraud,'"—citing *Berry on Automobiles*, section 814, and many other authorities.

See, also, *Whiting v. Squeglia* (Cal. App.) 232 P. 986. In view of the foregoing decisions, it is deemed unnecessary to consider the cases cited from other jurisdictions.

[3] The statement that the operation of the plant was more economical for cooking and heating than the use of wood at \$2 a cord was not the mere expression of an opinion. It was made by the agent, who presumably knew the cost of operating the plant, to the defendant, who was without knowledge thereof. It is clear that the statement was made for the purpose of inducing the defendant to make the purchase. The form of expression used is immaterial. The agent must have intended and the defendant doubtless understood the statement to relate to an important quality of the plant, that of economy in operation. That seems to have been the agent's chief selling point. The defendant had the right to believe that the agent's statement was based upon his knowledge and experience. Under the circumstances shown by the evidence, the statement was as to an existing fact, a quality of the plant, and not the expression of a mere opinion. "What amounts to an expression of opinion as compared with a positive statement of fact depends upon all the circumstances of the case." *French v. Freeman*, 191 Cal. 579, 585, 217 P. 515, 517. See, also, *Harris v. Miller* (Cal. Sup.) 235 P. 981, 984; *Herdan v. Hanson*, 182 Cal. 538, 546, 189 P. 440; *Tracy v. Smith*, 175 Cal. 161, 165, 165 P. 535. "When one of the parties possesses, or assumes to possess, superior knowledge or spe-

cial information regarding the subject-matter of the representation, and the other party is so situated that he may reasonably rely upon such supposed superior knowledge or special information, a representation made by the party possessing or assuming to possess such knowledge or information, though it might be regarded as but the expression of an opinion if made by any other person, is not excused if it be false." *Haserot v. Keller*, 67 Cal. App. 659, 670, 228 P. 383, 388.

[4, 5] Appellant says that "after the defrauded party, with knowledge of the facts has elected to treat the contract as valid he cannot change his position and assert it is invalid." But the facts in evidence do not show that defendant elected to treat the contract as valid. For more than a year after the plant was installed the plaintiff made repairs and adjustments in an effort to overcome the defects of which defendant complained. Its efforts were continued even after receipt of defendant's letter of June 28, 1923, and that of his attorney of July 17, 1923, in which defendant refused to pay for the plant and offered to return it to plaintiff. "The doctrine of election of remedies is based upon estoppel, and it is therefore apparent that where fraud exists, there is not the same reason for applying a rigid rule of estoppel as in other cases." 12 Cal. Jur. 787.

[6] It is contended that the defendant did not prove damages or that he had rescinded the contract, and that the evidence shows that he was guilty of laches. It was not necessary for the defendant to prove that the property purchased was of no value or that it was worth less than the amount he agreed to pay for it. "Property purchased need not be entirely worthless in order to entitle one defrauded into purchasing it to hold the seller liable for the loss thereby inflicted upon him. * * * The fact that the property is actually worth what the vendee gave for it does not preclude him from obtaining relief on the ground that the sale was induced by false representations made by the vendor, if it would have been worth still more had the representations been true." 12 R. C. L. 393. "The exact amount of damage need not be shown, provided it be in an 'appreciable' sum." *Munson v. Fishburn*, 183 Cal. 206, 219, 190 P. 808.

[7, 8] Where fraud is relied upon as a defense merely, "neither the limitation of the statute nor the doctrine of laches will operate to bar the defense of the invalidity of the agreement upon the ground of fraud, for so long as the plaintiff is permitted to come into court seeking to enforce the agreement, the defendant may allege and prove fraud as a defense. In short, it is not incumbent upon one who has thus been defrauded to go into court and ask relief, but he may abide his time, and when enforcement is sought

against him excuse himself from performance by proof of the fraud." *Estate of Cover*, 188 Cal. 133, 140, 204 P. 583, 587. "Where no affirmative relief is sought, it is not necessary for him to have exercised an existing right to rescind." 12 Cal. Jur. 786; *Simon Newman Co. v. Lassing*, 141 Cal. 174, 74 P. 761. "There are three methods by which in cases like the present a party defrauded may obtain relief: (1) Cancellation or rescission," etc.; * * * (2) Affirmative relief by an action to recover * * * compensation for the injury sustained by the fraud; * * * (3) Defensive relief, whereby the fraud is set up by way of defense to defeat an action brought to enforce an apparent obligation or liability." *Toby v. Oregon Pac. R. Co.*, 98 Cal. 490, 498, 33 P. 550, 553; *Field v. Austin*, 131 Cal. 379, 382, 63 P. 692.

Appellant complains of the court's refusal to give an instruction to the effect that the stipulations of the contract precluded proof of false representations. The contention is disposed of by what has already been said. Appellant sets out four instructions given by the court, and states that "the giving of these instructions by the court is assigned as error." No attempt is made to point out wherein any of the instructions are erroneous, and no statement of law therein appears to be unfavorable to appellant. The other alleged errors which are not covered by the foregoing discussion are of minor importance, and need not be separately considered. It is sufficient to say that appellant's contentions relative thereto are without substantial merit.

The judgment is affirmed.

We concur: PLUMMER, J.; HART, J.

76 Cal. App. 267

**SPRECKELS v. CITY AND COUNTY OF
SAN FRANCISCO. (Civ. 5210.)**

(District Court of Appeal, First District, Division 1, California. Jan. 20, 1926. Hearing Denied by Supreme Court March 18, 1926.)

1. Municipal corporations §956(2)—Conclusion that conditions found by ordinance to exist were not sudden and unexpected, constituting emergency within exception to charter limitation on tax levy, held justified (*Charter of City and County of San Francisco*, art. 3, c. 1, §§ 2, 13).

Where ordinance of 1910 declared that conditions, which it found existed in that year, were created during 1906, and ordinances of 1908 and 1909 found same facts as basis for conclusion that necessity or emergency, essential under Charter of City and County of San Francisco, art. 3, c. 1, § 13, to suspension of limitation on tax levy in section 2, then existed, conclusion that such conditions were not sudden or unexpected and hence did not constitute emergency within charter was justified.

2. Municipal corporations $\S$ 956(2)—Implied conclusion that necessity declared was not pressing, justifying tax exceeding charter limitation, held warranted (Charter of City and County of San Francisco, art. 3, c. 1, $\S$ 2, 13).

Declaration in ordinance of 1910 that no adequate provision had been made for conditions described, which had continued since 1906, held to support trial court's implied conclusion that purpose was to extend extraordinary taxing power under Charter of City and County of San Francisco, art. 3, c. 1, $\S$ 13, over indefinite number of years, and that necessity declared was not pressing and urgent, so as to justify levy of additional tax in excess of limitation in section 2.

3. Municipal corporations $\S$ 956(2)—Continuance of sanitary measures to prevent recurrence of bubonic plague held not emergency authorizing tax exceeding charter limitation (Charter of City and County of San Francisco, art. 3, c. 1, $\S$ 2, 13).

Continuance of sanitary measures by board of health to prevent recurrence of bubonic plague, which had not existed in city for three years, held insufficient to constitute necessity or emergency within Charter of City and County of San Francisco, art. 3, c. 1, $\S$ 13, so as to authorize additional tax exceeding limitation in section 2.

4. Evidence $\S$ 10(1)—Trial and appellate courts within jurisdiction will judicially notice geographical situation of San Francisco and maritime traffic between it and regions from which bubonic plague originally came.

Geographical situation of city of San Francisco, and maritime traffic between it and regions from which bubonic plague originally came, are matters of general knowledge, which trial and appellate courts within jurisdiction will judicially notice.

5. Municipal corporations $\S$ 956(2)—Emergency expenditures, not segregated by ordinance, declaring emergency authorizing taxes in excess of charter limitation, from those of nonemergency character, cannot be sustained (Charter of City and County of San Francisco, art. 3, c. 1, $\S$ 2, 13).

Where ordinance declaring emergency authorizing additional tax levy under Charter of City and County of San Francisco, art. 3, c. 1, $\S$ 13, in excess of limitation in section 2, did not segregate emergency expenditures from those of nonemergency character, emergency items cannot be sustained.

6. Municipal corporations $\S$ 956(2)—It is assumed prima facie that board of supervisors, in declaring necessity for tax in excess of charter limitation, acted on sufficient inquiry, but its determinations are not conclusive (Charter of City and County of San Francisco, art. 3, c. 1, $\S$ 2, 13).

While it will be assumed prima facie that board of supervisors acted on sufficient inquiry in declaring necessity for tax levy exceeding limitation in Charter of City and County of San Francisco, art. 3, c. 1, $\S$ 2, as authorized by section 13, and burden was on one suing to recover taxes paid under protest to show

that facts found were untrue or conclusions therefrom unsupported, its determinations are not conclusive, but subject to review.

7. Appeal and error $\S$ 996.

Where fair and impartial minds may draw different conclusions from unconflicting evidence, trial court's conclusions must be sustained on appeal.

8. Municipal corporations $\S$ 956(2)—Charter held intended to authorize suspension of limitation on rate of taxation to meet only temporary necessities (Charter of City and County of San Francisco, art. 3, c. 1, $\S$ 2, 13, art. 16, $\S$ 29).

Charter of City and County of San Francisco, art. 3, c. 1, $\S$ 13, was intended to authorize suspension of limitation on rate of taxation in section 2 for purpose of meeting only temporary necessities; provision being made in article 16, $\S$ 29, for extraordinary conditions, not creating "great necessity or emergency," by submission of question of bond issue to electors.

9. Municipal corporations $\S$ 956(2)—Necessity of raising revenues exceeding amount of taxes authorized by charter, if not within emergency tax measure, must be met by bond issue (Charter of City and County of San Francisco, art. 3, c. 1, $\S$ 2, 13, art. 16, $\S$ 29).

If revenues sought to be raised by city of San Francisco in excess of amount which may be raised by taxation under Charter, art. 3, c. 1, $\S$ 2, are not within purview of emergency tax measure, authorized by section 13, necessity must be met by bond issue under article 16, $\S$ 29, or by charter amendment, regardless of hardship or inconvenience.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Rudolph Spreckels against the City and County of San Francisco. Judgment for plaintiff, and defendant appeals. Affirmed.

George Lull, City Atty., and Maurice T. Dooling, Asst. City Atty., both of San Francisco, for appellant.

Cushing & Cushing, of San Francisco, (Delger Trowbridge and William H. Gorrill, both of San Francisco, of counsel), for respondent.

CASHIN, J. An action to recover taxes paid under protest; it being alleged as the ground for recovery that the levy was in contravention of the provisions of the charter of the city and county of San Francisco restricting the taxing power of the municipality.

Section 2, c. 1, of article III of the Charter, at the time of the levy provided that, exclusive of certain special taxes, the tax levy for any year "shall not exceed the rate of one dollar to each one hundred dollars valuation of the property assessed"; this provi-

sion being qualified by the provisions of section 13 of the same chapter, which read as follows:

"The limitation in section eleven of this charter upon the rate of taxation shall not apply in case of any great necessity or emergency. In such case the limitation may be temporarily suspended so as to enable the supervisors to provide for such necessity or emergency. No increase shall be made in the rate of taxation authorized to be levied in any fiscal year unless such increase be authorized by ordinance passed by the unanimous vote of the supervisors and approved by the mayor. The character of such necessity or emergency shall be recited in the ordinance authorizing such action, and it shall be entered in the journal of the board. * * *

In preparing the tax levy for the fiscal year 1910-11, the supervisors of the city and county adopted two ordinances, the material portions of the first being as follows:

"Section 1. It is hereby recited, determined and declared that a great necessity and emergency exists within the city and county of San Francisco, which requires that the limitation of taxation contained in section 11, chapter 1 of article III of the charter of said city and county be temporarily suspended, and that the character of such necessity and emergency is as follows, to wit:

"On the 18th day of April, 1906, a large number of the public buildings and other structures, and much of the fire department equipment of said city and county were destroyed by fire, and on said day a large extent of the public sewers of said city and county were damaged and destroyed by earthquake; that a large extent of the public streets of said city and county were damaged by the combined effects of fire and earthquake; also there is danger that the bubonic plague, prevalent in 1907, may recur and provision should be made to prevent such recurrence; that it has been impossible to pave, repave, and repair streets, reconstruct and repair sewers, construct and repair the public buildings destroyed and damaged as aforesaid in April, 1906, from the appropriations heretofore made, and the great necessity and emergency hereby declared to exist has not been adequately provided for by previous tax levies made by the board of supervisors.

"Sec. 2. That by reason of the great necessity and emergency herein set forth large sums of money will be required to be expended by the city and county during the fiscal year ending June 30, 1911, for the paving, grading, repaving and repairing of streets, for the reconstruction and repair of sewers, construction of and repairs to public buildings, for construction and equipment of fire department buildings, for the purchase of land for fire department buildings, for the construction of, repairs to and equipment of school department buildings, and for the purchase of lands for police department purposes, and for the continuation and enforcement of sanitary measures. That the large sums required for the aforesaid purposes cannot be obtained from the annual income and revenue of the city and county, and said necessary expenditures cannot be made without temporarily suspending

the limitation upon the rate of taxation provided for in section 11 of chapter 1 of article III of the charter of said city and county."

The ordinance further declared that, for the reasons therein stated, the limitation upon the rate of taxation be temporarily suspended, and that an additional tax of 29 cents upon each \$100 valuation be levied.

The second ordinance, which levied the tax, apportioned the revenue to be derived therefrom as follows: For paving, repaving, grading, and repairs to streets, for reconstruction of and repairs to sewers, and for construction and repairs to public buildings and other structures, except school buildings, 22 cents; for construction and equipment of fire department buildings, and for purchase of lands for fire department purposes, 2½ cents; for reconstruction and repairs to and equipment of school department buildings, 2 cents; for construction and equipment of police department buildings, and for purchase of lands for police department purposes, 2 cents; for continuance of sanitary measures, one-half cent.

The protests filed by respondent and his assignor included as the grounds thereof those here urged against the validity of the levy, and were followed by demands for repayment, upon noncompliance with which the present action was filed.

At the trial, the ordinances mentioned, together with ordinances adopted during the years 1907, 1908, and 1909, were introduced in evidence, and, according to the language of the decision, no other evidence was received relating to the subject of an emergency or necessity within the meaning of the charter provision mentioned. The ordinance of 1907 declared the necessity for an additional levy for the purpose, among others, not included in the later ordinances, of repairing the streets of the city. The ordinances of the years 1908 and 1909 stated in addition thereto the same facts as are contained in the ordinance here in question as the basis for the conclusion of the board in each of said ordinances that a necessity and an emergency within the meaning of the charter existed, requiring an increase in taxation over the rate otherwise limited.

From the evidence, the trial court concluded that neither the necessity nor the emergency essential to a valid suspension of the charter limitation existed in 1910, and entered judgment for plaintiff, from which judgment defendant appealed.

It is contended by appellant that the evidence was insufficient to overcome the prima facie effect of the findings of the board, that the latter fairly support the board's conclusions, and that the judgment of the trial court is unsupported; and by respondent that, in addition to inferences reasonably to be drawn from the ordinances mentioned, any facts which that court might judicially no-

tice should be considered on appeal as having the effect of evidence supporting the judgment.

[1] The ordinance in question declared that the conditions found to exist in 1910 were created during the year 1906. In *San Christina, etc., Co. v. San Francisco*, 167 Cal. 762, 141 P. 384, 52 L. R. A. (N. S.) 676, it is held that by the use of the adjective "great" the charter means a necessity or emergency of grave character and serious moment; the word "emergency" being therein defined as an unforeseen occurrence or combination of circumstances which calls for an immediate action or remedy, a pressing necessity, an emergency, the word being also defined as a "sudden or unexpected happening." 15 Cyc. 452; *Colfax County v. Butler Co.*, 83 Neb. 803, 120 N. W. 444. Webster's International Dictionary defines the word "necessity" as "the quality or state of being necessary, in its primary sense signifying that which makes an act or event unavoidable." *St. Louis, etc., Co. v. Wanamaker & Brown*, 115 Mo. App. 270, 90 S. W. 737, 743.

The ordinances of 1908 and 1909 found, as the basis for the conclusion that a necessity or emergency then existed, the same facts as those contained in the ordinance of 1910. From the findings in the ordinance first mentioned, the trial court might reasonably have inferred that the board was then apprised as to the extent of the injuries to streets and sewers and to the real and personal property owned by the municipality; and, being so apprised, that the sums required to provide relief were then ascertained or ascertainable. These inferences fairly support the conclusion that the conditions declared to exist in 1910 were foreseen at least as early as the year 1908, were not sudden or unexpected, and hence did not constitute an emergency as defined above within the meaning of the charter. *Mallon v. Water Commissioners*, 144 Mo. App. 104, 128 S. W. 764; *Parker v. Mayor, etc., of Monroe*, 128 La. 951, 55 So. 587.

[2] It was also declared in the latter ordinance that theretofore no adequate provision had been made for the conditions as described. As stated, these conditions were known and had continued over a period of years, during which, as may fairly be inferred, the amounts required to furnish a remedy were ascertainable and as a reasonable probability had been ascertained.

This declaration, in view of the time which had elapsed since the catastrophe of 1906 and the above-suggested inferences, admits of a construction which supports the implied conclusion of the trial court that, contrary to the plain meaning of the charter (*San Christina, etc., Co. v. San Francisco*, supra), it was the purpose, following the occurrence mentioned, to extend the extraordinary taxing power over an indefinite number of years, and that the necessity declared in 1910 was not of the

pressing and urgent character which would justify the conclusions and acts of the board. *Colfax County v. Butler County*, supra.

[3, 4] Among the purposes for which the additional tax was levied was that of providing for "the continuance of sanitary measures under the direction of the board of health," etc. It not being contended that cases of bubonic plague existed within the municipality after the year 1907, the measures declared necessary by the ordinance in evidence were wholly preventive, and similar in character to other activities of the board of health. The needs of the board, in the absence of epidemics, were not unlike those of the police and fire departments, and could with reasonable certainty be anticipated. Where, as here, the necessity declared in 1910 arose from conditions known and continuing since the year 1907 the trial court might fairly conclude that the situation alleged was not unforeseen. That the danger declared was in its nature continuous was reasonably to be implied, not only from the ordinance, but from the geographical situation of the city and the maritime traffic which passes between it and the regions from whence the disease originally came; the latter facts being matters of general knowledge which the trial and appellate courts within the jurisdiction will judicially notice (*Varcoe v. Lee*, 180 Cal. 338, 181 P. 223); and, though it may be said that action by the board of health was necessary in this as in similar situations, the case presented is analogous to that of *Burr v. San Francisco*, 186 Cal. 508, 199 P. 1034, 17 A. L. R. 581, wherein it was held that an increase in the annual expenses of the city, caused by new activities of its government, was insufficient to constitute a necessity of emergency within the meaning of its charter.

[5] Should it be urged that the need for fire, police, and school department equipment was such as to fairly come within the charter provision here considered, the sums required therefor were not segregated from the cost of construction of buildings in which such equipment was to be installed, or, in the case of the police and fire departments, from that of the acquisition of lands. The same is true of the cost of repairs to streets, sewers, and school buildings, included in amounts levied for the additional purposes of paving and grading streets, the construction of sewers and the reconstruction of school buildings. Even if the court, therefore, had been of the opinion that the proposed expenditures for equipment or repairs were for the purpose of meeting a great necessity or emergency, it could not have sustained these items, since the ordinance furnished no means of segregating them from others of a nonemergency character. Moreover, it is apparent that the necessity for the equipment arose from the same cause as the other declared needs, had existed for the

same length of time, and was not sudden or unexpected—all of which facts would negative its alleged emergency character, and justify the same conclusion as to it which the court was warranted in drawing as to the proposed expenditures for new construction and the acquisition of lands.

[6] While it will be assumed *prima facie* that the board acted upon sufficient inquiry (In re Hoffman, 155 Cal. 114, 99 P. 517, 132 Am. St. Rep. 75; Morgan v. Long Beach, 57 Cal. App. 134, 138, 207 P. 53), and the burden rested upon appellant to show either that the facts found were untrue or that the conclusions therefrom were unsupported (Sav. & Loan Ass'n v. San Francisco, 146 Cal. 673, 80 P. 1086; San Francisco v. Flood, 64 Cal. 504, 508, 2 P. 264), its determinations were not conclusive but subject to review (San Christina, etc., Co. v. San Francisco, supra).

[7] The evidence in the instant case was without conflict, and the findings rest upon inferences drawn from the declarations of the board, together with circumstances judicially noticed; and though the facts would support inferences favorable to appellant, those drawn by the court also find reasonable support therefrom. They fairly overcome the presumptions mentioned, and sustain the conclusion that no necessity or emergency within the meaning of the charter was shown. Where fair and impartial minds may draw different conclusions from the evidence, though there be no conflict therein, the conclusions drawn by the trial court must be sustained on appeal. Kelly v. Brown, 2 Cal. Unrep. 536, 8 P. 38; Fanning v. Green, 156 Cal. 279, 104 P. 308; Bettens v. Hoover, 12 Cal. App. 313, 107 P. 329; Pratt v. Phelps, 23 Cal. App. 755, 139 P. 906.

[8, 9] In conclusion it may be said that it was the evident intention of the charter that the power to temporarily suspend the limitation upon the rate of taxation should be exercised for the purpose of meeting such necessities as were temporary in character. Provision is therein made for extraordinary conditions not within the definition of a "great necessity or emergency" requiring the acquisition of lands or the construction of any permanent building or improvement, the cost of which, in addition to the other expenses of the city and county will exceed the revenue raised by ordinary taxation in any one year, by directing the supervisors by ordinance to submit a proposition to incur a bonded indebtedness to the electors of the municipality. Charter, art. 16, § 29. As observed by the court in San Christina, etc., Co. v. San Francisco, supra, if the revenues sought to be raised by the city do not fairly come within the purview of an emergency tax measure, the necessity must be met either by the issuance of bonds or by an amendment to the charter, and no argument

of hardship or inconvenience will justify a court in ignoring its protective provisions.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

76 Cal. App. 293

TRUMAN v. SUTTER-BUTTE CANAL CO.
(Civ. 2981.)

(District Court of Appeal, Third District, California. Jan. 23, 1926. Hearing Denied by Supreme Court. March 22, 1926.)

1. Appeal and error $\S$ 995.

Probative force of expert witnesses' testimony is question solely for jury.

2. Appeal and error $\S$ 1002—Jury's verdict on conflicting evidence held conclusive on question whether water from defendant's ditch damaged orchard.

Verdict for plaintiff on conflicting evidence held conclusive of question whether damage to orchard was caused by water which escaped from defendant's ditch or from seepage from rice fields owned by plaintiff and others.

3. Evidence $\S$ 213(2)—Admission in evidence of letter containing offer of settlement to establish admission of liability for damages held not abuse of discretion (Code Civ. Proc. §§ 895, 997, 2078).

Admitting letter in evidence, to establish an admission of liability for water damage to plaintiff's orchard contained therein, held, under Code Civ. Proc. §§ 895, 997, and 2078, relating to admissions in evidence of offers of compromise, not abuse of discretion, though letter did contain offer to pay damages very greatly less than were claimed.

4. Appeal and error $\S$ 1064(1)—Instruction that escape of water from ditch alone was proof of negligence for which defendant was liable if it damaged plaintiff's orchard, if erroneous, held not prejudicial.

Where escape of water from defendant's irrigation ditch was admitted, instruction that escape or seepage of water from ditch was alone proof of negligence, and that if such negligence damaged plaintiff's orchard defendant was liable, if erroneous, held not prejudicial, in view of defendant's express admission of liability at least in part, and claim that damage was due principally to subterranean water from rice fields.

5. Trial $\S$ 295(1).

Jury should consider instructions as a whole.

6. Waters and water courses $\S$ 263—Instruction held not objectionable as authorizing jury to consider possible future negligence and damage in fixing damages to orchard from escaped water.

Instruction that, in determining damage to orchard from water escaped from irrigation ditch, jury might consider "detriment, if any,

resulting by reason of the negligent acts and omissions, if any, of defendant, or certain to result in the future," though awkward, *held* not construable as erroneously authorizing jury to consider possible future damage from future negligence.

7. Appeal and error — 758(3).

Appellant's mere statement that requested instruction refused "should have been given" *held* not sufficient to justify review.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by I. J. Truman, Jr., against the Sutter-Butte Canal Company. Judgment for plaintiff, and defendant appeals. *Affirmed*.

W. H. Carlin, of Marysville, and Henry Ingram, of Gridley, for appellant.

George F. Jones, of Oroville, and Orville C. Pratt, Jr., and Arthur H. Barendt, both of San Francisco, for respondent.

HART, J. The plaintiff sued the defendant to recover the aggregate sum of \$18,000, alleged to be the extent of the damage, measured in money, inflicted upon plaintiff's orchard by certain acts of the defendant. The issues of fact were tried before a jury, who awarded plaintiff a verdict for the sum of \$5,000. Judgment was entered accordingly, and from said judgment defendant appeals.

The defendant is a public service corporation, and owns and operates an irrigation system, "consisting of ditches, dams, pumping plants, and other structures," and serves persons owning lands contiguous to its system with water for irrigating purposes. It takes water from the Feather river and conveys it through its ditches to its various customers in the counties of Sutter and Butte.

The plaintiff owns a tract of 40 acres of land (specifically described in the complaint) in the county of Sutter. Of this tract, 26 acres, situated in the northeast corner of the tract, borders upon certain ditches maintained by the defendant for the purposes of its business in the distribution of water to its customers. The said 26 acres had been and constituted, at the time of the damage thereto in the manner claimed and alleged by plaintiff, to be hereinafter explained, a prune orchard of 2,340 trees, 16 acres thereof being set out in three year old trees, and the remainder planted in the month of March, 1921, with trees of the age of one year. The defendant, it appears, prior to and at the time of the damage alleged and complained of by plaintiff, owned and operated, as parts of its irrigation system, two ditches "touching said above described tract, one on the north side thereof, designated by defendant as lateral A, which, from the northeast corner, touches at all points the north side of said tract, and carries water in a westerly direction to various consumers of this defendant; the other ditch, designated by de-

fendant as lateral A-3, from its confluence with ditch lateral A at the northeast corner of said tract, extends in a southerly direction and touches at all points the east side of the above tract, and carries water in a southerly direction to various consumers of defendant." The complaint charges that, "for the first time during the season of the year 1921, and on or about the 5th day of May, 1921," the defendant caused said ditches to be filled with water, and that immediately thereafter the water so turned thereinto broke through and overflowed the banks at a point in lateral A-3, 100 feet, approximately, south of the junction of said lateral with lateral A, with the result that the water flowed over the banks of said ditch and "through the breach therein made" continuously for 24 hours, approximately, so that "for a period of 90 days, more or less, as plaintiff is informed and believes and therefore alleges, from said 5th day of May, 1921, the said 26 acres * * * were flooded, and water stood thereon at depths of from 6 to 18 inches, and that thereafter continuously, until on or about the 1st day of October, 1921, water seeped through the said laterals * * * onto said lands, keeping it in a saturated and soggy condition." The complaint alleges that, because of the flooding of said lands and the seepage referred to, more than 1,500 of the prune trees standing and growing thereon were "utterly destroyed, and the entire orchard was rendered wholly unfit for cultivation and useless for any purpose whatever, to the great injury, loss, and damage of plaintiff." The complaint charges that the inundation of plaintiff's land and the consequent destruction of his trees and injury to his land were due entirely to the carelessness and negligence of the defendant, either from the negligent construction of said ditches or from carelessly and negligently turning into said ditches and so forcing them to carry an excessive amount of water, or from both causes, and but for such carelessness and negligence the injury to plaintiff's land and the destruction of the trees thereon would not have occurred.

The damages claimed and asked for by plaintiff are: For the destruction of the trees, \$13,200; for the loss of the beneficial use of said land by reason of the flooding thereof, as alleged, for the years 1921 and 1922, \$1,300; as for special damage, by reason of the alleged necessity of the construction by plaintiff of a ditch paralleling the ditch of defendant on the north and east sides for a distance of not to exceed 30 feet, at a cost of \$3,500, approximately, for the purpose of draining the land of plaintiff and carrying off the seepage water from defendant's canal, the total amount of the damage being the sum above stated.

The answer, after certain formal denials, admits: That for the first time, defendant,

in May, 1921, turned water into and through the ditches referred to in the complaint or carried water down said ditches to the vicinity of plaintiff's said lands, but denies that at the time mentioned that there was carried through said ditches an excessive amount of water; "that it is a fact, however, that, on the 6th day of May, 1921, a small break occurred in lateral A-3, * * * through which water flowed out and upon plaintiff's land for a period of not to exceed six hours," but alleges that the said break was of such a nature as to have been unavoidable in the construction and maintenance of ditches, particularly during the first year of their use, and further alleging that defendant closed the break within a period of six hours after it occurred, and that thereafter, "and as soon as defendant could take the necessary apparatus upon the ground, it proceeded to and within a period of not more than 25 days from the occurrence of said break defendant caused said water to be pumped off said land, and no more breaks in said ditches or any thereof and no more water escaped from defendant's said ditches upon any of plaintiff's said land during said year by breaking of ditches, nor did any material or injurious amount of water during said year pass from defendant's said ditches to and upon plaintiff's land by any other means whatsoever." The answer proceeds to allege that the lateral ditch from which flowed the water onto plaintiff's land, as set forth in the complaint, was maintained along the north line of plaintiff's land at the request and for the benefit of plaintiff, so that the latter's land could be irrigated by water from defendant's said ditch. It is further likewise alleged that "plaintiff had maintained another ditch or lateral running along the entire south line of his said orchard tract * * * through which he took and received from defendant water, which he carried through said lateral for his own use and benefit, and in addition thereto upon the remainder of plaintiff's said land lying immediately south of that in said complaint, described and consisting approximately of 600 acres, upon which plaintiff, during the year 1921 cultivated and grew a rice crop, for the growing of which he procured from defendant and used thereon water during the whole of the rice cropping season of 1921." It is alleged by defendant that the drainage from plaintiff's land which was used in rice growing is in a northerly direction and "over and across plaintiff's orchard, described in the complaint," said land or orchard being "situated in a swale, hollow, or depression in plaintiff's said land; that the land itself is inclined to adobe and poorly fitted for the growing of an orchard, and owing to the unfavorable location of said orchard, particularly in view of the large amount of water which plaintiff took upon his own land for rice growing, and the drainage water escap-

ing from plaintiff's said rice land, by both surface and subterranean flow over, to, and upon said orchard, the short time said water escaped from said defendant's said ditch as aforesaid, laid upon a portion of said orchard, not exceeding in all four acres, did not materially affect said orchard, and the results shown there now would have been the same had such break in defendant's said ditch or canal not occurred."

As a special defense, the defendant charges that the overflow of plaintiff's orchard was wholly occasioned through plaintiff's own negligence, as follows: That well knowing that the 26 acres of land which he planted in prune trees were entirely unfit for the growing of prune trees by reason of its location or physical relation to his 600-acre tract devoted to rice growing, he carelessly, negligently, recklessly, and without the exercise of ordinary caution and care, "set out his said orchard in an unfavorable position and place therefor"; that, upon and after receiving the water furnished him by defendant at his request to be used in the irrigation of the said 600-acre tract upon which he was growing rice, plaintiff carelessly, negligently, and without the use of ordinary care permitted said rice water so brought and used on said 600 acres to escape, "by both surface and subterranean flow, over, to, and upon said orchard, which saturated and kept saturated the ground in said orchard during said summer of 1921 and 1922 and 1923, and if, as a matter of fact, any trees in said orchard were killed by water during said period or at all, they were so killed because of such water negligently by plaintiff permitted to go upon said orchard." The answer also specifically denies that plaintiff's trees or any of them were destroyed, and that plaintiff suffered any damage as alleged in the complaint.

Upon the issues as thus framed, the cause was tried and submitted to the jury, with the result as above stated.

Counsel for plaintiff expressly admit in their briefs that the evidence is in substantial conflict upon the claim of plaintiff that the defendant's negligence in maintaining lateral ditches described in the complaint was a direct contributing cause of the damage to plaintiff's orchards. It is contended, however, as is to be implied from the defendant's answer, that such negligence was not the sole cause of the damage, but that much of the injury to the plaintiff's orchards was due to seepage or a subterranean flow of waters from certain rice fields situated in near proximity to and south, southeast, and east of the orchards. One of these rice fields, a tract of approximately 600 acres of land, and situated east of the orchards, belonged to plaintiff. Counsel for defendant also make this statement in their opening brief:

"Respondent claimed damage in his complaint in the sum of \$13,200, and the jury awarded

him \$5,000. Of course, we believe that the jury had no right to award any damage at all, and that if any were awarded the sum specified by them in their verdict was grossly excessive, but we are also aware of the fact that we are dealing with a matter that went to the jury for consideration. * * * We must also admit that the amount of damages awarded, while apparently very excessive, finds some support in the testimony of Mr. Leonard A. Walton."

But while making those admissions, counsel for the defendant, nevertheless, insist that the evidence supporting the verdict was of so slight or unsatisfactory a character as to have made certain alleged errors of law occurring in the course of the trial singularly prejudicial to the substantial rights of the defendant in the trial of the case. A careful review of the evidence forbids our assenting to that proposition, assuming that there is merit in the contention that the rulings referred to were erroneous. Those rulings are three in number, the first of which involves the action of the trial court in admitting in evidence, over objection by defendant, a certain letter addressed to plaintiff by an engineer employed by defendant, and which had reference to the break in defendant's ditch, and in which the writer, among other matters therein stated, admitted that the damage to plaintiff's property was caused in part by water which flowed over and upon the orchards from the defendant's ditch by reason of the break occurring therein. The other assigned errors arise from certain instructions embraced within the court's charge to the jury.

The evidence shows, as the complaint alleges, that, on the 5th day of May, 1921, the defendant, for the first time after the lateral ditches mentioned in the complaint were constructed, turned into said ditches a flow of water equal to the capacity thereof; that these laterals bordered plaintiff's orchard on the east and the north; that during the nighttime between the 5th and 6th days of May, the bank of the east lateral, designated in the complaint as lateral A-3, gave way to the pressure of the water, causing a break in said bank covering a space in width of several feet and $3\frac{1}{2}$ to 4 feet deep; that the water from said lateral flowed in a large volume over and upon the orchard of plaintiff; that, besides flowing through said breach, water also passed through numerous cracks or interstices in the banks of both laterals; that the water then flowing on the low part of the orchard of plaintiff developed into a large pool, approximately "knee deep," and within three days from the time of said break and the overflowing of the water from the said ditches onto and over said orchard, approximately 1,000 prune trees of said orchard were destroyed. One Snyder was, at the time of the break and had been for some time prior thereto, foreman and in charge of plaintiff's orchard. He testified that, early

in the morning of May 6th, he discovered the break, and that the orchard was covered with water; that not only was water passing through the break "good and fast," but was also passing over the banks and through the cracks in the banks for a distance along the lateral of from 120 to 150 feet. This witness stated that he immediately notified the man in charge of defendant's ditches at the "ditch camp," located about a mile east from the point where the break occurred, of the break; that the water was thereupon "shut off" so that it would not longer pass through the laterals; that, notwithstanding the shutting off of the water from the laterals, the break in the ditch continued to grow in size, and the water still therein to flow over and upon the orchards; that he attempted to stop the flow by depositing sacks of dirt in the break. It was further shown that about three days after the break the defendant installed a pumping equipment in the orchard and proceeded to pump the water therefrom; that the pumping was continued practically through the entire summer, and the water not entirely pumped from the orchard until the month of September or October, 1921. Further recapitulation herein of the testimony as to the break and the overflowing of plaintiff's orchard by the water from the ditch by reason of the break and of the existence of cracks in the banks of the laterals need not be made, since the fact of the break and the fact of the water from the ditch flowing in large quantities upon plaintiff's property are admitted, as is also the fact that there is evidence which supports the amount of the damages awarded. But it is important, as showing the faulty construction or careless maintenance of the ditch, to state that one Buckner, who was a ditch tender in the employ of the defendant for a month prior to and at the time the break occurred, testified that on each of three successive days immediately preceding the time the water was turned into the laterals on the 5th day of May, 1921, he was engaged in removing from the ditches or laterals weeds and dirt, preparatory to the turning thereinto water from the main canal, and that while so engaged he observed that the banks of the laterals "were cracked and low in places and uneven"; that "in some places the ditch was in good condition, but other places the banks were cracked for a space of 100 feet or more in spots all along the canal." This witness testified on cross-examination:

"Q. How many of those cracks did you see on A-3? A. I didn't count them; they were all along the whole levee.

"Q. How many did you see? A. I don't know.

"Q. Would you say there was 100 of them? A. I would say there was several thousand of them."

The witness stated that he went to where the break occurred on the 6th of May, about

10 o'clock a. m. As to what he then observed, he testified, on cross-examination:

"Q. How many breaks did you find? A. One break.

"Q. And that was as you have described it, about 10 feet wide? A. Yes, sir.

"Q. Did you find water running out of that levee at any other place except at that break? A. Yes, sir; through the cracks.

"Q. Where? A. All along the east side.

"Q. What? A. As far as the water was at that time."

This witness further testified that one Sitton, then the water master of defendant, and two other employees thereof, went over and along the laterals for three days immediately before the water was turned into the laterals on May 5th and saw the cracks in the banks thereof.

The theory of the defense, as has before been stated and as is indicated by the answer of the defendant, is that the use of the large quantities of water necessary for the growing of rice upon the rice fields situated not far distant from the plaintiff's orchards had the effect of raising the subterranean water plane of said rice lands, with the result that the water from that source had continuously flowed underground in such large quantities to the orchard as to destroy the roots of the prune trees, it being a matter of common knowledge that fruit trees require a much smaller amount or acre-feet of water to sustain them than is required in rice culture, and that to give to such trees water much in excess of what, according to their nature, they require will generally result in their destruction. The distance of the rice fields from the plaintiff's orchard on the south and west thereof is, according to the evidence, over a quarter of a mile, and the distance of such fields from said orchards on the north is about $2\frac{1}{2}$ miles. It was admitted by defendant's expert witnesses that the general subterranean drainage from these rice fields is to the south and west, or, in other words, from the direction of the orchards; but the theory was and is (and the expert witnesses of defendant testified to that effect) that, due to the large quantities of water used on said rice lands in the two or three years preceding the time at which the break occurred, a water mound developed underground or beneath the surface of the rice lands, the effect of which was to raise the water plane or table below the ground an average of 11 feet over the whole of the acreage of the rice lands—some 9,000 acres in the aggregate; that the result of this increase in height of the water plane in said lands was to force the underground drainage from its natural flow and turn it in the direction of and to the orchards of the plaintiff, thus causing the roots of the prune trees to remain in standing water.

[1] Whether the testimony of the expert witnesses in support of that theory was of

sufficient probative force to overcome the case made by the plaintiff presented a question solely for the jury to determine. The fact that the bank of the lateral ditch yielded, to the force of the water turned into the ditch and caused the water to pass over and upon the plaintiff's orchard or portions thereof is admitted. There was testimony, as we have shown, that the lateral in which the break occurred and from which the water flowed upon and inundated portions of the orchards was in very poor condition for holding or carrying water in quantities sufficient to be used for irrigation purposes because of the large number of cracks or interstices therein from which the water could and did seep. There was testimony that within three days after the overflowing of the plaintiff's orchards by reason of the breaking of the bank of the lateral ditch, almost 1,000 trees died. It was further shown that, notwithstanding that in the two years (1922 and 1923) immediately succeeding the year 1921, in which the damage complained of here occurred, the rice lands in the vicinity of plaintiff's orchards were flooded with water, and still there was testimony to the effect that the only trees found to be destroyed or dead on said orchards were in that portion of the orchards which was flooded from defendant's ditch in 1921. This testimony, it will be noted, tends to dispute the theory upon which the defendant relied to overcome the showing made by the plaintiff in support of the allegations of his complaint.

[2] Thus it will be observed that the most that can be said of the question whether the damage to plaintiff's trees was wholly due to the flooding of his land by the water from the defendant's ditch, or was caused by the joint action of the water thus thrown upon the orchard and the percolating waters from the rice fields, is that thereon there existed and does exist a conflict in the evidence. Of course, in that situation, so far as the evidence is concerned, the verdict of the jury, which necessarily implies a finding that the proximate cause of the damage was the negligent acts of defendant in the construction and management of its ditch, is conclusive upon this court.

We are now brought to a consideration of the alleged errors occurring in the trial of the case. The letter above referred to as having been erroneously, and to the prejudice of the rights of the defendant, admitted in evidence against the latter's objection, was addressed to plaintiff by Mr. Norton Ware, chief engineer of defendant, and was offered and received in evidence while plaintiff was under direct examination. The letter, after stating that a careful investigation of plaintiff's "orchard damage" had been made, and describing the conditions existing in the vicinity of the orchard, stating that the land, because of its character and its situation with reference to the rice fields, is not well adapted

to the development of a thriving orchard under the "present irrigation methods in the vicinity" of the orchards, proceeds as follows:

"The value of the orchard has been placed at \$185 per acre; the total valuation therefore would be \$4,865 for the 26.3 acres planted to trees. The Canal Company has contributed to some extent to the general seepage condition in the orchard, but the major portion of the damage is due to the rice irrigation. There is a total of 2,266 trees in the orchard, of which 506 are dead and 571 not thrifty; or 47½ per cent. of the orchard has been damaged. This makes the damage done amount to \$2,300. The Canal Company is willing to assume \$250 of this damage, being the amount of damage due to direct seepage from our canals along and adjacent to the trees affected."

[3] The specific objection to the introduction of the letter in evidence was that it constituted an offer by defendant to plaintiff for a compromise and settlement of the claim of damages by the latter for the injury sustained, and that it was therefore inadmissible under sections 895, 997, and 2078 of the Code of Civil Procedure. Counsel for plaintiff stated, in reply to the objection, that his sole purpose in offering the letter was to show an admission by the defendant, through an authorized agent, that the defendant did contribute to the damage of plaintiff's orchard. The court, by its ruling admitting the letter, expressly limited the proof of the contents of the letter to the purpose for which counsel for plaintiff stated that they offered the letter in evidence. The two sections first named of the Code within the inhibitions of which it is claimed the letter falls provide that where, before the trial, the defendant offers in writing to allow judgment be taken against him for a specified amount, and the offer is not accepted, the offer and acceptance may not be given in evidence nor affect the recovery, otherwise than as to costs. Section 2078 provides that "an offer of compromise is not an admission that anything is due." The letter was written by Ware a short time after the break occurred, and nearly six months prior to the filing of the complaint herein. There is no evidence in the record showing that, at any time, either prior or subsequent to the writing of the letter, or prior or subsequent to the filing of the complaint herein, any negotiations were opened or pending between plaintiff and defendant looking to a compromise or settlement of any compensation which plaintiff might claim for the damage to his orchards. No question was asked plaintiff on cross-examination by defendant's counsel as to any proposition of compromise having been made or discussed between the parties, nor was Ware, who testified for defendant, asked by counsel for the latter whether any conversations or conferences or negotiations looking to a compromise were had at any time between the parties. If any such confer-

ences or negotiations had taken place prior to the writing of the letter or at any time, it may be assumed that the fact thereof would have been brought out at the trial. The letter does not contain a direct or definite proposition to settle any claim which plaintiff might make. But, conceding, as well we may, that it contained a proposition to compromise, it did so upon an admission by defendant of liability for the damage, the offer to settle, however, being for much less than was and is claimed by plaintiff, and therefore the trial court cannot be justly charged with an abuse of discretion in admitting the letter in evidence as in proof of such admission. The rule in this regard is well stated in *Hartford Bridge Co. v. Gran-ger*, 4 Conn. 142, 148, as follows:

"The law on this subject has often been misconceived; and it is time that it should be firmly established. It is never the intendment of the law to shut out the truth; but to repel any inference, which may arise from a proposition made, not with design to admit the existence of a fact, but merely to buy one's peace. If an admission, however, is made, because it is a fact, the evidence to prove it is competent, whatever motive may have prompted the declaration. * * * The question to be considered, is, What was the view and intention of the party in making the admission; whether it was to conceive a fact hypothetically, in order to effect a settlement, or to declare a fact really to exist."

In *Rose v. Rose*, 112 Cal. 341, 44 P. 658, an action for divorce, in a letter written by the husband to the wife, the former offered to divide the property as in settlement of their property rights, and described it as community property. The offer of the letter in evidence was objected to on the ground that it was an offer of compromise which was not accepted by the wife. The trial court admitted the letter, however, and on appeal the ruling allowing the letter in evidence was assigned as error and prejudicial, to which the Supreme Court, through the late learned Judge Van Fleet, replied:

"The court did not err in admitting, on the issue as to the character of the property, the paper signed by defendant, in which he offered to divide the property, and described it as community property. It was admitted solely on the question as to whether the property was community or separate, and for this purpose it was proper as a declaration by the defendant, even conceding that the paper is to be regarded as an offer of compromise."

See, also, *Donley v. Bailey*, 48 Colo. 373, 376, 110 P. 65; *Dunlap v. Montana-Tonopah M. Co. (C. C.)* 192 F. 714; *Teasley v. Bradley*, 120 Ga. 373, 375, 47 S. E. 925; *Kennell v. Boyer*, 144 Iowa, 303, 122 N. W. 941, 24 L. R. A. (N. S.) 488; also footnote at page 489, *Ann. Cas.* 1912A, 1127.

In *Batchelder v. Batchelder*, 2 Allen (Mass.) 105, it is said that whether or not such admissions are by way of compromise and to

buy one's peace, or are mere admissions of liability and express or implied promises to pay, are primarily questions of fact for the trial court in determining the admissibility of testimony. See, also, *Greenfield v. Kennett*, 69 N. H. 419, 45 A. 233; *Langdon v. Ahrends*, 166 Iowa, 636, 147 N. W. 940, 941.

[4] The following instruction, given by the court at the request of plaintiff, is criticized as invading the domain of fact:

"You are instructed that if you find that water escaped through or over the banks of said lateral A-3, or seeped or percolated from or out of such lateral A-3 or other canal or ditch of defendant company, the mere fact of such escape of water as aforesaid is in itself sufficient evidence to prove negligence on the part of defendant canal company, and if you find that such negligence resulted in damage to the premises of plaintiff and to the fruit trees thereon, your verdict should be for the plaintiff, for such sum as he has suffered therefrom, not exceeding the sum claimed in the complaint, to wit, \$13,200."

It is said that by giving the above instruction the court practically took the case from the jury. In support of this conclusion the defendant cites a number of cases holding that a canal company is not an insurer against all damages arising from its ditches, but is required to exercise reasonable or ordinary care only in the construction, maintenance, and operation of its ditches, or, in other words, is to be held only to the usual and ordinary course and manner of constructing its irrigating system. See *Nahl v. Alta Irrigation District*, 23 Cal. App. 333, 137 P. 1080; *North Stirling Irr. Dist. v. Dickman*, 59 Colo. 169, 149 P. 97, Ann. Cas. 1916D, 973; *Hunt v. Sutter-Butte Co.*, 66 Cal. App. 363, 225 P. 884. The cases named hold as counsel for defendant contend, and the court below, in addition to the instruction complained of, also gave instructions in accord with the theory upon which those cases proceed. The instruction under criticism here, however, was based upon and is supported by what the Supreme Court said in denying a petition for a hearing of the case of *Tormey v. Anderson-Cottonwood I. Dist.*, 53 Cal. App. 559, 568, 200 P. 814. The exigencies of this case do not require us to attempt to differentiate, even if it may be done, between the case just named and the instant case upon the theory of a difference in the facts of the two cases, since it is plainly true that, whether the instruction correctly or incorrectly states the law, in so far as it is applied to this case, the giving of it cannot be held to have worked prejudice as against the defendant, in view of the fact that it (defendant) expressly admitted liability, at least in part, for the damage of which plaintiff here complains. And this is true, even though such admission was limited, as indicated, since the question of the defendant's liability, whether for any or for all, or for only a part of the damage, was

essentially an issue in the case under the plea of defendant that the damage was due entirely to the subterranean water flowing into the orchard from the rice fields, the admission that it was in part, and only in part, responsible for the damage, and the undisputed evidence that the portions of the orchards damaged were inundated by the water passing through the bank of the ditch and the interstices therein.

[5, 6] The court told the jury that, in arriving at the amount of any damages they might assess against defendant and award the plaintiff, they were "to determine the difference, if any, between the value of plaintiff's premises, including the growing fruit trees thereon, immediately before they were damaged by reason of the negligent acts or omissions of defendant, if any, and the value of the same premises after they were so damaged, *taking into consideration the detriment, if any, resulting by reason of the negligent acts and omissions, if any, of defendant, or certain to result in the future,*" etc.

The defendant assails the part of the instruction which we have italicized as so extending the scope of the inquiry as to the damage suffered by the plaintiff as to have justified the jury into taking into consideration, in assessing the damages, some other damage which the defendant might cause to plaintiff's property by some future negligent acts or omissions in the maintenance of its ditches—that is, damage which might be so caused after the 6th day of May, 1921—and counsel for defendant assert that the "jury probably" so understood it. Save and except the words in italics, the instruction is free from objection. To the extent of those words, the instruction is awkwardly expressed, to say the least of it. But the court, by those words, undoubtedly intended to say what it said in another of its given instructions, to wit, " * * * You are entitled to consider, not only the damage that has heretofore visibly occurred, if any, to plaintiff's premises and to the growing fruit trees thereon, but also the damage, if any, to said premises and to said trees that is certain to result in the future as the direct and necessary result of *the acts or omissions of said defendant,*" the language "certain to result in the future," being specifically confined in other instructions, as well as in the rulings of the court as to the evidence addressed to the question of damage, to the damage caused in the year 1921, as alleged in the complaint. Indeed, a careful reading of the italicized portion of the criticized instruction must at once convey to the mind that the court predicated the expression, "certain to result in the future," entirely upon the "negligent acts and omissions" alleged in the complaint. Paraphrasing or amplifying the italicized language of the instruction, as it is amplified by the other instruction given on the measure of damages, it clearly means, and, of course,

was intended to read, " * * * taking into consideration the detriment, if any, resulting by reason of the negligent acts and omissions, if any, as alleged in the complaint, or which may result in the future from the negligent acts and omissions so alleged." The jury, considering the instructions as a whole, as it was their duty to do, and also having in view the rulings of the court confining the evidence to the proof of such damage only as might have been done to plaintiff's property in the year 1921 from the overflowing of the water therein from defendant's ditch on May 5th or 6th of that year, certainly could not have understood the italicized words to mean anything other than as thus amplified and construed. Indeed, the proposition which the instruction would state under the construction thereof by counsel for defendant would be palpably absurd; so plainly so, indeed, that the absurdity would readily be perceived by any layman possessing ordinary intelligence.

[7] The counsel for the defendant in their brief set forth a number of instructions which they submitted, but which the court refused to give to the jury, and in this it is asserted that the court committed prejudicial error. The counsel do not point out that the instructions preferred by them and refused by the court announced any principles of law applicable to the case which were not stated in the charge of the court to the jury. All that counsel say in regard to the action of the court in refusing to allow said instructions is that they "should have been given." This is not sufficient to justify a review of the assignments in that particular. The charge of the court seems to have covered every rule or principle of law pertinent to the issues as made by the pleadings and developed by the proofs necessary to an enlightened consideration of the evidence by the jury.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

76 Cal. App. 227

PEOPLE v. McCLOSKEY. (Cr. 886.)

(District Court of Appeal, Third District, California. Jan. 15, 1926. Rehearing Denied Feb. 13, 1926. Hearing Denied by Supreme Court March 15, 1926.)

I. Constitutional law ⚡200, 258—**Weapons** ⚡3—Statute prohibiting person convicted of felony to own or possess firearm capable of concealment held not, as applied to property possessed when it was enacted, violative of due process or ex post facto (St. 1923, p. 696, § 2).

St. 1923, p. 696, § 2, prohibiting person convicted of felony from owning or possessing firearms capable of concealment, as applied to property owned at time of its enactment, held not a

taking of property in violation of due process clause nor ex post facto.

2. Criminal law ⚡304(2).

Danger to public from indiscriminate carrying of deadly weapons is matter of common knowledge.

3. Constitutional law ⚡92.

No one can acquire a vested right to continue in possession of that which is a menace to public safety.

4. Weapons ⚡17(4) — Jury held justified in finding revolver was capable of firing cartridges as against contention it was an "antique" within exception of statute (St. 1923, pp. 696, 702, §§ 2, 15).

In prosecution for carrying firearms in violation of St. 1923, p. 696, § 2, jury held justified under evidence in finding revolver was capable of being fired as against contention it was antique, within section 15 of the act.

5. Weapons ⚡8—If weapon still retains its efficiency to such an extent that it may be in some manner used as originally intended, a person carrying it contrary to law will be criminally liable.

No matter how disabled a weapon may be, if it still retains its efficiency to such an extent that it may be used as originally intended in some manner, a person carrying it contrary to law will be criminally liable.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

John McCloskey was convicted of possession of a revolver, and he appeals. Affirmed.

Lee Gray, of Colfax, and Boyer & Havens, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was charged with the crime of having "in his possession and under his control a certain firearm, to wit, a revolver capable of being concealed upon the person, he, the said John McCloskey, having been convicted of a felony against the property of another, to wit, burglary in the second degree." He was convicted and sentenced to imprisonment in the state prison. This appeal is from the judgment of conviction and the order denying his motion for a new trial.

The evidence shows that the defendant was the owner of the revolver, and that, at the time of his arrest, he was carrying it in the pocket of the right-hand door of an automobile owned and then being driven by him. Three cartridges fitting the revolver were in the same pocket. He admitted that he had been convicted of the alleged burglary.

Section 2 of the act under which the defendant was prosecuted, in so far as applicable to the questions here presented, provides:

"No person who has been convicted of a felony against the person or property of another

* * * shall own or have in his possession or under his custody or control any pistol, revolver or other firearm capable of being concealed upon the person." Stats. 1923, p. 696.

Section 15 provides:

"This act shall not apply to antique pistols or revolvers incapable of use as such."

[1] The court refused to permit the defendant to prove that he owned and had possession of the revolver prior to the time the act went into effect. Appellant contends that "one cannot lawfully be convicted of a crime for continuing to own and possess that which had lawfully become his property"; that, as applied to such property, the act is an *ex post facto* law, and that to punish the owner for continuing in possession thereof would be to deprive him of his property without due process of law. It has been held in a number of cases that the act is a valid and reasonable exercise of the police power of the state.

"It is a well-recognized function of the Legislature in the exercise of the police power to restrain dangerous practices * * * and to regulate the carrying and use of firearms and other weapons in the interest of the public safety. * * * Private property rights of individuals are required to yield when in conflict with reasonable police regulations." *In re Rameriz*, 193 Cal. 633, 650, 226 P. 914, 921 (34 A. L. R. 51); *People v. Gonzales* (Cal. App.) 237 P. 812; *People v. James* (Cal. App.) 235 P. 81; *People v. Camperlingo* (Cal. App.) 231 P. 601.

See, also, *People v. Smith*, 36 Cal. App. 88, 171 P. 696.

[2] The danger to the public safety from the indiscriminate carrying of deadly weapons, especially by persons who are criminally inclined, is a matter of common knowledge, and, as justifying the regulation of the practice thereof by the state in the exercise of its police power, the evil is comparable to that of the use of intoxicating liquors. In *Samuels v. McCurdy*, 267 U. S. 188, 45 S. Ct. 264, 69 L. Ed. 568, 37 A. L. R. 1378, the Supreme Court of the United States had under consideration a statute of the state of Georgia which made it unlawful to possess intoxicating liquor which had been lawfully acquired before the passage of the statute. It was contended that the law, "under which liquor lawfully acquired can be seized and destroyed, is an *ex post facto* law," and that "the law in punishing the owner for possessing liquor he had lawfully acquired before its enactment deprives him of his property without due process." Both contentions were overruled. The court said:

"This law is not an *ex post facto* law. It does not provide a punishment for a past offense. It does not fix a penalty for the owner for having become possessed of the liquor. The penalty it imposes is for continuing to possess the liquor after the enactment of the law. * * * The ultimate legislative object of prohibition is to

prevent the drinking of intoxicating liquor by any one because of the demoralizing effect of drunkenness upon society. The state has the power to subject those members of society who might indulge in the use of such liquor without injury to themselves to a deprivation of access to liquor in order to remove temptation from those whom its use would demoralize and to avoid the abuses which follow in its train. * * * The Legislature has this power whether it affects liquor lawfully acquired before the prohibition or not."

[3] The foregoing principles of law are applicable to the facts of this case. No one can acquire a vested right to continue in possession of that which is a menace to the public safety.

[4] Appellant contends that the weapon is an "antique * * * revolver incapable of use as such." The weapon "is a 32 caliber short cartridge revolver. * * * Five shots, * * * nickel plated, ivory handle," with a three-inch barrel, and a total length of seven inches. At the time of the trial it was "quite rusty." "If you pull the hammer once it is stuck, and will not work any more. * * * And it is necessary to take hold of the trigger and shove the trigger forward to get it to work again." The sheriff and his deputy both testified that in their opinion the revolver was in such mechanical condition that it could be fired. The former stated that it was doubtful whether the hammer of the revolver would "strike sufficiently hard to explode those old shells (referring to the three cartridges found with the revolver), but I believe if you put new shells in that gun right now and pull the trigger it would go off." In the revolver there was one empty shell which evidently had not been discharged recently. Two of the three cartridges were indented, indicating that an unsuccessful attempt had been made to fire them. Relative to the three cartridges, the sheriff testified:

"In my opinion there would be two reasons why those shells would not explode. * * * The shell itself appears to be an old shell. In order to explode it a gun would have to be in first-class condition.

"Q. It would take an especially hard concussion of the firing pin to shoot these particular shells? A. As old as they are, yes, sir.

"Q. What other reason? A. The matter of fact that the gun was not capable of hitting with sufficient force to explode the old shell.

"Q. Two of the shells are indented? A. Yes.

"Q. The third one was not? A. Was not.

"Q. And there was one exploded shell in the chamber of the gun? A. There was.

"Q. What would you say as to the nature of shells fired from a gun as to some of them going off and others not—does that happen? A. It does quite frequently—age and the nature of the gun—the primer, as you call it. * * * When we first took the gun in our possession it was not in quite as bad condition as at the present time, but it was not in condition at the time we received it.

"Q. Not in good condition then? A. No."

[5] The revolver and the cartridges were introduced in evidence, and the jurors had the benefit of their examination thereof. It cannot be said that the jury was not justified in concluding, from an inspection of the revolver and the cartridges, together with the foregoing testimony, that the revolver was capable of firing such cartridges.

"Although the courts to some extent differ as to what conditions will destroy the efficiency of a weapon, the rule seems to be established that no matter how disabled a weapon may be, if it still retains its efficiency to such an extent that it may in some manner be used as originally intended, a person carrying such a weapon contrary to law will be held criminally liable. * * * It has been held that whether a pistol carried is loaded or unloaded is immaterial, and does not affect the criminal liability of the person carrying it." 8 R. C. L. 290; Ann. Cas. 1913E, 513; 34 L. R. A. (N. S.) 1174.

The court instructed the jury in accordance with the foregoing quotation.

The judgment and the order are affirmed.

We concur: PLUMMER, J.; HART, J.

76 Cal. App. 434

CARTON CORPORATION v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY. (Civ. 5599.)

(District Court of Appeal, First District, Division 1, California. Feb. 5, 1926.)

1. New trial $\S$ 38—Court's action in improperly granting or denying motion for nonsuit is ground for new trial.

Court's action in improperly granting or denying motion for nonsuit, whether made on opening statement or after close of evidence, is error of law occurring at trial, and ground for new trial.

2. Mandamus $\S$ 31—Writ of mandate will lie to compel court to hear and determine matters within its jurisdiction that come properly before it.

Writ of mandate will lie to compel court to hear and determine matters within its jurisdiction that come properly before it, where it has erroneously determined that it is without jurisdiction, such determination not being conclusive where there is no question of fact or sufficiency of facts involved.

3. Mandamus $\S$ 4(3)—Appeal held plain, speedy, and adequate remedy from order denying new trial, though it required more time in its pursuit than mandamus (Code Civ. Proc. $\S$ 956, 1086).

Remedy by appeal from order denying new trial for alleged error in granting motion for nonsuit, under Code Civ. Proc. $\S$ 956, held plain, speedy, and adequate, within section 1086, so as to prevent issuance of writ of mandate, though it required more time in its pursuit.

Application by the Carton Corporation for a writ of mandate prayed to be directed to the Superior Court in and for Alameda County. Writ denied.

Joseph C. Meyerstein and Frank Webster, both of San Francisco, for petitioner.

Crosby, Naus & Crosby and Girard Richardson, all of Oakland, for respondent.

CASHIN, J. A petition for a writ of mandate directing the superior court in and for the county of Alameda to hear and determine a motion for a new trial.

It appears that in an action pending in respondent court issues of fact were raised by the pleadings, that the cause having come on for trial, evidence was adduced by the plaintiff (who is the petitioner here) in support of the allegations of its complaint, and that upon the conclusion of the latter's case a motion by the defendant for a nonsuit, on the ground that plaintiff had failed to prove a sufficient case for the jury, was granted. Thereafter and within the time provided by statute petitioner served and filed a notice of intention to move for a new trial upon the minutes of the court and the pleadings and papers filed in the action, stating as one of the grounds therefor errors of law occurring at the trial and excepted to by plaintiff. Therewith was served a notice of the time and place of making the motion. Defendant thereafter moved to strike from the files the notices mentioned, which motion was granted.

It is urged by respondent that the facts stated do not bring petitioner's motion within the purview of the statute providing for the granting of new trials, and, further, that the judgment upon the motion for a nonsuit being appealable, petitioner has by that means a plain, speedy, and adequate remedy in the ordinary course of law.

[1] That the action of the court in improperly granting or denying a motion for a nonsuit, whether made upon the opening statement or after the close of the evidence, is an error of law occurring at the trial, and that such error is ground for a new trial, has been repeatedly declared by the decisions of the courts of this state. *Stow v. Sup. Ct.*, 172 P. 598, 178 Cal. 140; *Smith v. Hyer*, 105 P. 787, 11 Cal. App. 597; *Converse v. Scott*, 70 P. 13, 137 Cal. 239; 20 Cal. Jur. "New Trial," $\S$ 89, 90.

It being our view that the cases cited have established the rule as the law of this state, it will be unnecessary to discuss the decisions of the courts of other states cited by respondent or the argument of counsel for the latter other than to point out the distinction between the cases of *Abbey Land & Imp. Co. v. San Mateo*, 139 P. 1068, 167 Cal. 434, 52 L. R. A. (N. S.) 408, Ann. Cas. 1915C, 804, and *Stow v. Sup. Ct.*, supra, which, it is contended by respondent, are in conflict. In the for-

mer it was held that there had been no trial of the cause upon issues of fact, the case having been submitted for decision upon the pleadings, and that therefore a motion for a new trial could not be entertained; whereas in the latter the court carefully stated as the grounds for its decision that the judgment there in question was not upon the pleadings, but that the situation presented was that upon the trial of issues of fact, under pleadings which had passed demurrer, proffered testimony was rejected upon the ground that it could not be relevant under the complaint, believed by the court to be insufficient; that plaintiff stood upon his pleading, and the court gave judgment against him. It was therefore held that the judgment was in essence one of nonsuit; that the ruling was reviewable as an error in law occurring at the trial, and was ground for a new trial.

The distinction between the determination of the legal effect of the ultimate facts in issue and that of the probative effect of the evidence adduced in support of such facts, as affecting the power of the trial court to entertain a motion for a new trial, is also pointed out in *Monteverde v. Sup. Ct.*, 212 P. 690, 60 Cal. App. 252, 259.

We hold, therefore, that, under the California cases cited, a motion for a new trial could properly be entertained in the instant case.

This brings us to the question raised by respondent as to the proper remedy to be pursued by petitioner.

[2, 3] The determination by a court that it is without jurisdiction is not conclusive, where there is no question of fact or of the sufficiency of the facts involved in its ruling. The law especially enjoins the duty of hearing and determining all matters which are within its jurisdiction and which come properly before it; and a writ of mandate may issue in a case where such determination is erroneous. *Cahill v. Sup. Ct.*, 78 P. 467, 145 Cal. 42. Such being the rule, it remains to be considered whether petitioner has in the

premises a plain, speedy, and adequate remedy in the ordinary course of law. Code Civ. Proc. § 1086.

As held in *Hughes v. De Mund* (Cal. App.) 233 P. 94, any order made upon a motion for a new trial may be reviewed upon an appeal from the judgment (Code Civ. Proc. § 956), including, as there stated, an order dismissing the motion, and such orders are no longer directly appealable. It is not contended by petitioner that grounds for a new trial existed other than the alleged error in granting the motion for a nonsuit. From that judgment an appeal would lie (*Commis v. Guaranty Oil Co.*, 154 P. 882, 29 Cal. App. 139; *Brown v. Sterling Furniture Co.*, 166 P. 322, 175 Cal. 563), upon which the alleged error could be reviewed (Code Civ. Proc. § 956; *Converse v. Scott*, 70 P. 13, 137 Cal. 239). But it is urged that such appeal, owing to the delay involved, does not furnish the speedy and adequate remedy contemplated by section 1086 of the Code of Civil Procedure.

It has been uniformly held that an appeal affords a plain, speedy, and adequate remedy, not only where jurisdiction has been exceeded, but where there has been a refusal to exercise it; that the remedy by mandamus or prohibition is given only in exceptional cases; and that the remedy by appeal is not inadequate because ordinarily it requires more time in its pursuit than either a proceeding in prohibition or mandamus. *Lightner Mining Co. v. Sup. Ct.*, 112 P. 909, 14 Cal. App. 642; *Agassiz v. Sup. Ct.*, 27 P. 49, 90 Cal. 103; *Aldrich v. Sup. Ct.*, 66 P. 846, 135 Cal. 12; 16 Cal. Jur. "Mandamus," § 19.

No facts being shown in the instant case which fairly create an exception to the general rule stated, and it appearing that an appeal from the original judgment will furnish a speedy and adequate remedy for the correction of the alleged error, the writ is denied.

We concur: TYLER, P. J.; KNIGHT, J.

76 Cal. App. 438

RUSS LUMBER & MILL CO. v. PEOPLE'S TRUST & SAVINGS BANK et al.
(Civ. 5276.)

(District Court of Appeal, First District, Division 2, California. Feb. 5, 1926. Hearing Denied by Supreme Court April 5, 1926.)

1. Guaranty ☞4.

Written instruments, signed by bank, and directing delivery of lumber to contractor, held not guaranties of payment, but orders for such lumber.

2. Banks and banking ☞1010.

Where lumber furnished to contractor on bank's order was used to swell assets of bank, seller was entitled to recover whether or not bank's acts were ultra vires.

Appeal from Superior Court, Riverside County; William D. Dehy, Judge.

Action by the Russ Lumber & Mill Company against the People's Trust & Savings Bank and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. G. Irving, of Riverside, for appellants.
E. S. Williams, of Los Angeles, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendants to recover a judgment for the reasonable value of building materials. The action was brought against the corporate defendant as the principal debtor, and against the other defendants on their stockholders' liability. The action was tried in the lower court before the court sitting without a jury; that court made findings in favor of the plaintiff and caused its judgment to be entered in accordance with those findings. The defendants have appealed.

The claim of the plaintiff was evidenced by seven different writings. In drawing its complaint the plaintiff alleged:

"That on or about March 11, 1919, at Riverside, Cal., said People's Trust & Savings Bank made and entered into an agreement with said plaintiff, wherein and whereby said People's Trust & Savings Bank agreed that, if said plaintiff would furnish to said defendant Albert Schliem lumber and building materials from time to time as said Schliem should order the same from said plaintiff, said People's Trust & Savings Bank would guarantee the payment of and pay to said plaintiff the amounts for all such lumber and building materials furnished to said Albert Schliem, and that said People's Trust & Savings Bank from time to time would execute and deliver to said plaintiff written orders authorizing the furnishing of such lumber and building materials by said plaintiff to said Schliem, and guaranteeing and agreeing to pay to said plaintiff the amount of lumber and building materials furnished by said plaintiff to said Schliem to the extent stated in said respective orders. That pursuant to said agree-

ment said People's Trust & Savings Bank, on March 11, 1919, and June 17, 1919, and August 8, 1919, and September 25, 1919, and October 31, 1919, and December 9, 1919, and January 18, 1920, executed and delivered to said plaintiff its certain written orders and agreements, wherein and whereby said People's Trust & Savings Bank authorized said plaintiff to furnish to said Albert Schliem lumber and building materials and guaranteed the payment, and agreed to pay to said plaintiff for all such lumber and building materials to the extent stated in said respective orders and agreements. That each of said orders was in the amount of \$2,000, and that in and by said orders said People's Trust & Savings Bank guaranteed the payment and agreed to pay to said plaintiff for lumber and building materials furnished by said plaintiff to said Schliem in the aggregate amount of \$14,000. That copies of said orders and agreements are hereto attached and hereby referred to as parts hereof the same as if here set forth at length."

Later the trial court made a finding that all of the allegations contained in those paragraphs are true, and each of said allegations is true. The papers referred to in the complaint were attached to it and are as follows:

"Riverside, Cal., March 11, 1919.

"Russ Lumber & Mill Company, Riverside, Cal.—Gentlemen: Referring to the request of Albert Schliem for credit: Please be advised that we will guarantee the payment of any bills of lumber and other building materials ordered by Mr. Schliem. We would request that you give us, as soon as possible after delivery of any material, a copy of the invoice, setting forth the job or point of delivery, and also that you put a limit of \$2,000 credit extended without additional verification from us. The price list to be in effect, approved by Mr. Schliem, is attached hereto.

"Yours truly,

"People's Trust & Savings Bank,
By J. C. Odell, President."

"Riverside, Cal., June 17, 1919.

"Russ Lumber & Mill Co., Riverside, Cal.—Gentlemen: On March 11, 1919, we gave you an order to furnish to Mr. Albert Schliem, lumber and other building material, to the extent of \$2,000, for which we guaranteed the payment. As the above \$2,000 has been almost all used up, we hereby authorize you to furnish to Mr. Albert Schliem, an additional \$2,000, two thousand dollars, in lumber and other building materials, and present bills to us as soon as possible, showing amounts and where delivered, and we guarantee payment of this additional \$2,000, in the same way as the \$2,000 covered in our order to you March 11, 1919.

"Yours truly,

"People's Trust & Savings Bank,
By J. C. Odell, President."

"Riverside, Cal., Aug. 8, 1919.

"Russ Lumber & Mill Co., City.—Gentlemen: We gave you two orders for two thousand dollars each to cover material furnished to Albert Schliem, which orders are mostly used up. We therefore authorize you to furnish to Mr. Albert Schliem lumber and other building material to the extent of another two thousand dollars

and charge same to our account and present bills as soon as possible showing amounts and where delivered.

"[Signed] People's Trust & Savings Bank,

"By J. C. Odell, President."

Except as to the date and the amount, each of the other seven instruments was in the same form as the one last quoted. It will be noted that the language of the complaint which alleges that the defendant corporation "guaranteed the payment" can be dropped, and that the pleading will still be sufficient. Furthermore, the finding of the court was such that, if all reference to said papers "as guaranties" should be eliminated, the findings will still be in favor of the plaintiff and against the defendant, and will be sufficient to support the judgment.

On this appeal the appellant in the last analysis makes but one point, and that is that each of said written instruments purports to be a guaranty, and that the defendant corporation had no power to guarantee the written obligations of any person, and therefore the writings were ultra vires and void. The vice in this reasoning is that there is nothing whatever on the face of said writings indicating that said writings were guaranties excepting only the first two writings.

We turn then to the passages in the record which tend to throw light on the question as to whether either of the first two papers was intended as a guaranty. Mr. Schliem was a contractor doing business in the neighborhood of Riverside. On the 11th of March, 1919, he had an account with the defendant bank, and was owing the bank various sums of money. At the same time the bank held the title to numerous pieces of property as security for the moneys owing to it by Mr. Schliem. Mr. Schliem had at that time several incomplete building contracts. The bank held written authority authorizing it to collect such sums as would become due as the various contracts were completed. On March 11, 1919, Mr. Schliem needed building materials to complete some of those contracts. He called on the plaintiff and had a conversation with Mr. Kennedy, the representative of the plaintiff. Mr. Kennedy testified:

"Mr. Schliem came in the office one day and wanted we should furnish him some lumber; and I told him we would not agree to furnish lumber to him—we would not furnish lumber to him until we knew where we would get the money. He asked us if we would furnish the lumber if the bank would pay for it. I told him certainly we would. So he went down to the bank, and a few minutes after Mr. J. C. Odell called up on the phone, and said that Mr. Schliem had been speaking to him in regard to lumber, and wanted to know if we would furnish it. I told him we would if the bank would be good for it. So then Mr. Schliem came back in an automobile and got me and took me down to the bank, and I talked to Mr. J. C.

Odell, and he asked if I would furnish lumber to Mr. Schliem. I told him no, I would not furnish it to Mr. Schliem, but I would furnish it to the bank. The conversation was that if we would furnish the lumber to Mr. Schliem the bank would be responsible for it and pay for it. It was understood there was to be a written order given, but Mr. Odell did not want to give a written order at that time. He wanted me to come back again in the morning. He turned to Mr. Schliem and asked him if he had to have any lumber right away; and Mr. Schliem said he would have to have some that afternoon. Mr. Odell stated definitely that the bank would take care of the account and would give us an order. When I went in in the morning to get the order he presented the order to me and instructed me to furnish lumber to Mr. Schliem."

The next morning Kennedy went to the bank for his order, one was presented signed by Odell, Kennedy refused to accept it, and thereupon Odell asked him to prepare the paper in such form as he wanted it. Thereupon Kennedy prepared the paper which appears above, and which is dated March 11, 1919, and, on presentation, Mr. Odell signed in the form in which we have copied the instrument. Each of the other papers was prepared by the plaintiff and was presented to the bank for signature.

Mr. Odell was called as a witness, and gave no testimony contradicting Mr. Kennedy as we have quoted him above. Mr. Schliem was called as a witness, and testified that he did not remember the facts. Running through the entire transcript as the case was tried in the lower court the papers above set forth were referred to by the witnesses as orders, and counsel for the plaintiff and counsel for the defendants used the same language. After each one of these papers had been signed and delivered the plaintiff delivered building materials on such job and in such quantity as Mr. Schliem directed, and at the same time delivered to the bank invoices in form as follows:

"Riverside, Cal., Mar. 31, 1919.

"People's Trust & Savings Bank, A. Schliem, Main & Santa Ana Job, to Russ Lumber & Mill Co., Dr., Seventh & Mulberry Streets.

Date. Bill No.

March 11 6678 \$96 50
etc."

Numerous similar invoices are copied into the record, and our attention is not called to any passage contained in the record wherein anybody contended that the real debtor was not the defendant bank, but should have been A. Schliem, and that the invoices were improperly written.

[1] There is testimony in the record that Mr. J. C. Odell had the management and supervision of the commercial department, the savings department, and the trust department, although it further appears that there

was another individual specially in charge of each of those desks. Under these circumstances we think it is quite clear that the writings above set forth were not intended as anything but orders, and that they were orders issued by the manager of the defendant corporation. Furthermore, from the facts which we have recited, it appears that the president of the bank was attempting to save the bank from incurring a loss, and that it does not necessarily appear that his acts were ultra vires. *Stewart v. Stewart Hotel Co.*, 164 P. 620, 33 Cal. App. 167; *Dunne v. Independent Order of Foresters*, 196 P. 41, 185 Cal. 211, 216, 18 A. L. R. 639.

[2] But if we assume for the purposes of this opinion, and for those purposes only, that the acts of the bank were ultra vires, still the defendant shows no defense. It is not disputed but what the plaintiff's property was delivered to, and on, the defendant's orders and was used to swell the assets of the defendant. In its complaint the plaintiff alleged and sought to recover the reasonable value of its materials so furnished to and used by the defendant. Under these circumstances the respondent was clearly entitled to recover. *Pauly v. Pauly*, 40 P. 29, 107 Cal. 8, 18, 48 Am. St. Rep. 98; *Pullman Palace-Car Co. v. Central Transp. Co. (C. O.)* 65 F. 158, 162.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE J.

76 Cal. App. 207

MALACHOWSKI v. VARRO et al.
(Civ. 5283.)

(District Court of Appeal, First District, Division 2, California. Jan. 15, 1926. Hearing Denied by Supreme Court March 15, 1926.)

1. Insurance — 512.

Contract of insurance indemnifying owner of motorbus, operating commercially, against liability for injuries to third persons, *held* one of indemnity.

2. Insurance — 152(3) — Ordinance, pursuant to which indemnity bond insuring owner of motorbus against liability for damages to third persons was executed, became part of such bond.

Provisions of ordinance, pursuant to which indemnity bond insuring owner of motorbus against liability for damages to third persons was executed, became part of such bond, as if incorporated therein.

3. Insurance — 591½ — Under policy of indemnity insuring owner of motorbus against liability for damages to third persons, administratrix of deceased, struck by bus, can directly sue insurer; "inure."

Where policy of indemnity, which insured owner of commercial motorbus against liability

for damages to third persons, "inured" to benefit of any one sustaining damage or injury, and contemplated that claimants might either sue insurer directly or sue assured and, after obtaining judgment, sue insurer on such judgment, plaintiff administratrix of decedent, killed by motorbus, can sue insurer directly, notwithstanding bus owner was not served and did not appear at trial; "inure" meaning to devolve upon.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Inure.]

4. Appeal and error — 175 — Insurer could not, on appeal, contend policy under which plaintiff sought to recover did not cover car striking deceased, where license number of car was not in issue.

Where license number of car which killed deceased was not in issue, insurer could not, on appeal, contend policy under which plaintiff sought to recover did not cover car striking deceased.

5. Automobiles — 245 (2, 13).

Negligence of operator of motorbus striking pedestrian going to street car, and contributory negligence of pedestrian, *held* for jury.

6. Appeal and error — 931 (1).

Reviewing tribunal must assume that trial court believed testimony in support of its findings.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Josephine Malachowski, as administratrix of the estate of Bruno Malachowski, deceased, against H. A. Varro, doing business as the Liberty Stage Line, and the California Highway Indemnity Exchange. Judgment for plaintiff, and defendant Exchange appeals. Affirmed.

B. P. Gibbs and W. I. Gilbert, both of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondent.

STURTEVANT, J. Bruno Malachowski was killed by being struck by an automobile bus. Later his widow took out letters of administration and thereafter she filed a complaint as such administratrix against H. A. Varro, doing business as Liberty Stage Line, and as the owner of the automobile bus, and she joined as a defendant California Highway Indemnity Exchange, a corporation. Service of process was not made on the owner, but it was made on California Highway Indemnity Exchange, a corporation, and it appeared and answered. In drawing her complaint the plaintiff pleaded a cause of action for personal injuries following the procedure in *Stein v. United Railroads*, 159 Cal. 368, 113 P. 663. In addition thereto the plaintiff pleaded that on August 3, 1920, by its policy the said California Highway Indemnity Exchange agreed to indemnify the defendant H.

A. Varro for any loss or damage caused by the operation of the autobus, and that said policy provided that it should inure to and be for the benefit and protection of the plaintiff. In its answer the defendant inserted several denials and in addition thereto pleaded the contributory negligence of the deceased. A trial was had before the trial court sitting without a jury. The trial court made findings in favor of the plaintiff, and from a judgment entered thereon the California Highway Indemnity Exchange has appealed. The appellant makes several points and we will take them up in the order stated in the appellant's brief.

In several different issues the appellant makes the contention that the respondent was not entitled, at least before judgment had, to maintain an action against the appellant. In this behalf the appellant asserts that it was neither alleged, found, nor proved that the appellant or its agent owned or operated the bus, or that the appellant was guilty of any negligence. The respondent replies that her action is *ex contractu* and that, by reason of the terms of the policy and by reason of the terms of the ordinance requiring the execution of the policy, the respondent was entitled to adopt the procedure which she followed.

Ordinance No. 40502 (N. S.), approved June 30, 1920, of the council of the city of Los Angeles regulates the use of motorcars for the transportation of passengers for hire. By section 1 certain words are defined. By section 2 it is made unlawful for any person to engage in the business of operating an automobile for hire without first obtaining a permit in writing from the Board of Public Utilities so to do. Section 5 provides:

"Before any of the permits herein provided for are issued, the board shall require the owner of every automobile for hire * * * to file with the board and thereafter keep in full force and effect a bond or policy of insurance in such form as said board may deem proper, and executed by a surety or sureties approved by said board, insuring the public against any loss or damage that may result to any person or property from the operation of such vehicle * * * provided the maximum amount of recovery in such bond or policy of insurance specified shall not be less than the following sums, to wit: For the injury or death of one person, \$5,000. * * *

On March 31, 1921, there was filed with the Board of Public Utilities, Los Angeles, an indenture in writing, which contained provisions as follows:

"* * * (a) Against loss from common-law or statutory liability for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered (or alleged to have been suffered) while this contract is in force, by any person or persons, not in the employ of the subscriber, resulting directly from the ownership, use or maintenance of any automobile described in the schedule herein contained. This contract shall

cover such injuries so sustained wherever any automobile covered hereby may be in the service of the subscriber. The exchange's liability is limited to five thousand dollars (\$5,000.00) for injury to or death of any one person, and, subject to the same limit for each person, the exchange's total liability for injury to or death of more than one person in any one accident is limited to ten thousand dollars (\$10,000.00). * * *

"* * * (g) The foregoing special agreements are made subject to the general agreements which shall be construed as conditions.

"Schedule of Warranties, Contract No. 1046. * * *

"Name of subscriber, H. A. Varro, d.b.a. Liberty Stage Line. Business, auto stages. * * *

"The automobiles covered hereunder are described as follows: * * * Number, 24,361. State License No. 263-597. * * *

Indorsement.

"Date, August 1, 1920.

"It is hereby understood and agreed that, notwithstanding expressions inconsistent with or contrary thereto in this policy contained, this policy is specifically issued to cover a passenger carrying automobile, jitney bus or motorbus. This policy shall inure to and be for the benefit and protection of any one who shall sustain any damage or injury, or to the heirs, personal representatives, administrators, executors or assigns of any such person who may be so damaged or injured or suffer death by reason of negligence on the part of the driver or operator of the automobile or so-called jitney bus or motorbus, or from the defective construction thereof when such jitney bus or motorbus and the driver or operator of same are duly licensed, have permit issued by authority of the Board of Public Utilities, Los Angeles, California. * * *

"It is further understood and agreed that, in the event a final judgment covering any loss or claim under this policy is rendered against the assured, the Exchange guarantees the payment of said judgment direct to the plaintiff securing such judgment, irrespective of the financial responsibility or any act or omission on the part of the assured, provided that any action by the said plaintiff to recover under this clause is commenced within twelve months next after such final judgment shall have been rendered, or where such limitation of time is prohibited by the laws of the state wherein this policy is issued, then and in that event no suit or action shall be sustainable unless commenced within the shortest limitation permitted under the laws of such state. The Exchange does not prejudice by this condition any defense against such loss or claim that it may be entitled to make under this policy, nor shall anything herein be construed to alter or waive any of the provisions of the general agreements of this policy in so far as they relate to any action brought against the Exchange by the assured. * * *

"Attached to and forming a part (when countersigned and dated by an authorized agent) of policy No. 1046 issued by the California Highway Indemnity Exchange, Los Angeles, California, to H. A. Varro d.b.a. Liberty Stage Line, of Downey, California.

"Countersigned this 3d day of August, 1920."

"* * * This contract subject to the following general agreements: * * *

"(13) No action shall lie against the attorney or any subscriber at the Exchange, to recover for any loss under this contract, unless brought by the subscriber himself, nor to recover for any loss arising under clauses (a) or (c) of the special agreements unless brought by the subscriber himself to recover for moneys actually paid by him in satisfaction of a judgment after trial of the issue in a suit instituted within the period limited by the statute of limitations, and in no event shall any action lie unless brought within ninety days after the right of action accrues as herein provided; provided, however, that the insolvency or bankruptcy of the subscriber shall not release the Exchange from the payment of damages (to a person not a party to this contract) for injury sustained or loss occasioned during the life of this contract, and in case execution against the subscriber is returned unsatisfied in whole or in part in an action brought by the injured, or his or her representative in case death result from the accident, because of such insolvency or bankruptcy, or because sufficient property of the judgment debtor cannot be found to satisfy such execution, then an action may be maintained by the injured person, or his or her personal representative, against the Exchange, subject to and under the terms of this contract for the amount of the judgment recovered in such action not exceeding the amount herein limited or the amount that the subscriber might have recovered against the Exchange under this contract, in the event the judgment had been fully satisfied against him.

"* * * In witness whereof, the subscribers at California Highway Indemnity Exchange have caused this policy to be issued by their attorney.

"Countersigned at Los Angeles, California, this 3d day of August, 1920. * * *" (Duly executed.)

Indorsement.

"Effective March 15, 1921.

"It is hereby understood and agreed that the 1921 state license numbers of the Reo cars covered under this policy are as follows:

Motor No. 24361 1921 St. Lic. 233-688

" " 30961 " " " 233-690

in lieu of St. license numbers 263-597 and 263-688, respectively, as originally written under item (N) of the schedule of warranties of this policy.

"In all other respects the terms, limits and conditions of this policy remain unchanged.

"Attached to and forming a part (when countersigned and dated by an authorized agent) of policy No. 1046 issued by the California Highway Indemnity Exchange, Los Angeles, California, to H. A. Varro, d.b.a. Liberty Stage Line of Downey, California."

[1, 2] Taking up the contract by its four corners it is quite clear that it is an indemnity bond. *Somers v. United States F. & G. Co.*, 191 Cal. 542, 547, 217 P. 746. The record discloses without any contradiction that the bond was given pursuant to the provisions of the ordinance approved June 30, 1920, of the council of the city of Los Angeles. That being so, the provisions of the ordinance became a part of the bond to the same extent as though the ordinance were in-

corporated in the bond. *Town of Mill Valley v. Massachusetts Bonding & Insurance Co.*, 68 Cal. App. 372, 229 P. 891; *Milliron v. Dittman*, 180 Cal. 443, 445, 181 P. 779.

[3] The document marked "Indorsement" states on its face that it is a separate paper, attached to the policy and effective when countersigned, etc. In this litigation the courts are required to give force and effect to that paper over and above the provisions contained in the other document to which it was attached. Civ. Code, § 1651. Specially examining that rider it is clear that it contemplated two different procedures. It provided:

"That the policy 'shall inure to and be for the benefit and protection of any one who shall sustain any damage or injury. * * *'"

"To inure" is a very broad expression meaning to devolve upon. *Century Dictionary*; *Bouvier's Law Dictionary*. It is also clear that under the terms of the policy it was contemplated that claimants might maintain an action against the assured, and, having obtained judgment, such persons could thereafter maintain an action on such judgment against the appellant. Acting under the theory first stated, it was held in an action involving a contract very similar in terms that the insurance company could be joined as a party defendant with the assured. *Gugliemetti v. Graham*, 50 Cal. App. 268, 270, 195 P. 64. The contract involved in *Milliron v. Dittman*, supra, was not so closely similar, nevertheless, the same ruling was made. This respondent followed that practice. The fact that the owner was not served and did not appear at the trial did not operate retroactively so as to create an infirmity in the procedure at the time of the trial when there was no infirmity at the time process was served on the appellant. Under the provisions of the contract executed by the appellant and the owner we think that the plaintiff was entitled to maintain an action directly against the appellant.

[4] The original policy covered an automobile No. 24361 having a state license number 263-597. There was some evidence that the automobile which struck the deceased bore the state license number 233-688. The appellant thereupon argues that the policy under which the respondent sought to recover did not cover injuries caused by the automobile that struck the deceased. The original policy was dated the 3d day of August, 1920. It covered an automobile number 24361 having a state license number 263-597. By the terms of the statute then in force the state license would expire January 31, 1921, and a new license must thereupon have been procured. The bus that was involved in the accident bore license number 233-688. An indorsement dated March 15, 1921, attached to the policy and signed by the appellant, contained the following:

"It is hereby understood and agreed that the 1921 state license numbers of the Reo cars covered under this policy are as follows: Motor No. 24361 1921 St. Lic. 233-688 * * * in lien of St. Lic. No. 263-597."

Moreover, in paragraph 4 of her complaint the plaintiff alleged that the state license number of the bus involved was 233-688. The appellant did not deny the allegation. At the trial, before any evidence was taken, the trial court inquired as to what were the issues. Speaking of the paragraphs of the complaint:

"The Court: Just a moment. Four?

"Mr. Gilbert: Four is denied.

"Mr. Drake: Only as to the negligence; the negligence is denied."

It thus appears that the allegation as to the state license number of the automobile involved in the accident was not in issue.

[5, 6] The appellant contends that there was no negligence in operating the automobile bus. It cites some of the record to support the contention. The respondent replies that there was evidence showing negligence. A most cursory examination of the record discloses that the most that can be said in behalf of the appellant is that the evidence was conflicting. The accident occurred in the city of Los Angeles on the night of the 13th of February, 1921. The decedent, his wife, and their children had made a call in one of the outlying districts. Some time after dark in the company of their host they went to the intersection of Stephenson avenue and Bonnie Beach street to take a street car going west. Some of the witnesses stated that it had been raining. Other witnesses stated that it had not been raining, but that it was foggy. The intending passengers reached the northeast corner of the intersection of the streets above named. Later a street car approached from the east and the decedent went out into the street to stop the car. His host, Mr. Natuski, went with him. The rest of the group did not go, or, if they attempted to go, returned to the corner. Mr. Natuski stated that he saw the street car approaching from the east and that he saw the automobile

bus approaching from the west. They were on the north side of the street car track. There is no evidence in the record that there were any other vehicles in that portion of the street at the time that the accident occurred. The motorman on the street car saw the bus coming in the opposite direction and also saw the persons assembled at the crossing. He testified that two were standing right out and four or five women coming out. That the two men he saw standing out in the street were between 3 and 4 feet from the north-bound rail of the car track; north from it—just about straight out where the car would have stopped. When he first saw the autobus, the witness was 75 or 80 feet from his stopping place. The autobus was traveling near the center of the street between the north rail and the curb. There was a light on Bonnie Beach in the intersection. When the bus got in about 25 or 30 feet, it swung towards the south—towards the north rail of the car track. Just as it got right down in front, the bus hit the deceased—hit him, and the other fellow, to save himself, jumped right out in front of the witness' car within a foot of the north rail. The motorman made an emergency stop to keep from hitting him. After the bus struck the man, it swerved back in towards the center of the street. Before the accident the deceased moved a little closer to the car. He moved from the position he was in towards the track. He did not move back out in the line of the machine; he moved the other way. Some witnesses testified that the autobus approached the spot traveling "very fast"; others said it was traveling 12 to 14 miles an hour. Several witnesses testified that no whistle or horn was sounded. If the trial court believed the foregoing testimony, and in support of its findings we must assume that it did, it cannot be held as a matter of law that there was no evidence of negligence, nor that the decedent was guilty of contributory negligence.

We find no error in the record.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

76 Cal. App. 347

Ex parte OSWALD. (Cr. 1285.)

(District Court of Appeal, Second District, Division 1, California. Feb. 1, 1926.)

Constitutional law §83(3)—Master and servant §69—St. 1919, p. 294, § 6, providing for imprisonment where employer willfully and with wrongful intent refuses payment when able, held not unconstitutional (St. 1911, pp. 1268, 1269; Const. art. 1, § 15, and article 20, § 17½).

St. 1919, p. 294, § 6, passed as substitute for St. 1911, pp. 1268, 1269, which had been declared unconstitutional, and providing imprisonment penalty for willful refusal of employer or agent, having ability, to pay wages, held, in view of Const. art. 20, § 17½, not violative of article 1, § 15, prohibiting imprisonment for debt, and which applies only to civil action for debt and not imprisonment for misdemeanor.

Application of George H. Oswald for a writ of habeas corpus, to be directed to the Chief of Police of the City of Los Angeles, to secure the release of petitioner from custody on a charge of violating an act to regulate the payment of wages (St. 1919, p. 294). Writ denied.

George L. Greer, of Los Angeles, for petitioner.

J. M. Friedlander, City Prosecutor, of Los Angeles, for respondent.

CONREY, P. J. The petitioner is in custody pursuant to a judgment of conviction of a misdemeanor, in that, after having become indebted to a laborer for wages amounting to \$300, then due and payable, the petitioner, although having the ability to pay, did willfully and unlawfully refuse, neglect, and omit to pay the same, and did then and there willfully and unlawfully and falsely deny the amount and validity of said indebtedness, with the intent to secure a discount for himself, and with the intent to annoy, harass, oppress, hinder, delay, and defraud his employee of said sum and indebtedness. The offense charged was an act in violation of the provisions of section 6 of an act to regulate the payment of wages, etc., approved May 6, 1919 (Stats. 1919, p. 294; Deering's General Laws, 1923 Ed., Act 4743).

The sole point relied upon by petitioner is stated in his contention that the statute is unconstitutional, in that it provides for imprisonment for debt, contrary to the provisions of article 1, § 15, of the Constitution of California, which reads as follows:

"No person shall be imprisoned for debt in any civil action on mesne or final process, unless in cases of fraud, nor in civil actions for torts, except in cases of willful injury to person or property; and no person shall be imprisoned for a militia fine in time of peace."

Prior to said act of 1919 the Legislature had adopted "an act providing for the time of payment of wages," which purported to make it a misdemeanor for an employer to violate the provisions of section 1 of the act, which section provided that the earned and unpaid wages of an employee when discharged should become due and payable immediately, and also provided that when an employee, not having a contract for a definite period, quit or resigned his employment, his wages earned and unpaid should become due and payable five days thereafter. Stats. 1911, pp. 1268, 1269. In the case of *In re Crane*, 145 P. 733, 26 Cal. App. 22, it was held that the act was unconstitutional, in that it in effect permitted imprisonment on mesne process for debt. The court declared that, under the constitutional provision, which we have quoted, imprisonment for debt is prohibited in this state except in cases "where it is made to appear that the indebtedness was fraudulently contracted, or that there has been an attempted fraudulent disposition of the property of the debtor with the intent to delay or defeat the payment of the debt."

The statute of 1919 apparently is the result of a legislative effort to substitute for the act of 1911 a law which would not result in imprisonment for mere nonpayment of debt, but would only impose that penalty where the employer or his agent, having the ability to pay, willfully refuses payment with a certain wrongful intent, described as follows:

"With intent to secure for himself, his employer or other person, any discount upon such indebtedness, or with intent to annoy, harass, or oppress, or hinder, or delay, or defraud, the person to whom such indebtedness is due. * * *" Section 6.

In the first place, it should be noticed that section 15 of article 1 of the Constitution, above quoted, does not in terms apply to criminal actions, but only provides against imprisonment for debt in civil actions. The decision in the case of *In re Crane*, supra, is based upon the assumption that the act there under review was an attempt to accomplish the prohibited purpose under the guise of punishment as for misdemeanor, but that in reality it was a method of enforcing, by imprisonment, the payment of debts. Without entering into a discussion of that decision it will suffice to compare it with the case *In re Nowak*, 195 P. 402, 184 Cal. 701. That case related to an ordinance of the city of Los Angeles, for the violation of which the petitioner was charged with the crime of misdemeanor. For the commission of this offense the petitioner was imprisoned. The court said:

"This imprisonment does not violate his constitutional right not to be arrested for debt. Imprisonment for debt, as such imprisonment is defined in our constitutional guaranties, is necessarily imprisonment in a civil action for

debt. As such imprisonment existed in the English common law, it was a provisional remedy strictly analogous to the present-day remedy of attachment of goods. It is against such attachments that the constitutional guarantees against imprisonment for debt are directed. They have no application whatever to imprisonment for crime, and legislative bodies are free to provide for punishment by imprisonment of offenders who commit acts denominated by the said legislative bodies as offenses against the public, provided, of course, that other constitutional limitations are not violated."

Conceding that the foregoing statement by the Supreme Court was obiter dictum (as petitioner herein contends that it was), yet we believe that it is a correct statement of the law. We further concede that at a date later than that of the Nowak decision the provisions of article 1, § 15, of the Constitution, were again applied by a District Court of Appeal in like manner as was done in the Crane Case, and that in the later case the Supreme Court denied a petition for rehearing. *People v. Holder*, 199 P. 832, 53 Cal. App. 45.

Are any other constitutional limitations violated by the provisions of the statute under which the petitioner has been convicted? So far as we know there is no direct decision upon the validity of this statute. There is a decision from which, by reasoning from analogy, an inference may be drawn. We refer to *In re Ballestra*, 161 P. 120, 173 Cal. 657. Petitioner there was in custody upon a charge of having violated the provisions of a statute which prohibited employers from issuing to their employees certain kinds of evidence of indebtedness in lieu of money. Sustaining the validity of the statute, the court said that the right to make contracts, like other personal and property rights, is subject to reasonable regulation, designed and calculated to promote the general convenience, prosperity and welfare.

"Laws having a reasonable tendency to accomplish these results, and not imposing unreasonable burdens upon individuals, are valid. The provisions of the statute in question do not transgress this rule. As applied to ordinary transactions between employers and employees, of the kind embraced within its terms, the statute is, in our opinion, valid and constitutional."

In addition to what was said in the *Ballestra* Case it will be appropriate to observe that the people of California have directly recognized that the relations between employer and employee are a proper subject for legislative regulation. Section 17½ of article 20 of the state Constitution (section adopted November 3, 1914) reads in part as follows:

"The Legislature may, by appropriate legislation, provide for the establishment of a minimum wage for women and minors and may provide for the comfort, health, safety and general welfare of any and all employees."

It is reasonable to presume, in support of the legislative enactment now questioned in this case, that some employers in this state in times past have willfully refused to pay the wages due and payable to their employees, although they were able to pay, and have so refused with intent to secure some discount upon the indebtedness, or with intent to annoy, harass, oppress, hinder, delay, or defraud the employees to whom such indebtedness was due. As the Supreme Court said in the *Ballestra* Case, referring to the subject-matter of the statute there under review, "The purpose of the statute evidently is to prevent the evils which the Legislature believed had arisen from such practices." So here, considering the condition which presumably the Legislature had found to exist, and considering the terms of the statute which it enacted, we cannot say that imprisonment for the misdemeanor described in this statute is imprisonment merely for failure to pay a debt. It is imprisonment for the willful failure to pay the debt under circumstances which show an intent to oppress or otherwise defraud the employee. We are persuaded that the public has an interest in the prevention of wrongs of this character, just as much as it is interested in the prevention of some other of those wrongs against property or wrongs against persons which are commonly regarded as being properly within the scope of operation of criminal law.

The petitioner is remanded to custody.

We concur: HOUSER, J.; YORK, J.

76 Cal. App. 409

METZGER et al. v. VESTAL et al.
(Civ. 2788.)

(District Court of Appeal, Third District, California. Feb. 3, 1926. Opinion modified and Rehearing Denied March 5, 1926.)

1. **Executors and administrators** ⚡314(4)—Statute requiring clerk to set time for hearing on petition for decree of distribution held sufficiently complied with (Code Civ. Proc. § 1668).

Where court set day for hearing petition for final decree of distribution, and ordered clerk to give notice thereof, clerk's notice with filing and posting thereof held sufficient compliance with Code Civ. Proc. § 1668, requiring clerk to set time for hearing.

2. **Executors and administrators** ⚡315(6).

Decree of distribution, having become final, cannot be attacked on ground that court erroneously interpreted terms of will or law applicable thereto.

3. **Executors and administrators** ⚡315(5)—Assignee of wife's interest under will held entitled to sue for property after final decree of distribution, particularly in view of omnibus clause.

Where omnibus clause of decree of distribution, which granted equal division of shares of stock in corporation to wife and son of deceased, was sufficient to pass title to property omitted from particular description therein, assignees of wife's interest could maintain action to establish claim to additional property on ground that deceased owned all the stock of the corporation, or that such stock was community property.

4. **Appeal and error** ⚡236(2)—Plaintiffs held entitled to review of order sustaining demurrer without leave to amend, though no leave to amend was sought in advance of ruling.

Plaintiffs, against whom judgment was entered on same day that demurrer to complaint was sustained without leave to amend, held entitled to review, though they did not ask leave to amend in advance of ruling on demurrer.

5. **Appeal and error** ⚡238(6)—Plaintiffs held entitled to review of order sustaining demurrer without leave to amend, though they did not attempt to have judgment entered on same day vacated.

Where plaintiffs had no opportunity to ask leave to amend prior to entry of judgment on order sustaining demurrer to complaint without leave to amend, they were not required to move to vacate judgment for purpose of permitting them to amend in order to have ruling reviewed on appeal.

6. **Pleading** ⚡225(1).

Plaintiff, desiring to amend after demurrer sustained, should be allowed reasonable opportunity to do so, where such procedure would obviate objections made thereto.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Suit by D. J. Metzger and another against Rolla Vestal and others. Judgment for defendants, and plaintiffs appeal. Reversed, with directions.

James T. Matlock, of Red Bluff (Jackson Hatch, of San Francisco, of counsel), for appellants.

W. A. Fish, of Red Bluff, for respondents.

FINCH, P. J. The trial court sustained demurrers to the complaint without leave to amend and thereupon entered judgment in favor of the defendants. This appeal is from the judgment.

It appears from the complaint that George W. Vestal died in the county of Tehama on the 9th day of April, 1918, leaving a valuable estate consisting of the capital stock of the defendant corporation; that he left a last will in which he named defendant Rolla Vestal, a son, as executor, and by the terms of which, after making certain bequests of money, he gave the remainder of his property to his surviving wife, Clara Vestal, and his son, Rolla Vestal, share and share alike; that the will was admitted to probate and Rolla Vestal was appointed executor and acted as such throughout the administration of the estate; that all bequests have been paid: that on the 29th day of March, 1920, a final decree of distribution was entered, distributing the remainder of the estate to Clara Vestal and Rolla Vestal in equal shares; that the decree recites that 475 shares of the capital stock of the corporation are a part of such remainder; that on the 21st day of November, 1922, Clara Vestal transferred her half of the 475 shares of stock to the plaintiffs; that thereafter the plaintiffs conveyed the same to defendant Schafer; and that on the 8th day of November, 1922, Clara Vestal—

"did for a valuable consideration convey and set over and sell unto these plaintiffs all of her right, title, and interest of every kind in and to all the property, real, personal, and mixed, of the estate of the said George W. Vestal, deceased, and all her said community property, and all other rights and interests of every kind therein acquired by her by the decree of final distribution."

The prayer of the complaint is, in substance, for a decree adjudging that Clara Vestal, upon the death of George W. Vestal succeeded to one-half of the capital stock of the corporation as her share of the community property, and that she took one-half of the remainder under the will; that the plaintiffs are the owners of 467½ shares of the capital stock by reason of their purchase thereof from Clara Vestal; that an accounting of the "business, properties, and transactions" of the corporation be had; and that "plaintiffs have such other and further relief as they may be entitled to have in equity."

All of the defendants demurred to the com-

plaint on the ground that it does not state facts sufficient to constitute a cause of action. The defendant Rolla Vestal demurred upon the further grounds that "plaintiffs have no legal capacity to sue"; that there is a misjoinder of parties and of causes of action; that the complaint is uncertain in specified particulars; that it contains several causes of action which are not separately stated; and that the alleged cause of action to cancel the certificate of stock for 475 shares originally issued to him is barred by the statute of limitations.

The complaint covers 40 typewritten pages, and is therefore too long to be set out at length. Parts thereof will be stated in connection with the discussion of questions relating thereto.

[1] Appellants contend that the decree of distribution is void because no legal notice of hearing the petition therefor was given, in that the court rather than the clerk fixed the time for such hearing. Upon the filing of the final account of the executor and his petition for distribution, the court, on the 3d day of March, 1920, made the following order:

"It is hereby ordered that Monday, the 22d day of March, A. D. 1920, at 10 o'clock a. m., be and the same is hereby appointed for the settlement of the said account and for hearing said petition for distribution, and that the clerk of this court give notice thereof by causing notice to be posted in at least three public places in said Tehama county, at least ten days before said 22d day of March, A. D. 1920, according to law."

The clerk gave notice of the hearing as follows:

"Notice is hereby given that Rolla Vestal, the executor of the estate of George W. Vestal, deceased, has rendered and presented for settlement, and filed in said court his final account of his administration of said estate, and a petition for the distribution of the residue thereof, and that Monday, the 22d day of March, 1920, at 10 o'clock a. m., at the courtroom of said court at the courthouse in the town of Red Bluff, in said Tehama county, has been duly appointed by the said court for the settlement of said final account and hearing said petition for distribution, at which time and place any person interested in said estate may appear and file his exceptions in writing to said account and petition, and contest the same.

"Dated: March 4, 1920. H. G. Kuhn,
"Clerk.
"[Seal.] By C. A. Luning,
"Deputy Clerk."

Section 1668 of the Code of Civil Procedure provides that—

"The clerk of the court must set the petition for hearing by the court, and give notice thereof, * * * setting forth the name of the estate, the executor or administrator, and the time appointed for the hearing of the petition."

The foregoing notice of the hearing, signed by the clerk, was filed in his office on the

day it bears date, together with proof of posting copies thereof as required by law. If it be conceded that the order of the court was ineffective, the clerk's notice, together with the filing and posting thereof, was a sufficient compliance with the statute. As stated in the opinion of the trial court:

"All these acts on the part of the clerk amounted to the appointment by him of a day for the hearing and it was all on March 4, 1920, made a matter of record in his office. The time fixed for the hearing was appointed both by the court and the clerk, acting in harmony and in unison, and there was no effect in the notices given for the hearing of the petition for distribution."

The decree of distribution provides:

"That the whole of the residue of said estate hereinafter particularly described, and any other property not now known or discovered, which may belong to said estate, or in which the said estate may have any interest, be, and the same is hereby distributed as follows: To Clara Vestal, surviving widow of said decedent, and Rolla Vestal, a son, the whole of said residue in equal shares, that is to say, share and share alike. The following is a particular description of the said residue of said estate referred to in this decree, and of which distribution is now ordered as aforesaid: * * * Four hundred and seventy-five shares of the corporate stock of the said George Vestal Company, a corporation."

[2] Appellants contend that the decree is erroneous, in that it distributes to Clara Vestal only half of the property, whereas she was entitled to have three-fourths thereof distributed to her. The allegations of the complaint in this connection are to the effect that the court erroneously interpreted either the terms of the will or the law applicable thereto. Since the decree has become final, it is clear that it cannot be attacked on such grounds.

The allegations of the complaint tending in any degree to show extrinsic fraud in procuring the decree of distribution are so meager and the theory upon which plaintiffs seek relief by reason of such fraud is so uncertain that it would be ill advised, in advance of appropriate pleadings, to discuss the theories upon which plaintiffs may or may not be entitled to judgment on the ground of fraud. It is sufficient to say that the complaint is insufficient to warrant a judgment in favor of plaintiffs on the ground of fraud upon any theory. *Simonton v. Los Angeles T. & S. Bank*, 221 P. 368, 192 Cal. 651, 659.

[3] There is a feature of the case, however, which does not involve an attack upon the decree of distribution, and which evidently was not called to the attention of the trial court, since it is not referred to in the opinion of the court. The omnibus clause of the decree is sufficient to pass title to property of the decedent omitted from the particular description contained therein. *Smith v. Biscailuz*,

21 P. 15, 23 P. 314, 83 Cal. 344, 359; Humphrey v. Protestant, etc., Church, 97 P. 187, 154 Cal. 170, 172; Victoria Hospital Ass'n v. All Persons, 147 P. 124, 169 Cal. 455, 458; Heydenfeldt v. Osmont, 175 P. 1, 178 Cal. 768, 773. Standing upon the very terms of the decree, therefore, and their purchase of the property distributed to Clara Vestal, the plaintiffs have the right to maintain an action to establish their claim that all of the capital stock of the corporation was the property of George W. Vestal at the time of his death and that they acquired a half interest therein by their purchase thereof from Clara Vestal after the same had been distributed to her. Additional allegations of the complaint which are material to the particular question under discussion will be stated generally in substance only:

"Many years before the beginning of this action * * * George W. Vestal and * * * Clara Vestal intermarried * * * and lived together as husband and wife from that time continuously up to the date of the death of said George W. Vestal." Neither of them had any property at the time of their marriage and "whatever property or estate they acquired during their marriage relationship was acquired by them and each of them by their mutual undertakings and efforts and not otherwise," and all of said property was at all times and "at the time of the death of said George W. Vestal, community property of said George W. Vestal and said Clara Vestal." On the 10th day of February, 1904, "George W. Vestal caused to be prepared and executed, and caused to be filed, * * * articles of incorporation of" the defendant corporation. It is stated therein that "the amount of the capital stock of this corporation shall be \$20,000, divided into 1,000 shares of the par value of \$20 each"; that "the amount of said capital stock which has been actually subscribed is \$20,000, and the following are the names of the persons by whom the same has been subscribed:

Names of Subscribers.	No. Shares.	Amount.
George W. Vestal.....	475	\$9,500 00
Rolla Vestal.....	475	9,500 00
Clara Vestal	45	900 00
Ethel Gist.....	4	80 00
Robert Gist.....	1	20 00

The articles of incorporation were signed and acknowledged by all of the subscribers. "At the time of the incorporation of the defendant corporation herein, it was well understood, acknowledged, and agreed by and between said George W. Vestal and said Clara Vestal that all the properties which were to be, and that were in fact, conveyed to said defendant corporation, were * * * to be in fact their community property, * * * and that * * * such properties and interests should be and remain the community property of said George W. Vestal and said Clara Vestal, and * * * said Clara Vestal never did at any time * * * waive * * * her community interest in the said property, or in any of said property. * * * Said corporation was so organized and established only for the purpose of conveniently and properly controlling and handling said community properties, and for no

other purpose or purposes." Clara Vestal "never did at any time or in any manner whatever enter into any agreement * * * concerning the issues of the shares of the stock of the defendant corporation to the persons named in the articles of incorporation, * * * or as to the amount or number of shares of said corporate stock to be fixed or that was fixed in said articles of incorporation, and that the organization of the said defendant corporation was the act solely of said George W. Vestal, and that said distribution of the shares of the stock of said defendant corporation was made and carried into execution by said George W. Vestal, without any consideration of, or acquiescence in, or consent to, the same by said Clara Vestal, and * * * she never did agree or consent to said distribution of said corporate stock." The shares of stock of the corporation "represented in fact and in truth all the said community property of said George W. Vestal and said Clara Vestal, and * * * said corporation was so incorporated by said George W. Vestal with the object and for the purpose of carrying on the business which, before its organization he had been carrying on, and for the purpose of dealing only with all said properties * * * at that time owned by said George W. Vestal and said Clara Vestal, as community property." George W. Vestal, "without any consent whatever of said Clara Vestal, made, executed, and delivered to said defendant corporation assignments and transfers of all said community properties and delivered to said defendant corporation full possession and control of all said community properties, * * * and * * * said defendant corporation has never had at any time, or acquired in any way, any properties of any kind, * * * save and except those so delivered to it by said George W. Vestal, and the rents, issues, and profits and accumulations thereof." At the time of the organization of the corporation, "no money whatever was paid" to it for the shares of stock issued to the subscribers, and the "amounts stated in said articles of incorporation to have been subscribed * * * were not then, and never were, paid, or expected to be paid, by said subscribers, and * * * no money whatever was ever paid into the corporation by any of the subscribers thereof, and * * * it was never understood or agreed that any money should be paid for said stock, and * * * the purpose of said George W. Vestal in causing to be organized the said defendant corporation never contemplated the actual ownership of said subscribers of the shares they subscribed for."

The complaint does not allege that the stock was issued to the persons named in the articles of incorporation without consideration. Neither does it appear whether the alleged community property was acquired before or after the amendment of 1891 to section 172 of the Civil Code (St. 1891, p. 425) to the effect that the husband cannot make a gift of the community property, or convey the same without a valuable consideration, unless the wife consent thereto in writing. Rolla Vestal, Ethel Gist, and Robert Gist still hold the shares of stock originally issued to them.

The general allegations, that all the stock of the corporation was community property at the time of decedent's death, that one-half thereof was distributed to Clara Vestal, that she transferred her interest therein to plaintiffs, and that some of the defendants hold certain shares thereof under invalid claims of ownership, state a cause of action, even though some of the particular facts alleged detract somewhat from the force of such general allegations and thereby render the complaint uncertain. If the capital stock was issued to the persons named in the articles of incorporation, without consideration, and pursuant to an agreement or understanding with them that they were not to become the owners thereof, but were to hold the mere legal title for the sole purpose of enabling them to participate in the management of the corporation's business, then all of such stock was the community property of George W. Vestal and his wife, and by the terms of decedent's will, as interpreted by the court, the whole thereof was given to Clara Vestal and Rolla Vestal in equal shares. If the facts be as so stated, then Clara Vestal did not receive all the shares of stock which were distributed to her, and she had the right to sue for the remainder thereof. Being the owner of such additional shares, her transfer thereof to plaintiffs, under the authorities cited, gave them the same right which she had to sue for their recovery.

[4, 5] Plaintiffs did not make application for leave to amend. Respondents contend that, therefore, the plaintiffs are not in a position to complain of the order denying them leave to amend, citing *Bailey Trading Co. v. Levy* (Cal. App.) 237 P. 408, 412, and the cases therein referred to. In the case cited, the record shows that the demurrer was interposed to an amended complaint; that it was argued by counsel for the respective parties at 10 o'clock a. m. on the 14th day of January, 1924, and taken under advisement by the court; that on the same day, at 2 o'clock p. m., the court entered an order sustaining the demurrer without leave to amend; and that judgment in favor of the defendant was given and entered on the 28th day of January, 1924. The plaintiff in that case, therefore, had 14 days within which to apply for leave to amend. In this case, the demurrers were argued on the 26th day of February, 1923, and taken under advisement by the court. On the

25th day of June, 1923, the court ordered the demurrers sustained without leave to amend and on the same day entered judgment against plaintiffs. Plaintiffs had no knowledge or notice that the demurrers had been sustained until after the judgment had been entered. Respondents say:

"Counsel had ample time while the demurrer was under advisement to ask leave to file an amended complaint. Furthermore, after the court sustained the demurrer without leave to amend and gave judgment, the plaintiffs could have made application to the lower court to set aside the judgment, under the provisions of section 473 of the Code of Civil Procedure in order that they might file an amended complaint."

Plaintiffs were not required, in order to have the point reviewed on appeal, to ask leave to amend in advance of the ruling upon the demurrers or to move to vacate the judgment for the purpose of permitting them to amend. *Schaake v. Eagle, etc., Can Co.*, 63 P. 1025, 67 P. 759, 135 Cal. 472, 480; *James v. Steifer Mining Co.*, 171 P. 117, 35 Cal. App. 778, 788. The rule that a party, against whom an order has been entered sustaining a demurrer without leave to amend, must ask leave to amend in order to have the ruling reviewed on appeal, presupposes that the complaining party had an opportunity to ask such leave prior to the time of entry of judgment on the order. To hold otherwise would be to carry a technical rule to the extreme of absurdity.

[6] The complaint in question was the original complaint, it never having been amended. While the demurrers were properly sustained, at least upon some of the special grounds urged, the plaintiffs ought to be permitted to amend in order that the case may be decided upon the merits rather than upon technical rules of pleading.

"Unless it be clear to a trial court that a defective complaint cannot be amended so as to obviate the objections made thereto, a plaintiff desiring it should be allowed reasonable opportunity to so amend." *Payne v. Baehr*, 95 P. 895, 897, 153 Cal. 441, 447.

The judgment is reversed, with direction to the trial court to grant the plaintiffs leave to file an amended complaint.

We concur: HART, J.; PLUMMER, J.

76 Cal. App. 445

VAN CAMP SEA FOOD CO., Inc., v. NEWBERT et al. (Civ. 5224.)

(District Court of Appeal, Second District, Division 1, California. Feb. 5, 1926. Rehearing Denied March 5, 1926.)

1. Fish $\S$ 12—Order of commission determining capacity of fish cannery must be based on equipment actually installed (St. 1925, p. 597, § 5, subd. [a]).

Under St. 1925, p. 597, § 5, subd. (a), game and fish commission's determination of capacity of fish cannery must be based on equipment actually installed, and not on future expectations, and order made by commission based on equipment to be installed is void.

2. Fish $\S$ 12—Commission cannot be required to determine capacity of fish cannery and make order not within its powers (St. 1925, p. 597, § 5, subd. [a]).

Fish and game commission cannot by mandamus be required to make determination of capacity of fish cannery, where such act is not within its power under St. 1925, p. 597, § 5, subd. (a).

3. Fish $\S$ 9—Statute making allowance of sardines for use in reduction plant only to fish cannery using one-pound oval cans held unconstitutional as discriminating against other kinds of packers, and unjustly favoring cannery using one-pound oval cans (St. 1925, p. 595).

St. 1925, p. 595, making certain monthly allowance of sardines for use in reduction plant only to cannery using one-pound oval cans, held unconstitutional as unlawfully discriminating in favor of cannery of sardines as against other kinds of packers, and unjustly favoring cannery using one-pound oval cans.

4. Constitutional law $\S$ 211—Statutes $\S$ 71—Classification other than constitutional, natural, or intrinsic will fail to meet requirements for validity when attacked for lack of uniformity and as being discriminative.

Classification other than constitutional, natural, or intrinsic will fail to meet requirements for validity of statute, when attacked on ground that it lacks uniformity and is discriminative.

5. Constitutional law $\S$ 48.

Where no reason for attempted discrimination appears, general rule that Legislature is presumed to have investigated facts and that its conclusion must be respected cannot prevail.

6. Constitutional law $\S$ 42—Fish and game commission may question constitutionality of law affecting use of sardines in reduction plants, in mandamus proceeding against it (St. 1925, p. 595).

Fish and game commission may question constitutionality of part of St. 1925, p. 595, allowing only cannery of sardines in one-pound oval cans sardines for reduction purposes, in mandamus proceeding against commission.

7. Constitutional law $\S$ 43(2)—Fish and game commission held not estopped from questioning constitutionality of statute affecting use of sardines in reduction plant, by reason of its having made determination of capacity and allowance of sardines for such use (St. 1925, p. 595).

Fish and game commission held not estopped from questioning constitutionality of St. 1925, p. 595, affecting use of sardines in reduction plants because it at first recognized validity and acted thereon, by making determination of capacity and allowance of sardines for reduction, in absence of showing that some injury or injustice has resulted by reason thereof.

Original application by Van Camp Sea Food Company, Inc., for mandamus against F. M. Newbert and others, members of the Fish and Game Commission, to compel them to determine capacity of packing plant. Demurrer sustained, and writ discharged.

William A. Alderson and Fredericks & Hanna, all of Los Angeles, for petitioner.

B. D. Marx Greene, of San Francisco, for respondents.

HOUSER, J. This is a petition for a writ of mandate to be directed to the respondents in their capacity as the Fish and Game Commission of the state of California, commanding them to make—

"a determination and order determining that the capacity of the packing plant of petitioner for canning sardines is 18,000 tons per month, and allowing petitioner 4,500 tons of sardines per month to be used in its reduction plant, being 25 per cent. of the said capacity of the packing plant of petitioner, without condition or qualification."

From the petition it appears that for several years last past petitioner has been actually engaged in the business of packing sardines; that at the time of filing the petition herein petitioner had installed in its packing plant 30 can-closing machines for one-pound oval cans of sardines and other equipment necessary for canning sardines to the capacity of said closing machines; that some time prior to the filing of the petition herein, to wit, on the 29th day of August, 1925, petitioner filed with respondents, as members of the fish and game commission of the state of California, an application under the provisions of subdivision (a) of section 5 of an act entitled "An act to amend an act entitled 'An act to conserve the fish supply in California by empowering the fish and game commission to regulate and control the handling of fish or other fishery products for the purpose of preventing deterioration or waste,'" etc. (Stats. 1925, p. 595); that by the terms of said application petitioner represented that it was and had been prior thereto actually engaged in packing sardines, and that it would be so actually engaged during the season for packing sardines of 1925—

26; that during the said season petitioner *would have installed* in its said packing plant 30 can-closing machines for one-pound oval cans of sardines intended to be used in said packing plant during the said season, and other equipment necessary for canning said sardines to the capacity of said closing machines, installed and ready for operation, and intended to be operated during said season; that the monthly capacity of the packing plant of petitioner for canning sardines was and would be during the season of 1925-26 18,000 tons of sardines; that petitioner requested that it be allowed, to be used in its reduction plant, 4,500 tons of sardines for each calendar month, being 25 per cent. of the monthly capacity of said packing plant; that thereafter, and following a hearing upon said application, the respondents, as such fish and game commission, made an order determining the capacity of the canning plant of petitioner by which there was made to petitioner, "while actually engaged in packing sardines, a monthly allowance of sardines to be used in its reduction plant of 4,500 tons for each calendar month, based upon its aforesaid canning capacity of 18,000 tons per month, and being 25 per cent. of the monthly capacity of the packing plant. "This order is made subject to the regulations required by the Fish and Game Commission's General Order No. 1, which order is made a part of this order."

"General order No. 1," referred to by the said order of determination by the respondent, fish and game commission, contained, among other things, the following:

"In order to determine whether a packer is actually engaged in packing sardines, this commission will require that for each ton of sardines received by a packer during a calendar month he shall produce 15 cases of one-pound ovals (48 cans to the case), or the equivalent, if other size cans are used."

It is from the conditions contained in "general order No. 1," and especially that part thereof which has just been quoted herein, that petitioner seeks relief. Its contention is that in the hearing before the respondents as such fish and game commission, to which reference has been had, respondents have and had authority to determine the capacity only of the plant of petitioner, and that the conditions attached thereto, known as "general order No. 1," were in excess of the authority conferred by the terms of the act upon respondents as such fish and game commission.

The respondents, however, have demurred to the petition on the grounds that it does not state facts sufficient to constitute a cause of action, or sufficient to authorize the issuance of a writ of mandate in said matter.

The act authorizes the fish and game commission to determine the monthly capacity of any packer of sardines by taking into consideration and basing its findings upon:

"The number of can-closing machines for one-pound oval cans of sardines actually installed in said plant and ready for and intended to be used therein during the season immediately following the making of the application hereinafter mentioned; provided, that the other equipment of said plant necessary for canning to the capacity of said closing machines is likewise installed and ready for operation. For each closing machine so installed the fish and game commission shall make a monthly allowance of sardines to be used in the reduction plant of one hundred fifty tons for each calendar month."

Respondents direct attention to the fact that the application by the petitioner to the respondents for the order determining the monthly capacity of the packing plant belonging to the petitioner, contained, not a statement of "the number of can-closing machines for one-pound oval cans of sardines *actually installed* in said plant and *ready* for and intended to be used therein during the season immediately following the making of the application," but, to the contrary, that petitioner contented itself with a representation merely of the number of can-closing machines which it expected would be ready for operation at the time the season for canning sardines would open. Furthermore, in the same connection, respondents point to the order made by the commission which contains the findings:

"1. That applicant *will have installed* in its said plant thirty (30) can-closing machines for one-pound oval cans of sardines intended to be used therein during the season 1925-26.

"2. That the other equipment of said plant necessary for canning to the capacity of said closing machines *will likewise be installed* and ready for operation."

[1, 2] It is clear that the powers of the fish and game commission in the premises are derived solely from the provisions of the act under consideration. Its authority to determine the capacity of any fish canning plant is found within the terms of that portion of the act heretofore quoted herein, that "the fish and game commission must take into consideration and base its findings upon the following facts, namely: The number of can-closing machines * * * *actually installed* * * * and *ready* for and intended to be used" in the packing plant of the petitioner during the season immediately following the application for the order fixing the capacity of the petitioner. With reference to the packing capacity of a petitioner, no authority is vested in the commission to determine what reasonably may be expected to happen in the future. It may "take into consideration and base its findings" solely upon what actually exists at the time the application is made. Were it otherwise, an unscrupulous packer might make unwarranted representations regarding his future expectations in the way of what machinery he expected to install, and thereby procure an order determining the

monthly capacity of his packing plant far in excess of that which it would be possible for him otherwise to obtain, which result would be out of harmony with the evident purpose of the statute. By recognizing the authority of the commission under the facts of the instant case to fix the packing capacity of an applicant upon its representation of what it reasonably expected would be its equipment at the beginning of the canning season, would be a misconstruction of the plain language of the act and a precedent for the exercise of unlimited discretionary power in the commission in that regard. The words of the statute are so precise that there can be no misunderstanding of their meaning. They authorize a certain finding by the commission, based upon certain existing material facts, and none other. An order made by the commission which does not rest upon such authority is manifestly a nullity; and, it appearing by the representations contained within the petition of the applicant, as well as in the order made by the commission, that the order in the premises was not founded upon such facts as the commission was authorized to consider, it follows that the order in question was and is void and of no effect. Consequently the commission cannot be required by order of this court to perform an act not prescribed by the statute as being within its powers.

[3] The act under consideration contains no provision giving to any packer of sardines other than one packing his product in one-pound oval cans the right to have the packing capacity of his plant determined by the commission, to the end that the monthly allowance of sardines to be used in a reduction plant for fertilizer purposes may be fixed by order of the commission. Because of such alleged discrimination, it is contended by respondents that that portion of the act which gives to packers of sardines in one-pound oval cans the special privilege of using sardines for reduction purposes is unconstitutional.

Section 4 (b) of the act defines a packer as—

"Any person, firm, association or corporation using fish by canning, or preserving by the common method of drying, salting or smoking."

And section 5 (a), in part provides:

"It shall be lawful for a packer of sardines, actually engaged in packing sardines, to take and use in a reduction plant in each calendar month, sardines to the amount of twenty-five per cent. of the monthly capacity of the packing plant. * * *

Then follows in the act the provision heretofore quoted herein by which the commission is authorized to determine the packing capacity of the plant of any packer by taking into consideration the number of can-closing machines for one-pound oval cans of sardines actually installed and ready for and intended to be used in said plant, etc.

It will be noted that the act specifically

provides for several different kinds of packers, namely: The canner, the dryer, the salter, and the smoker. Evidence received by the referee appointed by this court discloses the additional fact that there are at least five different sized cans used by the canner of sardines, to wit, the one-pound oval, the half-pound oval, the half-pound square, the quarter-pound square, and the six-ounce tall cans. Of the several kinds of packers of sardines, the canner is the only one who is permitted to have the packing capacity of his plant determined in order that the monthly allowance of sardines to be used in a reduction plant may be fixed by the commission; and of the canners, the only one who is given that right is the packer using one-pound oval cans for his product.

[4] So much heretofore has been written on the question of uniformity as applied to the persons upon whom a given statute will act or be effective that it is considered unnecessary to devote any attention to any elaboration. It may suffice, therefore, to note that in principle a classification other than constitutional, natural, or intrinsic will fail to meet the generally accepted requirements for the validity of a statute which is attackable upon the ground that it lacks uniformity and that it is discriminative in its operation. Considering, then, the several essential prerequisites in the attempted classification contained within the provisions of the statute under consideration, it may be said that no claim is made that a classification of a canner of sardines, as distinguished from either a dryer, a salter, or a smoker of such fish, is to be found within any of the provisions of the Constitution of this state, which implied concession leaves for determination whether the statutory segregation is one which for the purposes of the act is either natural or intrinsic.

The evidence produced before the referee of this court shows that in the conduct of his packing plant each of the several kinds of packers, as defined by the statute, has a very considerable amount of offal and other otherwise waste material derived from the ordinary operation of his business which is fit for reduction purposes only, from the sale of which, together with certain by-products thereof, is afforded the principal source of revenue and profit to the packer. There is, however, no natural distinguishing feature between the several businesses of the different kinds of packers so far as the reduction end of the industry is concerned. Each of the packers produces practically the same quantity of offal from an equal quantity of sardines, and the number or poundage of fish unfitted for any reason for the use of the canner for human consumption would be practically identical with those likewise unsuitable for the use of either the dryer, the salter, or the smoker of sardines. Any individual packer, of whatever kind, for the purpose of pro-

ducing fertilizer from the operation of his packing plant, must necessarily depend upon a source of supply identical in all respects with that relied upon by each of the other several kinds of packers defined by the statute. There is, then, neither a natural nor an intrinsic distinction or difference between any one kind of packer and any other kind of packer, so far as the operation of the statute as affecting the reduction of sardines in a fish-packing plant is concerned. The effect must be that the statute unlawfully discriminates in favor of the canner of sardines as against each of the other kinds of packers of such fish.

In addition to such general discrimination, the statute is likewise objectionable for the reason that it unjustly favors the canner of sardines using one-pound oval cans for his product as against each of the cannery who may use any or all the other sizes of cans for canning his fish. No reason has been suggested why a canner using the half-pound oval can, or the half-pound square, or the quarter-pound square, or the six-ounce tall can should be deprived of the right to have the capacity of his packing plant determined by the commission, to the end that he, too, may be given the right to manufacture fertilizer from the offal of the fish which he cans, and likewise use such other fish for reduction purposes as may not be fit for other practical use.

[5] No reason whatsoever being discoverable for the attempted discrimination, the general rule that the Legislature is presumed to have investigated the facts upon which it acts, and that its conclusion as impliedly expressed in the statute must be respected by the courts, cannot prevail.

[6] The contention by petitioner that, because respondent is not an aggrieved party to the proceeding it is in no position to question the constitutionality of that part of the statute under consideration is untenable. In the case of *Quong Ham Wah Co. v. Industrial Accident Commission*, 192 P. 1021, 184 Cal. 26, 12 A. L. R. 1190, it is held that the rule suggested by petitioner here is subject to the exception that, where no member of the class against whom the discrimination exists is in a position to raise the constitutionality of the statute, any person affected by the application of the statute may urge its unconstitutionality. The purpose of the act in question, as partly expressed in its title, is "to regulate and control the handling of fish or other fishery products." By its terms, "no person shall use any fish except fish offal in a reduction plant, except of the species, in the manner and to the amount allowed by the provisions of this act." It would thus appear that, except as to the use of fish offal for reduction purposes, no packer of fish would be permitted to lawfully operate a reduction plant in any manner other than as is provided by the statute, the essential provision of which being as heretofore quoted herein. It

is therefore apparent that, if at the instance of a packer of sardines, other than a canner using one-pound oval cans, the unconstitutionality of the supposedly objectionable provisions of the statute should be established, the result would be of no benefit to such packer. His act would merely bring about the destruction of the discriminatory provisions of the statute, but at the same time would gain the packer no advantage. In the case to which reference has just been had (192 P. 1021, 184 Cal. 26, 31, 12 A. L. R. 1190), in speaking of the effect of a situation somewhat similar to the facts here presented, the court quoted with approval from the case of *Greene v. State*, 119 N. W. 6, 83 Neb. 84, 131 Am. St. Rep. 626, wherein, among other things, it is said:

"If we apply to such a law the rule that its constitutionality would only be considered when the objection was made by a party discriminated against, there could be no objection to its validity. When such a law is sought to be enforced against any person, whether belonging to the classes discriminated against or not, it should be declared void."

The additional point advanced by petitioner is that, because respondents, as such fish and game commission, have heretofore recognized the validity of the statute and have acted upon a provision therein by adopting its requirements with reference to giving notice of a hearing on the question of a determination of the capacity of the packing plant of the petitioner, and in connection therewith have issued an order fixing the packing capacity of petitioner, respondents are estopped from attacking the statute on the ground that it is unconstitutional.

In the case of *Allen v. Hance*, 118 P. 527, 529, 161 Cal. 189, 196, it is said:

"Whatever may have worked the estoppel, whether the estoppel rests in judgment, deed, contract, or in pais, in its essence it amounts to but this, that a man is forbidden to show the existence of a fact because by his past conduct, his declarations, his agreement, his deed or a judgment, it would work an injustice and an injury to his adversary to permit him to do so."

See, also, *Frank v. Crescent Wharf, etc., Co.*, 195 P. 79, 50 Cal. App. 272.

[7] In establishing the claimed estoppel of respondents, it should appear that some injustice or some injury has resulted to petitioner by reason of the fact that, based upon an application initiated by petitioner, respondents set a time for hearing the application, and thereafter made an order determining the packing capacity of the business of petitioner. Petitioner at least impliedly requested that respondents do the things which they did, and it is not apparent in what manner petitioner has been prejudiced by such conduct on the part of the respondents. But if any injury or injustice has resulted to petitioner by reason of the acts of respondent

ents in the premises, such injury was brought about at the instigation of petitioner, and in such circumstances it should not be heard to complain.

The demurrer to the petition is sustained, and the writ discharged.

We concur: CONREY, P. J.; YORK, J.

76 Cal. App. 288

YATES v. DYER et al. (Civ. 3031.)

(District Court of Appeal, Third District, California. Jan. 22, 1926.)

1. Appeal and error — 1011(1).

Court's finding on conflicting evidence as to whether appellant signed certain note held conclusive on appeal.

2. Bills and notes — 487—Court properly permitted complaint to be amended to show maker's mark in copy of note set out therein.

Where copy of note set out in complaint failed to include mark of one of makers, which appeared after his name in original note, court properly permitted complaint to be amended by inserting mark in proper place in note.

3. Bills and notes — 54.

Where maker's name on note was signed by another at maker's direction, it was sufficient, in view of Civ. Code, § 3100, without maker's mark.

Appeal from Superior Court, Modoc County; F. M. Jamison, Judge.

Action by J. A. Yates against H. E. Dyer and others. Judgment for plaintiff, and defendant James Edwards appeals. Affirmed.

J. T. Sharp, of Alturas, for appellant.

Oscar Gibbons, of Alturas, for respondent.

PER CURIAM. The plaintiff brought this action to recover the amount of a promissory note alleged to have been executed by the defendants. The answer admits that defendants Dyer and St. John executed the note, but denies that the defendant Edwards executed the same. The court found that all of the defendants executed the note and entered judgment against all of them for the amount due thereon. The defendant Edwards has appealed from the judgment.

[1] The plaintiff testified as follows:

"Q. Do you know who signed the name of James Edwards there on this note? A. Mr. Dyer signed it by direction of Mr. James Edwards.

"Q. Do you know who made the cross there at the end of the name of Mr. Edwards on this note? A. Mr. Edwards made it.

"Q. Were all three of these defendants present when these names were signed on this note? A. They were.

"Q. Was the note read over in the presence of Mr. James Edwards and the other defendants? A. It was.

"Q. Was this cross made before or after the name of James Edwards was signed by Mr. Dyer? A. I told Mr. Edwards to hold his hand on the pen while Mr. Dyer signed it, as that would make it legal that way, and so he did; and, after the signature was completed, then I says, 'Now you take your pen and make your cross there,' and so he did that."

Dyer denied that he signed Edwards' name to the note. Edwards and St. John also denied plaintiff's statements as to the signature of Edwards. Dyer wrote his own name and that of Edwards in the presence of the court for the purpose of comparison. The court's finding on this conflicting evidence is conclusive on appeal.

[2] On the copy of the note set out in the complaint no cross appeared after Edwards' signature. The court permitted the complaint to be amended by inserting a cross after Edwards' signature. It was not error to permit the amendment.

[3] While Dyer signed his own name as one of the makers of the note, he did not sign it as a witness to Edwards' signature. Appellant contends that "this omission is fatal to the contention that the note was legally executed by mark." The signature was sufficient without the mark. Civ. Code § 3100; 19 Cal. Jur. 822; 36 Cyc. 451; Hilborn v. Alford, 22 Cal. 482; Harris v. Harris, 59 Cal. 620; In re Walker, 110 Cal. 387, 42 P. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104; Phillips v. Sanger Lumber Co., 130 Cal. 431, 62 P. 749; Curtin v. Salmon River, etc., Co., 141 Cal. 308, 74 P. 851, 99 Am. St. Rep. 75; In re Holloway's Estate (Cal. Sup.) 235 P. 1012; Pitney v. Pitney, 55 Cal. App. 22, 202 P. 940; note 22 L. R. A. 297.

The judgment is affirmed.

76 Cal. App. 331

NEWMAN v. MENNE et al. (Civ. 3001.)

(District Court of Appeal, Third District, California. Jan. 28, 1926.)

1. Judgment  143(7) — Judgment against plaintiff should not be set aside because his attorneys withdrew as such before trial and he had not been required to appoint others or to appear in person.

Plaintiff's affidavit that his attorneys withdrew as such on day before trial and that he had not been required to appoint another or to appear in person held insufficient to support order vacating judgment entered against him when he failed to appear, and recalling and returning execution issued thereon without service.

2. Appeal and error  436—Appeal from order vacating judgment held not to have effect of staying proceedings in trial.

Trial court may order commission to take depositions of witnesses in another state after defendant's appeal from prior order vacating judgment which was entered against plaintiff when he failed to appear at trial; such appeal not having effect of staying proceedings.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by C. N. Newman against Charles A. Menne, doing business under the name and style of the Electric Utilities Company, and others. Judgment for defendants, and they appeal from an order vacating judgment and recalling execution, and from an order directing commission to issue to take testimony. Order vacating judgment and recalling execution reversed; order directing that commission issue to take testimony affirmed.

A. H. Carpenter, of Stockton, for appellants.

A. V. Scanlan, of Stockton, for respondent.

FINCH, P. J. There are two appeals in this case, on a single transcript. The first is from an order vacating the judgment entered in the action in favor of the defendant and recalling the execution issued thereunder. The second is from a subsequent order directing the issuance of a commission to take the depositions of certain witnesses residing in another state. The second order was made after the defendant had given notice of appeal from the first.

[1] The action came on regularly for trial on the 4th day of February, 1925. "The plaintiff neglected and failed to appear in

said court and cause, or to offer any evidence in his own behalf, and thereupon judgment was entered * * * against the said plaintiff, and in favor of the defendants," for their costs. Thereafter, on the 22d day of April, 1925, plaintiff served and filed notice of motion for an order vacating the judgment and recalling the execution which had been issued thereon, on the ground that the court was without jurisdiction to render the judgment. In support of the motion the plaintiff made affidavit as follows:

"C. N. Newman, being first duly sworn, deposes and says: That he now is, and at all times herein mentioned was, the plaintiff in the above-entitled action; that Foltz, Rendon & Wallace were attorneys for said plaintiff prior to the 3d day of February, 1925; that on said 3d day of February, 1925, said Foltz, Rendon & Wallace served a notice of withdrawal as such attorneys on said plaintiff; and that said attorneys forthwith ceased to act as attorneys for said plaintiff on said 3d day of February, 1925, and ever since said date have not acted as such attorneys for said plaintiff in the above entitled action; that said plaintiff has not, at any time heretofore, been required by the adverse party appearing herein, to wit, the defendant Charles A. Menne, or by any other person or persons, by written notice or otherwise, to appoint another attorney, or to appear in person."

The court granted the motion, and "ordered that * * * the said judgment is hereby vacated, set aside, annulled and canceled, and that the said execution be recalled and returned without service." The affidavit does not state facts sufficient to support the order. *De Recat Corporation v. Dunn* (Cal. Sup.) 242 P. 936.

[2] In view of the necessity of reversing the first order, the appeal from the second order becomes unimportant. Appellants contend that the effect of the appeal from the first order was to stay all proceedings in the trial court, and that therefore the court was without "jurisdiction to order a commission to take testimony." The Supreme Court has held to the contrary. *S. F. Gas & Electric Co. v. Superior Court*, 155 Cal. 30, 99 P. 359, 17 Ann. Cas. 933.

The order vacating the judgment and recalling execution is reversed and the trial court is directed to deny the motion therefor.

The order directing the issuance of a commission to take the depositions of witnesses outside of the state is affirmed.

We concur: HART, J.; PLUMMER, J.

76 Cal. App. 489

GOLDBERG v. DAVIS. (Civ. 5283.)

(District Court of Appeal, Second District Division 1, California. Feb. 10, 1926.)

Appeal and error  628(1)—Failure to file transcript in time held excusable, where occasioned by failure to provide undertaking for costs, and theretofore appellant's attorney had been accorded courtesy of paying costs on completion (Code Civ. Proc. §§ 473, 953b).

Where appellant was acting in good faith and had meritorious cause for appeal, failure to file transcript within time required by Code Civ. Proc., § 473, held excusable, where delay was occasioned by failure to provide undertaking for costs, as required by section 953b, and theretofore appellant's attorney had been accorded courtesy of paying for transcript when completed.

Action by Nathan Goldberg against Thelma H. Davis. Judgment for plaintiff, and defendant appeals. On motion to dismiss. Motion denied.

L. E. Dadmun, of Los Angeles, for appellant.

Burnett Wolfson, of Los Angeles, for respondent.

HOUSER, J. A motion to dismiss the appeal herein has been presented by the respondent on the ground that there was a failure to file the transcript within the time required by law. Without conceding the fact that the transcript was not filed within the time prescribed by the rules of this court, under the provisions of section 473 of the Code of Civil Procedure, appellant has prayed to be relieved from any default on the ground that it arose through mistake, inadvertence, or excusable neglect.

Appellant represents that the reason for her failure to file the transcript on appeal within the required time was because, although the attorney who represented her on said appeal gave the order to the clerk of the trial court to prepare the transcript on appeal, such transcript was not prepared and made ready for certification and approval by the trial judge in accordance with the provisions of the statute, solely because of a misunderstanding by her attorney of an arrangement for such matters in general existing between him and such clerk.

Section 953b of the Code of Civil Procedure provides in substance that at the time the notice of appeal is filed with the clerk the appellant shall also file an undertaking by which the appellant shall become bound to pay to the clerk the cost of preparing the transcript, or that the appellant may arrange personally with the stenographic reporter for his compensation.

Counsel for appellant has filed an affidavit herein, by which it appears that in each of

five different cases arising in the superior court, and in which appeals were taken by him for his several respective clients in such matters in the same manner as was the appeal taken in the instant case, he filed his notice of appeal, made his demand for the clerk's transcript in accordance with the provisions of the statute, and in each case, after the transcript had been prepared and the bill for the cost of the preparation thereof presented to counsel representing the appellant, he had paid the same; that in the instant case he followed the same course and fully believed that the transcript would be prepared and the bill therefor thereafter presented as had been done in each of the other cases to which reference was had and did not deem it necessary to make any arrangement different from that theretofore made in those cases. Furthermore, that six days before the notice of the motion for the dismissal of the appeal herein was served and filed with the clerk of this court he had written a letter to the clerk of the trial court inclosing a check in payment of the cost of the transcript on appeal in another case, and in the same communication had requested the clerk to inform him if the transcript on appeal were ready in the instant case. On the other hand, a deputy clerk in charge of the "transcript department" in the office of the clerk of the trial court made affidavit in substance that, after the notice of appeal herein had been filed, said deputy clerk left a message at the office of the attorney for appellant to the effect that arrangements should be made with the clerk of the trial court looking toward the payment or guaranteeing the payment of the costs for preparing the transcript on appeal; that no response was received from such message; and that on each of at least two other occasions the deputy clerk had telephoned the office of said attorney and had left a message to the same effect as the first message, and with the same result. In reply to such affidavit the attorney for appellant has filed his affidavit that no such message was ever received by him. In addition thereto, the clerk and stenographer in the office of the said attorney makes affidavit that it was her duty to receive all telephone calls in said office during regular office hours, and that no telephone message, such as was described in the affidavit of the deputy clerk, was ever received in such office.

From such contradictory statements it is difficult (if possible) to determine which of the affiants is mistaken. The fact, which is undisputed, that the attorney for appellant had customarily been accorded the courtesy by the clerk of the trial court of permitting him to order his transcripts on appeal and on completion of each of such transcripts to pay the cost thereof without theretofore furnishing an undertaking in the matter, together

with the fact that under such arrangement, a few days before the notice of the motion for the dismissal of the appeal herein was filed with the clerk of this court, the attorney for appellant had paid the costs of the transcript of another appeal and at the same time had requested information from said clerk as to when the transcript in the instant case would be ready, would indicate that, so far as the attorney for appellant was concerned, he had relied upon the custom as to the payment of costs of preparing transcripts on appeal theretofore existing between him and the clerk of the trial court, and had had no intimation that such arrangement had been changed. Although the transcript on appeal may not have been filed within the time required by law, it is apparent that appellant, through her attorney, was acting in good faith. The delay occasioned by the default of the appellant did not occasion any alleged hardship on the respondent. Within a few days after the notice of motion herein was filed the transcript was prepared and made ready for presentation to the trial judge for his certification and approval as required by law, and the affidavit of the attorney for appellant shows that the appeal is meritorious and that it is prosecuted in good faith. In such circumstances, assuming (without deciding) that at the time when the notice of motion herein was filed, the time allowed by law for filing the transcript on appeal had expired we are of the opinion that the appellant should be relieved from her default and that the motion to dismiss the appeal should be denied.

It is so ordered.

We concur: CONREY, P. J.; YORK, J.

76 Cal. App. 366

WOODARD v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.
(Civ. 5273.)

(District Court of Appeal, Second District, Division 1, California. Feb. 2, 1926.)

1. Exceptions, bill of $\S$ 42—Submitting proposed amendments to bill of exceptions held not to waive reserved objections to failure to serve bill in time allowed.

Submitting proposed amendments to bills of exception and at same time specifically reserving all objections to failure to serve bill within time allowed by law held not to waive such objections.

2. Exceptions, bill of $\S$ 42—Where objections to failure to serve bill of exceptions within time allowed were reserved in proposing amendments to bill, acknowledgment of receipt of copy of notice that bill and amendments would be taken up for settlement without again specifying reservation of objections held not to waive objections.

Where objections to failure to serve bill of exceptions within time allowed were specific-

ally reserved in proposing amendments, acknowledgment of receipt of copy of notice that proposed bill and amendments would be taken up for settlement without again specifying insistence upon objections reserved held not to waive objections, where, on following day, notice of motion to dismiss proceedings upon ground stated was given.

Petition by Willis Woodard for writ of mandate to be directed to the Superior Court in and for County of Los Angeles and Hon. Charles S. Burnell, Judge thereof, to compel settlement of bill of exceptions. Writ denied.

D. A. Knapp, of San Francisco, for petitioner.

Charles W. Fournl, of Los Angeles, and H. P. Babson, of Los Angeles, for respondents.

HOUSER, J. Mandate. In this proceeding petitioner seeks an order directing the respondent superior court and a judge thereof to settle a bill of exceptions.

It is conceded that the proposed bill of exceptions was not served within the time allowed by law, and that the determining question is whether there was a waiver of that fact.

Stripped of all unnecessary detail, it appears that the plaintiff in the action presented to the defendant therein, but not within the time prescribed by law, a proposed bill of exceptions; that thereupon the defendant presented to the plaintiff and filed with the clerk of the court his proposed amendments to the proposed bill of exceptions, and at the same time served the plaintiff with a notice, copy of which being as follows:

"You will please take notice that the following amendments are proposed on the part of defendant K. Eustace to the bill of exceptions or transcript on appeal proposed by plaintiff, and that said amendments are proposed and submitted by said defendant without waiving any exceptions or objections which said defendant has or may have to the said proposed bill of exceptions or transcript on appeal, or the service thereof, or the filing thereof, or the settlement of same, and without waiving objection to said bill of exceptions or transcript on appeal, upon the ground that said bill of exceptions or transcript on appeal was not served within the time allowed by law, stipulation of counsel, or order of court."

[1, 2] At all times after said notice was served, the defendant reserved all objections and exceptions to said bill of exceptions and continually claimed and insisted that the plaintiff's proposed bill of exceptions was not served on the defendant within the time fixed by the statute. It is true that on December 3, 1925, on being served with notice that the proposed bill and amendments would be taken up for settlement on December 9th, the attorney for defendant signed an acknowledgment of receipt of copy of the notice, with-

out further specifying that he continued to insist upon the objections which he had reserved. But on the following day, December 4th, he served upon plaintiff's attorney notice that on December 9th he would move to dismiss the proceedings for settlement, upon stated grounds which were the same as those which had been reserved as above stated. It is therefore clear that no waiver of the objections had been expressed, or implied, or intended.

In the case of *Hicks v. Masten*, 36 P. 130, 101 Cal. 651, a proposed bill of exceptions was served on opposing counsel after the time for performing such act as provided by the statute had expired. Amendments to the bill as presented were proposed by opposing counsel and served upon the attorneys representing the losing party in the action. The bill of exceptions and the proposed amendments thereto were then left with the trial judge. Shortly thereafter, in open court, attorneys on either side being present, counsel representing the party presenting the bill of exceptions requested the court to fix a time for its settlement. The time having been fixed by the court, the attorney representing the party presenting the proposed amendments to the bill of exceptions stated that he would be "on hand." When the matter of the settlement of the bill of exceptions came on for hearing, objection for the first time was made thereto on the ground that the proposed bill of exceptions was not prepared and served in time. It was held that the objection came too late, and as a result thereof that the failure to serve the proposed bill of exceptions within the time fixed by the statute had been waived.

In *Bollinger v. Bollinger*, 94 P. 770, 153 Cal. 190, where the facts were somewhat similar to those narrated in the foregoing citation, including the fact that no objection was made until at a meeting suggested by the trial judge between the attorneys representing the opposing parties to the action, held for the purpose of agreeing upon a settlement of the bill of exceptions, it was also ruled that the later objection in open court to the settlement of the bill of exceptions, on the ground that the proposed bill of exceptions had not been served within the time prescribed by the statute, was too tardily made.

In *Howell v. Pedersen*, 181 P. 674, 41 Cal.

App. 45, where a bill of exceptions was not served in time, and where the party upon whom it was served requested and received time additional to that provided by law, but at the same time, as well as within the admission of service upon such party of the proposed bill, reserved the right to "make any objections to the proposed bill of exceptions," it was held that the right of objecting to the bill had been fully preserved, and that no waiver had resulted.

In *Silverman v. Thompson* (Cal. Sup.) 238 P. 684, although for the first time an objection that the bill of exceptions had not been filed in time was expressly reserved at the time the proposed amendments were served, it was held that obtaining an order from the court extending the time within which to prepare and serve such proposed amendments to the bill of exceptions without at the time reserving such rights, constituted a waiver of the objection.

The case of *Mulcahy v. Young*, 208 P. 321, 58 Cal. App. 382, would seem to be determinative of the question herein involved. The facts in that case are in close resemblance to those in the case at bar, in that the proposed bill of exceptions was not filed within the time permitted by the statute for the performance of such act, and that the opposing party submitted proposed amendments to such bill at the same time "without waiving objection * * * to said [proposed] bill of exceptions, on the ground that said bill of exceptions was not served within the time allowed by law, stipulation of counsel or order of court." The proposed bill of exceptions not having been served in time, it was held that no ratification or acquiescence in such delay or failure was manifested by the action of the opposing party in proposing amendments to the proposed bill of exceptions and at the same time reserving his rights to object to the bill of exceptions on the ground that it had not been served within the time allowed by law. A petition to have the matter heard by the Supreme Court after decision by the District Court of Appeal was denied by the Supreme Court.

In view of the foregoing decisions, it is ordered that the application for a writ of mandate be and it is denied.

We concur: CONREY, P. J.; YORK, J.

76 Cal. App. 338

HEINE et ux. v. WRIGHT et al.

SAME v. ANGLO-AMERICAN LAND
CO. et al.

(Civ. 5003.)

(District Court of Appeal, First District, Division 1, California. Feb. 1, 1926. Hearing Denied by Supreme Court April 1, 1926.)

1. Attachment $\S$ 364—Defendant's agreement to secure release of attachment on real property by depositing money to be attached held not a "consent" to attachment, precluding recovery of damages (Civ. Code $\S$ 3515).

Defendant's agreement that, if plaintiff would release attachment on real property, they would deposit money which plaintiff might attach in its stead held not a "consent," under Civ. Code, $\S$ 3515, to attachment so as to bar their recovery for damages resulting from attachment; "consent" being an act unclouded by fraud, duress, or sometimes even mistake.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Consent.]

2. Attachment $\S$ 331—Attachment undertaking constitutes an original, independent, and absolute contract on part of sureties.

Attachment undertaking, providing that, in event of a judgment in favor of attachment defendants, obligors would become liable for damages, constitutes an original, independent, and absolute contract on part of the sureties in action thereon by attachment defendants against sureties.

3. Estoppel $\S$ 32(4)—Voluntary sureties on attachment undertaking held estopped, in absence of fraud, collusion, or mistake, to deny validity of attachment.

Sureties on attachment undertaking, providing without qualification that, if defendants recovered judgment, sureties would be liable, and purpose of attachment having been accomplished to damage of defendants and sureties, having become such voluntarily without dealings of any kind with attachment defendant, were, in absence of charges of fraud, collusion, or mistake, estopped to deny validity of attachment.

4. Attachment $\S$ 351.

In an action on an attachment undertaking, where real property is attached, only nominal damages, at most, are recoverable.

5. Appeal and error $\S$ 1241—Consent of attachment defendants to attachment held not available to obligors on appeal bond.

"Consent" of attachment defendants to attachment of bank deposit held not available to obligors on appeal bond; such consent not extending beyond period of lien created by attachment which ended on entry of judgment in defendant's favor.

6. Attachment $\S$ 364—Attachment defendants, substituting security for attached property, held not estopped to enforce liability for damages resulting from attachment, in absence of claim of fraud or deceit or misrepresentation (Code Civ. Proc. $\S$ 1962).

Attachment defendants, agreeing that, if plaintiff would release attachment on real property, they would deposit money which plaintiff might attach in its stead, held not estopped to enforce liability for damages resulting from attachment, in view of Code Civ. Proc. $\S$ 1962, where it was not claimed that any fraud or deceit was practiced, nor that any misrepresentations were made by defendants in substituting security for attachment, and it did not appear that attachment creditor was influenced or induced to accept such substituted security.

Appeals from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Separate actions by Frederick F. Heine and wife against A. L. Wright and another and against the Anglo-American Land Company and others. Judgments for plaintiffs in each action, and defendants appeal. Judgments affirmed.

Gerald C. Halsey and Frederick T. Leo, both of San Francisco, for appellants.

Walter H. Linforth, of San Francisco, for respondents.

KNIGHT, J. These two actions were commenced by respondents Frederick F. Heine and wife to recover damages resulting from an attachment of a bank deposit belonging to them. The first action was brought against the sureties on the attachment undertaking; the second against the principal and sureties on the undertaking given on appeal to continue the attachment lien in force pending appeal. The causes were heard and determined by the trial court upon the same evidence. Judgment in each action was given in favor of Heine and wife. The defendants therein have appealed, and present their appeals in one record.

The facts are that in 1917 the Anglo-American Land Company, a corporation, brought an action in the county of Sonoma against Heine and wife, in which certain real property belonging to the latter, in San Francisco, was attached. That action was based upon an alleged indebtedness of \$6,000 claimed to be due as a deficiency after sale of real property under a deed of trust given to secure a promissory note. The sureties on the attachment undertaking were C. W. Wright and John P. Rock. After the attachment had been levied, an opportunity was afforded Heine and wife to exchange said property for other real property, but they were unable to consummate the exchange because of the existence of said attachment. Thereupon one Hooper, acting for Heine and wife

in the matter of the proposed exchange of properties, conferred with the land company's attorney for the purpose of having said attachment released. Said attorney first demanded the execution of the usual bond on release of attachment, but Heine and wife declined to furnish such a bond upon the ground that it would require them to deposit a sum of money as collateral with the bonding company, upon which they would lose interest during the period of the deposit. Hooper then suggested that Heine and wife would be willing to deposit the sum of \$7,000, at interest, in a savings bank until the action was determined. In response to this proposition said attorney stated, according to his testimony:

"I told Mr. Hooper that that would be satisfactory to myself and my clients, and Mr. Hooper then said that he would have Mr. Heine at once deposit for himself and wife the sum of \$7,000 in the savings department of that bank at Santa Rosa, and that they would arrange with the bank to notify me in writing just as soon as that money was on deposit there, so we could proceed to make arrangements to attach it, and that as soon as the attachment was placed on the money that I would deliver the release of the real property. * * *"

Said money was deposited accordingly, but the clerk of the court in which the attachment was obtained refused to issue a new writ, unless a new affidavit and undertaking were given; whereupon said land company filed a new affidavit and another undertaking with appellants A. L. and G. A. M. Wright as sureties thereon, and caused to be issued a second writ of attachment, by virtue of which said bank deposit was levied upon; thereafter the attachment on said real property was released, and the exchange of said property was consummated. Upon trial of the action against Heine and wife judgment was rendered in their favor. Said land company appealed, and gave a bond with Annie L. and C. W. Wright as sureties thereon, for the purpose of continuing said second attachment in force pending appeal. On appeal the judgment in favor of Heine and wife was affirmed (*Anglo-American Land Co. v. Heine*, 198 P. 1009, 52 Cal. App. 472), the court holding that the evidence was sufficient to support the finding of the trial court that the indebtedness sued upon by said land company had been, as claimed by Heine and wife, fully paid and discharged. Thereupon Heine and wife brought these two suits for damages, one against A. L. and G. A. M. Wright as sureties on the second attachment bond, and recovered a judgment therein for the sum of \$239.20, which represented the accrued interest on said sum of \$7,000 at the legal rate, from the date of the levy of said attachment thereon until the entry of judgment, less the amount of interest paid Heine and wife by the bank on said deposit for the same period

of time at the rate of 4 per cent. The other was commenced against the Anglo-American Land Company, as principal, and Annie L. and C. W. Wright, as sureties on the appeal bond, which was given to continue said second attachment in force pending appeal, and a judgment therein was given in favor of Heine and wife for the sum of \$485.60 and costs, which represented the accrued interest on said bank deposit, at legal rate, from the date of the entry of judgment in the trial court to the date of the affirmance on appeal, less the amount of interest paid on said deposit by the bank.

In the second affirmative defense pleaded in the answer in each action it was alleged that respondents consented to the attachment of said bank deposit. The trial court negatived those allegations by a general finding, but further found in regard thereto that, in order to enable respondents to consummate the exchange of the attached real property, they deposited \$7,000 in a bank in Santa Rosa, and requested that the attachment be placed upon said bank deposit "instead of upon said real property."

Regarding the appeal prosecuted by the sureties on the attachment bond, the main contention urged for reversal of the judgment is that the conduct of respondents in depositing said money under the circumstances above related amounted to a consent on their part to the attachment being made, which consent precluded them from afterwards claiming damage resulting from said attachment. This contention is based primarily upon the maxim of jurisprudence that "he who consents to an act is not wronged by it." Civ. Code, § 3515.

[1] Even though it be assumed that consent by a defendant to an attachment being made upon his property does operate as a bar to the subsequent enforcement of the obligation arising from the attachment undertaking, the evidence in the instant case fails to show the exercise of such freedom of action on the part of respondents in regard to said attachment as would bring their conduct within the purview of the maxim of jurisprudence relied upon by appellant. The word "consent" means, in a legal sense, "capable, deliberate, and voluntary assent or agreement to, or concurrence in, some act or purpose, implying physical and mutual power and free action" (*Webster's Dictionary*); or, as stated in the case of *Butler v. Collins*, 12 Cal. 457, which was an action for damages for the tortious taking of personal property, wherein it was claimed that the owner consented to the taking:

"Consent, in law, is more than a mere formal act of the mind. It is an act unclouded by fraud, duress, or sometimes even mistake."

The evidence here shows without dispute that the Anglo-American Land Company was insisting at all times upon maintaining an

attachment lien on respondents' property to secure the payment of the alleged debt upon which it was suing, and refused to release the attachment on said real property until satisfactory substitution of security was effected; on the other hand, respondents from the beginning claimed that the suit upon which the attachment proceeding was based was groundless; and it was never intimated by them that they would waive, or refrain from pursuing, the remedy afforded by law for the recovery of such damages as might accrue from a wrongful or malicious attachment. The placing of said money on deposit in the bank under those circumstances cannot be said to be the result of the exercise of a free and voluntary act on the part of respondents such as would deprive them of their right to afterwards complain of the attachment, but was in effect a situation brought about by a coercive attitude manifested on the part of said land company in view of the pending exchange of said real property, whereby it refused to release the attachment on said real property until ample security was given in its place; in other words, the placing of said money in the bank was, in substance, a compliance with the demand of said land company for substituted security for an attachment already levied, acceded to by respondents only for the purpose of obtaining the release of said real estate, and thus obviating further and greater damages from being caused by the breaking up of the contemplated exchange of said property; and, having deposited the money under those conditions, we believe the trial court was correct in holding that respondents were not precluded from seeking recovery against the sureties on the attachment undertaking.

[2, 3] Furthermore, said land company, with whom these transactions regarding the bank deposit were had, is not a party to this particular action. The controversy here lies between the attachment defendants and the obligors on the attachment undertaking; the action being based solely upon said attachment undertaking. In such an action the undertaking, to all intents and purposes, constitutes an original, independent, and absolute contract on the part of sureties. *Frankel v. Stern*, 44 Cal. 168; *Pieper v. Peers*, 32 P. 700, 98 Cal. 42. It is not claimed by the appellants on this particular appeal that respondents induced them to become sureties on said undertaking, or made any request whatever of them in regard to the attachment of said bank deposit, or the release of the attachment on the real property; in fact, neither respondents nor their agent, Hooper, ever had any dealings with them, they having come into the case for the first time when they became sureties on the attachment undertaking. The undertaking sued upon was entered into by them voluntarily, in consid-

eration of the issuance of said writ of attachment, and for the purpose of having the respondents' property seized. The purpose sought was accomplished to the damage of respondents. Said undertaking provided without qualification that, in the event of respondents recovering a judgment in the action, appellants would become liable for damages caused thereby. Under those circumstances, and in the absence of any charges of fraud, collusion, or mistake, we are of the opinion that the contention urged by the appellants in regard to the matter of consent amounts to an attempted impeachment of the attachment, the validity of which they are, as such sureties, estopped to deny. *Tormey v. McIntosh*, 184 P. 1012, 43 Cal. App. 411; 2 Ruling Case Law, p. 890, citing cases; *McLean v. Wright*, 35 So. 45, 137 Ala. 644, 97 Am. St. Rep. 67; *Brown v. Tidrick*, 85 N. W. 185, 14 S. D. 249, 86 Am. St. Rep. 754.

[4] In reference to the appeal from the judgment given in the matter of the appeal bond, the land company, in addition to making the contention regarding respondents' consent, claims that, by releasing the attachment on the real estate and making the levy on the bank deposit, it was "led to change its position for the worse," and that therefore respondents are estopped from demanding or receiving any damages from these particular appellants, under the appeal bond, resulting from the attachment of said money. This claim is based upon the theory that, if the attachment on the real estate had continued to remain in force instead of being superseded by the attachment of the money, these appellants, as parties to the appeal bond, would not have been liable for the payment of damages, because, at most, only nominal damages are recoverable in an action brought upon an attachment undertaking where real property is attached. *Heath v. Lent*, 1 Cal. 410; *Elder v. Kutner*, 32 P. 563, 97 Cal. 490.

[5] We believe that the matter of respondents' conduct in relation to the attachment of the bank deposit, whatever it may have been, can have no effect upon the status of the obligors of the appeal bond, for the reason that the lien created by the attachment of the bank deposit, which it is contended was consented to by respondents, ended with the entry of judgment in the action in favor of respondents, and the liability of the obligors on the appeal bond arose from a transaction entered into by them after the entry of that judgment, and involves an obligation entirely distinct from the one in regard to which the conduct of respondents has been called into question. The conduct of respondents, therefore, in reference to the attachment of the bank deposit, cannot be held to extend beyond the period of the lien created by that attachment nor to operate to the advantage of these appellants.

[6] Moreover, the doctrine of estoppel can-

not be held to apply against the respondents, because none of the essential elements of that doctrine has been established. It is not claimed that any fraud or deceit was practiced, nor that any misrepresentations were made by respondents in substituting the security for the attachment; nor that any "intentional or deliberate act" on their part led said land company "to believe a particular thing true, and to act upon such belief" (Code Civ. Proc. § 1962; 10 Cal. Jur. p. 625); nor does the evidence show that said land company was influenced or induced to accept said substituted security. It acted in the matter of its own accord, and in order to obtain a more efficacious lien to secure the debt sued upon; and, having concluded the transaction through its attorney, must be presumed to have known of the legal consequences which might follow therefrom. But, even though it could be fairly inferred from the evidence that the substitution of security was effectuated through the inducement of respondents, it cannot be said with any degree of certainty that the land company's position was made worse thereby, for the reason that, if the attachment on the real property had continued in force, respondents, upon rendition of judgment in that action in their favor, would not have been restricted to nominal damages obtainable in an action against the sureties on the attachment undertaking, but would have been allowed, under the law, to proceed against the land company alone for malicious attachment (*Vesper v. Crane Co.*, 130 P. 876, 165 Cal. 36, L. R. A. 1915A, 541); and in such an action there is no fixed rule as to the amount of damages which might be recovered, it being proper to take into consideration all the circumstances attending the transaction, including the character and position of the parties, and which may carry the amount of damages beyond mere compensatory relief. (*Kinsey v. Wallace*, 36 Cal. 462; *Weaver v. Page*, 6 Cal. 681; 6 Cor. Jur. 539).

The case of *Baines v. Ullmann*, Lewis & Co., 9 S. W. 543, 71 Tex. 529, cited by appellants, is not in point as to either appeal. The controversy there concerned a second attachment, and it was proved that the first attachment, which was defective, was made with the consent of the attachment defendant. The court therefore held, merely, in reference to the question of consent, that the attachment defendant, having consented to his goods being attached, "it ought to be understood that he consented an attachment should be made that would hold the goods, and, if the first was informal, that the informality might be cured by the second."

It is our opinion that the judgment in each action should be affirmed, and it is so ordered.

We concur: TYLER, P. J.; CASHIN, J.

76 Cal. App. 321

**CALIFORNIA CREDIT & COLLECTION
CORPORATION v. RANDALL.
(Civ. 2956.)**

(District Court of Appeal, Third District, California. Jan. 27, 1926.)

1. Corporations ⇐80(8).

False representations as to amount of dividends being paid by corporation inducing execution of note in payment of stock subscription held sufficient defense to action on note.

2. Corporations ⇐80(12)—In action on stock subscription note, that corporation may have been earning 12 per cent. held no answer to defense of fraudulent representations that it was paying dividends in such amount.

In action on stock subscription note, defended on ground of fraudulent representations that company was paying 12 per cent. dividends, that stock may have been worth what defendant agreed to pay, and that corporation may have been earning enough to pay dividends as represented, held no answer to defense.

3. Corporations ⇐80(10) — Proof of fraudulent representations inducing execution of stock subscription note held not precluded by subscription agreement that verbal agreements with subscriber would not be recognized.

In action on stock subscription note, proof of fraudulent representations inducing execution held not precluded by subscription agreement that corporation will not recognize verbal agreements between agent and subscriber.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by the California Credit & Collection Corporation against Walter M. Randall upon a promissory note. Judgment for defendant, and plaintiff appeals. Affirmed.

J. R. Cunyngnam, of San Francisco, for appellant.

Fred W. McConnell, of Healdsburg, for respondent.

PER CURIAM. The plaintiff brought this action to recover on a promissory note, payable six months after date, given by the defendant to the Virden Packing Company, a corporation, and by that company assigned, after maturity, to the plaintiff for collection. The defendant entered into an agreement with the packing company to purchase 10 shares of its capital stock, at \$100 a share, the par value thereof. He paid \$250 on the purchase price, and gave the note in suit for the remainder thereof. The agreement contained the following provisions:

"It is expressly agreed that no stock is to be issued until the amount of this subscription and note or notes given therefor are paid in full in cash. * * * The subscription contract * * * contains the entire contract between the subscriber and the company and no agent or representative of the company, or any other

person, has any power to change or alter the terms of this subscription. * * * Verbal or other agreements between agents and applicants contrary to the terms of this contract are not authorized, and will not be recognized by the company."

The answer sets up as an affirmative defense that the defendant was induced to enter into the contract and to give the note by false representations made by the company's selling agent, E. J. Warner. The only alleged misrepresentation which is material to the questions raised by appellant is "that said stock * * * was then paying * * * twelve per cent. dividends." The court found in accordance with the allegations of the affirmative defense, and entered judgment in favor of defendant for the cancellation of the agreement and the promissory note and for costs of suit. The plaintiff has appealed from the judgment.

The 10 shares of stock were never delivered to defendant, and he did not pay any part of the note or receive any dividend upon his stock. The parties stipulated at the trial that, without the defendant's knowledge or consent, the company credited upon the note the amount of a dividend declared by it; the amount of such dividend not being stated in the stipulation. Relative to the alleged representations of the selling agent, the defendant testified as follows:

"Q. How did you come to subscribe for that stock? A. On account of the representations they made regarding the value of it and what it paid.

"Q. Well, what did Mr. Warner state to you about this stock before you subscribed for it? A. Oh, I met him I guess, several times, and he spoke about the investment, and said it was paying 12 per cent. I guess I saw him two or three times before I took the stock.

"Q. He told you the stock was then paying 12 per cent. dividend? A. That it had. * * *

"Q. Did he say anything about what it was paying then? A. As I understood him, he said it was paying then 12 per cent. * * *

"Q. Did you have any knowledge of stocks? A. I did not.

"Q. Or of the Virden Packing Company, a corporation? A. No.

"Q. Or what they owned? A. No.

"Q. Or anything about the formation of the company? A. Only what they told me.

"Q. Did you have any information of any kind as to the value of this stock? * * * A. No, I did not.

"Q. Did you have any knowledge of any facts relating to the resources of the Virden Packing company except what you got from Mr. Warner? A. That is all I knew. * * * I didn't know any such company existed. * * *

"Q. Mr. Randall, did you believe the statements that Mr. Warner made to you about this matter? A. I did. * * *

"Q. Did you rely on them? A. He was introduced to me by a friend of mine, and I depended on his statement on that account.

"Q. Would you have made this note and signed this stock subscription except for those representations? A. No, sir. * * *

"Q. * * * Was that stock ever issued to you? A. No, sir.

"Q. Was it ever tendered to you? A. No, sir. * * *

"Q. * * * About the time it became due, did the company make any demand on you for the payment of the note? A. Yes, sir; they did.

"Q. Did you answer them? A. Yes, sir.

"Q. Have you that letter; have you a copy of the letter you sent them? A. No.

"Q. What did you write them, Mr. Randall? A. I wrote to them that the stock was not what it was represented, had not paid the dividends, and I refused to pay the note. And on that ground they wrote back and said they were not responsible for the action of the salesman."

About 20 months after the note was executed, and prior to the commencement of this action, defendant's attorney wrote the company, requesting the return of the note, and stating that defendant "will give you any such formal release as you may desire." Relative to dividends declared by the Virden Packing Company, counsel for plaintiff stipulated at the trial as follows:

"I cannot stipulate as to the earning; I cannot stipulate to that. But I will stipulate that they have not paid or declared a dividend of 12 per cent, or half of 12 per cent. Now, I will make it good and strong, the fact of the matter is, I think they paid 2 per cent. dividends before that time, and I do not think they have ever paid more than 2 per cent."

The defendant is the only witness who testified at the trial, and his testimony, therefore, stands uncontradicted.

[1] It appears without conflict that the defendant was induced to execute the agreement and the note by the false representation that the packing company had paid, and was paying, dividends of 12 per cent. Such fraudulent representation is a sufficient defense. *Dox v. R. E. Lomax Co.*, 29 Cal. App. 718, 156 P. 874; 6 Cal. Jur. 770.

Appellant contends:

"The judgment of the court should be reversed: First, because a rescission of the contract had not been properly alleged, and there is a total failure of the evidence to support a rescission. Second, the defendant does not plead that he has been damaged in any sum whatsoever, neither is there any evidence of injury."

In *Field v. Austin*, 131 Cal. 379, 382, 63 P. 692, 693, it is said, quoting from *Toby v. Oregon, etc.*, R. R. Co., 98 Cal. 498, 33 P. 550:

"There are three methods by which, in cases like the present, a party defrauded may obtain relief: (1) Cancellation or rescission, etc.; * * * (2) affirmative relief by an action to recover compensation for the injury sustained by the fraud of the defendant; * * * (3) defensive relief, whereby the fraud is set up by way of defense to defeat an action brought to enforce an apparent obligation or liability."

"Where no affirmative relief is sought, it is not necessary for him to have exercised an existing

right to rescind." 12 Cal. Jur. 786; *Simon Newman Co. v. Lassing*, 141 Cal. 174, 74 P. 761.

"So long as the plaintiff is permitted to come into court seeking to enforce the agreement, the defendant may allege and prove fraud as a defense. In short, it is not incumbent upon one who has thus been defrauded to go into court and ask relief, but he may abide his time, and when enforcement is sought against him excuse himself from performance by proof of the fraud." *Estate of Cover*, 188 Cal. 133, 141, 204 P. 583, 587.

[2] The evidence does not show that the earnings of the company were not equal to 12 per cent. upon its capital stock or that the stock is not worth the price which defendant agreed to pay for the 10 shares thereof. The false representation alleged is, not that the company was earning 12 per cent. but that it was "paying * * * 12 per cent dividends." There is a material difference in value, in the estimation of small investors at least, between the stock of a corporation which is actually paying dividends and that of one which is merely earning equivalent profits. The one yields an available income to the owner thereof while the other does not. In a case such as this, where the defendant does not seek to recover damages, "the exact amount of damage need

not be shown, provided it be in an 'appreciable' sum." *Munson v. Fishburn*, 183 Cal. 206, 219, 190 P. 808, 813. The fact that the stock may have been worth what the defendant agreed to pay for it is not conclusive upon the question of damages. Where one is induced to buy property by false representations made to him by the owner thereof, the purchaser is "entitled to the benefit of his bargain, and hence should recover the difference between what the purchased property was actually worth and what it would have been worth had the false representations as to its value been true, regardless of the price paid." *MacDonald v. Roeth*, 179 Cal. 194, 201, 176 P. 38, 41; *Wood v. Niemeyer*, 185 Cal. 526, 532, 197 P. 795.

[3] The statement in the subscription agreement that "verbal or other agreements between agents and applicants contrary to the terms of this contract are not authorized and will not be recognized by the company" does not preclude proof of fraudulent representations by which the defendant was induced to execute the agreement and the promissory note. *Mooney v. Cyriacks*, 185 Cal. 70, 82, 195 P. 922; *Whiting v. Squeglla* (Cal. App.) 232 P. 986, 988.

The judgment is affirmed.

198 Cal. 290

RABE et al. v. WESTERN UNION TELEGRAPH CO. et al. (L. A. 7944.)

(Supreme Court of California. March 18, 1926.)

1. Appeal and error ⇨927(3).

In determining propriety of nonsuit, appellate court must consider every favorable inference fairly deducible and every favorable presumption fairly arising from evidence adduced as proved in favor of plaintiff.

2. Appeal and error ⇨927(3).

In determining propriety of nonsuit, where evidence is fairly susceptible of two constructions, or one of several inferences may reasonably be made, appellate court must take view most favorable to plaintiff.

3. Appeal and error ⇨927(3).

In considering propriety of nonsuit, appellate court must discard evidence contrary to plaintiff's.

4. Appeal and error ⇨927(3).

In considering propriety of nonsuit, plaintiff must be given benefit of every piece of evidence tending to sustain his averments, and such evidence must be weighed most favorably to his claim.

5. Appeal and error ⇨927(3).

In considering propriety of nonsuit, all relevant testimony must be given its full probative strength, whether erroneously admitted or not.

6. Appeal and error ⇨927(3).

In determining propriety of nonsuit, any questions arising from fact of variation between evidence of witnesses cannot be raised or considered on appeal.

7. Trial ⇨139(1), 165.

In considering nonsuit, evidence must be taken most strongly against defendant; and, if plaintiff's proof makes out prima facie case, motion should be denied.

8. Negligence ⇨121(1).

Negligence cannot be presumed, but must be proved.

9. Municipal corporations ⇨705(4).

Operating bicycle without front or rear lamps or reflex mirror, required by Motor Vehicle Act, § 13, subd. (b), later than half hour after sundown, *held* negligence per se.

10. Municipal corporations ⇨705(4)—Street lamps lighting area of approximately 30 feet held not to satisfy mandate of Motor Vehicle Law requiring bicycle to carry lighted lamp visible 300 feet (Motor Vehicle Act, § 13, subd [b]; St. 1919, p. 207).

On question of negligence of bicycle rider who struck deceased, that street lamps lighted area approximately 30 feet or more in circumference where injury occurred *held* not to satisfy mandate of Motor Vehicle Act, § 13, subd. (b), requiring bicycles on public highway to carry lighted lamp visible 300 feet.

11. Negligence ⇨6.

Negligence is relative to situation and is not always foreclosed or concluded by compliance with regulatory statute.

12. Municipal corporations ⇨706(6)—Negligence of bicycle rider passing regular stopping place of street car held for jury.

In action for death of deceased struck by bicycle said to be "whizzing" past street car receiving and discharging passengers, negligence of rider *held* for jury.

13. Death ⇨18(1).

Heirs, sustaining no substantial pecuniary loss by death, cannot recover substantial damages.

14. Pleading ⇨229.

Motions to amend pleadings to end that justice may be promoted are to be liberally granted, especially where amendment would not state new or different cause of action.

15. Limitation of actions ⇨124—Refusal to permit heirs suing for negligence causing death to amend so as to include omitted heirs as parties held error (Code Civ. Proc. § 340, subd. 3, and sections 377, 389).

In action for death, where two of decedent's heirs were not joined as parties by mistake, and to allow them brought in would cause no prejudice nor make new cause of action, refusal to allow trial amendment *held* error, in view of Code Civ. Proc. § 340, subd. 3, and sections 377, 389.

16. Limitation of actions ⇨124—Trial amendment to bring in heirs not named in original action for death held not to state new and distinct cause of action (Code Civ. Proc. § 377).

In action under Code Civ. Proc. § 377, for death, trial amendment to bring in parties not named in complaint as heirs of decedent *held* not to substitute new and distinct cause of action.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by Emil Rabe and others against the Western Union Telegraph Company and another. From a judgment of nonsuit, plaintiffs appeal. Reversed, with directions.

Martin Forrest, of Los Angeles, for appellants.

Beverly L. Hodghead, of San Francisco (Francis R. Stark, of New York City, of counsel), for respondents.

SEAWELL, J. This appeal is taken upon a bill of exceptions from an order granting defendants' motion for a nonsuit. The plaintiffs, being respectively the husband and married daughters of the decedent, Anna Bishop Rabe, joined in the above-entitled action to recover damages for the alleged wrongful death of said Anna Bishop Rabe, which occurred April 22, 1922, as a result of injuries inflicted upon her April 3, 1922, by being

struck by a bicycle which one Nick Sanseverino, an employee of the respondent Western Union Telegraph Company, a corporation, was riding and directing while engaged in his discharge of his duties as a deliverer of telegraphic messages for said respondent corporation.

The complaint, which contains an allegation that "the said plaintiffs are the only heirs of said deceased," was drawn, and the action was maintained, upon the authority of section 377, Code of Civil Procedure, providing:

"When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

[1-7] In our consideration of the evidence as to its sufficiency to pass a motion for a nonsuit, it must be borne in mind that we are required to conform to the well-established rules frequently announced by this court. *Gregg v. Western Pacific Ry. Co.*, 223 P. 553, 193 Cal. 212, contains quotations taken from a number of our previous decisions. We quote:

"Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence adduced must be considered as facts proved in favor of the plaintiff. Where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the view most favorable to the plaintiff. If contradictory evidence has been given it must be discarded. *Estate of Arnold* [82 P. 253] 147 Cal. 533. The plaintiff must be given the benefit of every piece of evidence which tends to sustain his averments and such evidence must be weighed in a light most favorable to plaintiff's claim. *Anderson v. Wickliffe* [172 P. 381] 178 Cal. 120. Evidence whether erroneously admitted or not, if relevant to the issues joined, must be given the credit and benefit of its full probative strength, and any question arising from the fact of variation between the evidence of the witnesses cannot be raised or considered. The evidence must be taken most strongly against the defendant, and, if the plaintiff has introduced proof sufficient to make out a prima facie case under the allegations of his complaint, the motion, if made upon the close of the case, should be denied."

The following citations are appended: *Bush v. Wood*, 97 P. 709, 8 Cal. App. 647; *In re Daly*, 114 P. 787, 15 Cal. App. 329; *Wassermann v. Sloss*, 49 P. 566, 117 Cal. 425, 38 L. R. A. 176, 59 Am. St. Rep. 209; *Hoff v. Los Angeles Pacific Co.*, 112 P. 53, 158 Cal. 596; *Lassen v. Southern Pac. Co.*, 159 P. 143, 173 Cal. 71; *Kleist v. Priem*, 196

P. 72, 51 Cal. App. 32; *Berger v. Lane*, 213 P. 45, 190 Cal. 443.

[8-12] With the foregoing rules in mind, we proceed to a statement of the facts as disclosed by the record. The decedent was a woman 62 years of age and in normal health. She was visited on April 3, 1922, at the home of herself and husband in the city of Los Angeles, by her daughter, Mrs. Alexia Valentine, and the latter's 3 year old child. The daughter upon taking her departure was accompanied by the mother to the northwest corner of Kohler and Seventh streets, at which point the former was to board a west-bound Kohler street car and the mother was to return to her home. Seventh street extends in an easterly and westerly direction and Kohler street extends in a northerly and southerly direction. The latter street does not continue across Seventh on a direct line at its point of entrance from a southerly direction. The easterly boundary line of Kohler street south of Seventh street, if projected northerly in its continuation, would form the westerly boundary line of Kohler street north of Seventh street; in other words, the exterior lines of the northerly and southerly sections of Kohler street, as each enters Seventh street, are out of line and form what is commonly called a "jog." The mother and daughter, in going from the former's home to the point where the latter was to take the street car, traveled upon the westerly side of Kohler street and crossed Seventh street at an angle to the northwest corner of said street; it being the place where the street cars discharged and received passengers. The mother, daughter, and child remained upon the sidewalk for some 10 or 12 minutes before a car arrived. As it approached, the daughter and her said child went into the street to board it. What period of time the mother, who had to recross Seventh street in order to return to her home, remained upon the sidewalk after the daughter started to board the street car, was not told by any witness, and it can only be approximated by physical facts and the sequence of events. Mrs. Valentine, who was also accompanied by her child, in crossing from the sidewalk to board the street car, was "brushed" by the passing bicycle shortly before she reached the car. It passed her going at a swift rate of speed and the wheel brushed her dress in passing between her and the sidewalk. Her testimony is that it "whizzed" by her as fast as it could go. She was not aware that the mother had been struck or run into by the bicycle until a few seconds later when her child saw the mother lying in the gutter near the north curb line not far from where she had left her standing. The mother was picked up in an unconscious state and did not regain full consciousness at any time thereafter. She sustained a fracture of the skull which resulted in death.

On the evening of the injury the sun set at

6:15. There is evidence in the record which would require us to hold, under the rules above announced, that decedent was struck as late as 7:15. There is no question but that it was later than 7 o'clock. The bicycle carried neither front nor rear light nor lamps nor reflex mirror of any kind as required by the provisions of section 13, subd. (b), of the state Motor Vehicle Act (Stats. 1919, p. 191), to be carried by a bicycle one-half hour after sunset and the messenger was clearly guilty of a violation of the mandates of said act in this respect. The meteorologist in the United States Weather Bureau at Los Angeles testified that at the time the injuries were inflicted the sky at and in the vicinity of Los Angeles was entirely overcast with stratus clouds—low clouds. It was not a foggy night so as to obstruct the view of the street if the lamps were burning, but an ordinary cloudy condition prevailed. The deceased when first observed upon the street was approximately 30 feet westerly from the northwest corner of Seventh and Kohler streets, lying in the gutter near the outer edge of the sidewalk. No negligent act on her part was testified to by any one, nor can such be inferred from any fact or circumstance disclosed by the record. Negligence cannot be presumed but must be proved. On the other hand, the employee and agent of the respondent corporation was guilty of negligence per se (*Mora v. Pavilla*, 199 P. 17, 186 Cal. 199; *Dewhurst v. Leopold*, 229 P. 30, 194 Cal. 424) in failing to comply with those sections of the state Motor Vehicle Act which provided that—

"Every bicycle while on the public highway shall carry a lighted lamp visible under normal atmospheric conditions at least 300 feet in the direction toward which such bicycle is faced," etc., within one-half hour after sunset.

The absence of a rear light or reflex mirror is not material to the instant case, as the failure to comply with the act in that particular could not have been, so far as we are able to discern, responsible for the injury. But the same argument cannot be made in defense of the absence of a light which the law required to be visible at least 300 feet in the direction in which the bicycle was moving. The law was enacted to prevent the kind of a catastrophe which were happened. Who may say, but the triers of fact, that if the law had been observed the injury would nevertheless have happened, or that the failure to comply with the law did not contribute proximately to the injury. There is testimony to the effect that certain street lamps in the vicinity sufficiently lighted an area approximately 30 feet or more in circumference. The lights of the street lamps did not satisfy the mandate of the law. The statute required a light to be carried that would be seen, under ordinary atmospheric conditions, at least a distance not

less than 300 feet. Besides, a light carried by an automobile or a bicycle has a distinct value to travelers that a street light does not possess. The public is accustomed to determine the safety of a situation with reference to the signal lights which the law requires vehicles must carry. Such warning or signal lights have an attractiveness not possessed by the ordinary overhead light. No one appeared in the instant case who claimed to have seen the bicycle before it struck the decedent, or at least before it "brushed" Mrs. Valentine's clothing in its swift passage. This incident must have been practically simultaneous with the collision of the bicycle with the decedent. It was proper, further, for the jury to consider the question of care exercised by the rider of the bicycle and the rate of speed at which he passed the street car which had stopped at a regular stopping place where people gather for the purpose of entering cars and are discharged therefrom. Negligence is relative to a given situation as it exists at the time injuries are inflicted. Negligence must be considered in relation to the facts and circumstances of the situation and the determination of the question is not always foreclosed or concluded by compliance with a regulatory statute. *Reaugh v. Oudahy Packing Co.*, 208 P. 125, 189 Cal. 335, 340. It was also proper for the jury to consider the agency or instrumentality by which the injury was caused, to wit, an unlighted bicycle, and the ease or difficulty by which it may be discerned upon a street lighted as the evidence shows the street in the instant case to have been lighted and the readiness by which a bicycle may be quickly and suddenly deflected from its course, together with other facts pertinent to the injury. We are of the opinion that the evidence was sufficient to establish a prima facie case of negligence.

[13-15] The second branch of the case calls for a consideration of the proceedings and the final ruling which followed a motion made by plaintiff for leave to amend the complaint by bringing in two heirs of the decedent who had been omitted from the action. These omitted heirs were grandchildren; one a son of a deceased son, and the other a son of a deceased daughter. The father and mother of said children, respectively, had predeceased Anna Bishop Rabe by many years. Said deceased daughter left surviving a son, who had not been heard from for a period of more than 4 years, and none of the other children of decedent or members of the family knew whether or not he was then living. The other heir was in all probability living. Both of said grandchildren of decedent, if living, would have passed their majority at the time of the grandmother's demise. It appears that neither was at any time dependent upon or had at any time enjoyed the bounty of decedent, or had ever been a member of her house-

hold. The existence of any other heirs than those joined in the action was drawn out on the cross-examination of appellant Alexia Valentine early in the trial. No action whatever was taken or objection made by defendants as to the nonjoinder of said two grandchildren. Some time after the facts had been elicited, as above stated, plaintiff asked leave to amend by bringing them in as plaintiffs, and it was against the granting of their motion that defendants entered their protest. Defendants confined themselves solely to objecting to the motion to bring in said heirs. The court reserved its ruling on the motion until all of plaintiffs' evidence had been put in. It thereupon denied the motion to amend and granted the motion for a nonsuit. The omitted heirs were according to the rules of consanguinity, one degree further removed from the common ancestor than the surviving daughters, and the parents of each of said omitted heirs had been dead for many years prior to the decedent's death, and the family contact and association as between the decedent and them had long since become severed. It is not strikingly strange that such an oversight should have occurred. No claim is made that said heirs were fraudulently omitted or that plaintiffs were guilty of bad faith in any sense by reason of said omission. The evidence in the record tends to show that said omitted heirs did not sustain any substantial pecuniary loss by the death of the decedent, and, if this is so, there could have been no substantial recovery in favor of either. In the *Matter of the Estate of Ricconi*, 197 P. 97, 185 Cal. 458, 14 A. L. R. 509; *Burk v. Arcata, etc., Ry. Co.*, 57 P. 1065, 125 Cal. 364, 73 Am. St. Rep. 52; *Simoneau v. Pacific Electric Ry. Co.*, 115 P. 320, 159 Cal. 494. The denial of a motion to amend a complaint by bringing in omitted heirs would work an exceptional hardship under section 377, Code of Civil Procedure, inasmuch as it would in effect deprive the plaintiff, who had moved diligently, the right to enjoy the benefit of the section if it should develop that certain heirs, who, for any reason—accident, misfortune, or mistake, however excusable—had been omitted as parties to the action in the original complaint, and the bar of section 340, subd. 3, Code of Civil Procedure, had run as to said omitted heirs between the time the action was commenced and the time the discovery of the neglect or mistake was made. Such a denial would be exceptionally disastrous in view of the law that a recovery in one action is a bar to subsequent actions by some other heir or heirs of whose existence the plaintiff had no knowledge at the time the action was instituted. This would be inconsistent with the cases which hold that, had the action gone to judgment, the omitted heirs would be bound thereby, and the only possible effect of such omission would be to diminish rather than enhance the defendant's

liability, for the reason that so far as the heirs are concerned a single joint action is given. They could not be subjected to a second recovery in a subsequent action by any other heir or heirs. *Salmon v. Rathjens*, 92 P. 733, 152 Cal. 290.

Nothing is said in *Salmon v. Rathjens*, supra, or in the other cited cases, which may be taken as an intimation by this court that an heir, who, through mistake, misfortune, or neglect, has been omitted as a party from the original complaint, cannot, under any circumstance, thereafter be brought in by amendment. That case emphasizes, as do others, the fact that the action permitted under section 377, Code of Civil Procedure, is statutory and a single cause of action is given and the action should be brought in the names of the persons to whom the right of action is given by the statute. But in none of the decisions is there an intimation to the effect that a complaint which omits heirs is not amendable. Such of our decisions as touch the question at all take it as a matter of fact that the complaint is subject to amendment under the same general rules which govern pleadings generally. It is the settled law of this state that motions to amend pleadings to the end that justice may be promoted are to be liberally granted. Especially should liberality be exercised in favor of allowing the amendment where, as in the instant case, the amendment would not state a new or different cause of action from that attempted to be stated in the original complaint. *Barr v. Southern California Edison Co.*, 140 P. 47, 24 Cal. App. 22. "Where there is no attempt to state a new cause of action in an amended complaint, but merely the addition of matters essential to make the original cause of action complete, the amendment, though made after the expiration of the period of limitation, relates back to the time of the commencement of the action." *Ruiz v. Santa Barbara Gas, etc., Co.*, 128 P. 330, 164 Cal. 188. No issue would have been changed by the amendment. Defendants would have suffered no prejudice by bringing in the absent heirs, as no issue would have been changed thereby. The evidence making it appear necessary to bring in other parties was elicited by the defendants. Great liberality is indulged in such cases to the end that justice will be subserved. "This is especially true where evidence has been received without objection, and the amendment is made to conform thereto, or where the filing of the amended complaint will save a claim from the bar of the statute of limitations." 21 Cal. Jur. 191, 192. The testimony in the instant case as to other heirs was brought out by the defendants and all that plaintiffs asked was to make the amendment conform to the evidence elicited by them. "When a complete determination of the controversy cannot be had without the presence of other parties, the court must

then order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed, and summons thereon to be issued and served." Section 389, Code Civ. Proc. It is unnecessary to illustrate by further citations of authority, or Code sections, the spirit of liberality that is to be indulged by courts to the end that there may be a complete and just determination of civil actions.

[16] There is no merit in the contention that the amendment would have substituted a new and distinct cause of action for the one pleaded. This contention has been put at rest by many decisions of this state, a few of which are *Cox v. San Joaquin Light Co.*, 166 P. 578, 33 Cal. App. 522; *Frost v. Witter*, 64 P. 705, 132 Cal. 421, 84 Am. St. Rep. 53; *Barr v. Southern California Edison Co.*, 140 P. 47, 24 Cal. App. 22; *Ruiz v. Santa Barbara Gas, etc., Co.*, supra.

For the foregoing reasons, the order granting the nonsuit is reversed, with directions that the plaintiffs be allowed to amend their complaint by bringing in the omitted heirs, either as plaintiffs or as defendants, as they may be advised.

We concur: WASTE, C. J.; LAWLOR, J.; RICHARDS, J.; SHENK, J.; CURTIS, J.

198 Cal. 333

DODD v. TEBBETTS et al. (L. A. 8030.)

(Supreme Court of California. March 25, 1926. Rehearing Denied April 22, 1926.)

1. Attorney and client §72—Where two defendants appeared by same attorney, presumption is that relation continued, where record fails to show it terminated, and his acts and stipulations are for both.

Where two defendants appeared by the same attorney, and the record fails to show that attorney ever ceased to be such for both defendants, it is presumed he continued such, and his acts and stipulations in all stages of the case, both trial and appeal, bind both defendants, though, after appearing for both, he signed himself attorney for one defendant.

2. Appeal and error §415—Where attorney appeared for two defendants, but appealed for one, appeal will not be considered from the judgment roll alone, because other defendant, claimed adverse in interest to appealing defendant, was not served with notice of appeal, but appeal is proper for hearing on the record.

Where attorney appeared for two defendants, and appealed for one only, the appeal will not be considered from the judgment roll alone, because the other defendant, claimed adverse in interest to the appealing defendant, was not served with notice of appeal, or other notices, but the appeal is proper for

hearing on the record including the bill of exceptions, as the attorney is presumed to represent the defendant not appealing, as well as appealing defendant.

3. Partnership §213(1)—Plaintiff, who relies on estoppel under statutory provision that one permitting himself to be represented as a partner is liable to third person who gives credit to the partnership on the faith thereof, must plead facts establishing estoppel (Civ. Code, § 2444).

Plaintiff, relying on equitable estoppel under Civ. Code, § 2444, providing that one permitting himself to be represented as a partner is liable as such to persons who, on the faith thereof, give credit to the partnership, must plead facts establishing such estoppel, in order to prove it, or support judgment based thereon.

4. Partnership §216(2)—Where defendant represented himself to be partner, on which representation plaintiff relied, plaintiff may plead that defendant is partner and liable as such, and, where denied, facts constituting estoppel may be shown without pleading further (Civ. Code, § 2444).

Where party represented self to be a partner with another, on which representation plaintiff relied, plaintiff may plead party is a partner and liable as such and, where the answer denies it, may prove facts constituting estoppel under Civ. Code, § 2444, without further pleading, and have judgment thereon.

5. Appeal and error §1011(1)—Where evidence in support of findings of court, hearing case without jury, is in substantial conflict, findings will not be disturbed on appeal.

Where evidence in support of findings of the court, hearing a case without a jury, is in substantial conflict, the findings will not be disturbed on appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action by William J. Dodd against William F. Tebbetts and Ruth Tebbetts on a promissory note. From the judgment for plaintiff, defendant last named appeals. Affirmed.

A. W. Sorenson, of Los Angeles, and Maurice E. Harrison, of San Francisco, for appellant.

Lawler & Degnan and Lloyd W. Moultrie, all of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff and respondent for the principal sum of \$10,100, with interest and attorney's fees amounting to \$2,296. The action was in the nature of a suit in equity arising out of a transaction wherein, as the plaintiff in his complaint alleged, he placed certain securities in the hands of a certain copartnership doing business under the name of William F. Tebbetts & Co., and composed of said defendants, which

said firm, upon the date thereof, executed their promissory note to the California Bank for the sum of \$12,500, due 180 days after date, and deposited said securities with said bank as security for the payment of their said promissory note, and thereupon received from said bank the sum represented by said note; that upon the maturity of said note the makers thereof failed, neglected, and refused to pay the sum due thereon, and that said plaintiff, in order to prevent the loss to him of said securities, was obliged to pay said note, with the interest then due thereon, and thereby became subrogated to the rights of said bank in and to said note and in and to the enforcement thereof; wherefore this action to recover from said defendants and each of them the amount of said note, with interest and counsel fees as aforesaid. The defendants answered, denying that they were or ever had been copartners, and alleging that the defendant William F. Tebbetts was the only person interested in said firm or doing business under the name of William F. Tebbetts & Co. They further denied that the plaintiff was the owner of the securities in question and in that behalf alleged that at the time of the transaction referred to in plaintiff's complaint the said plaintiff sold and assigned to the defendant William F. Tebbetts all of his right, title, and interest in said securities and that said William F. Tebbetts has ever since been and still is the owner thereof. The defendants admit the execution of the note in question by William F. Tebbetts personally and under the firm name of William F. Tebbetts & Co., but deny that the defendant Ruth Tebbetts ever executed the same, either personally or as a member of the firm of William F. Tebbetts & Co. The defendants deny that said plaintiff was compelled to pay said bank the amount due upon said note or any other sum in order to prevent a loss to him of said securities, and deny that he was subrogated or had any right to be subrogated to the rights of said bank by virtue of any payment by him of said note, and deny that they or either of them are indebted to said plaintiff in any sum whatsoever on account of said transaction. The defendants also presented a cross-complaint against said plaintiff, setting forth certain facts not necessary to be here detailed, whereby the plaintiff had become and was indebted to said William F. Tebbetts, doing business under the firm name of William F. Tebbetts & Co., in the sum of \$10,133.14, with interest from and after a certain date, and for which said sum defendant William F. Tebbetts demands judgment by way of affirmative relief. The answer and cross-complaint is signed "A. W. Sorenson, Attorney for Defendants." The plaintiff answered the said cross-complaint, denying specifically the averments thereof. The cause went to trial before the court without a jury upon the issues as thus framed. Upon the submission thereof the trial court

made and filed its findings of fact and conclusions of law. In its said findings the court recited the fact that upon the coming on of the cause for trial Messrs. Lawler & Degnan and Lloyd W. Moultrie appeared as attorneys for plaintiff, J. W. McAlpine, Esq., appeared as attorney for William F. Tebbetts, and Messrs. A. W. Sorenson and Hunsaker, Britt & Cosgrove appeared as attorneys for Ruth B. Tebbetts. The findings were indorsed as having been received by "A. W. Sorenson, by G. C., Attorney for Defendants." By its conclusions of law the trial court found that the plaintiff was entitled to judgment against the defendants William F. Tebbetts and Ruth Tebbetts, "doing business under the firm name of William F. Tebbetts & Co., and each of them," for the sum of \$10,100, together with interest and also for the sum of \$1,000 attorney's fees and costs. The judgment followed accordingly. The appeal therefrom was taken by Ruth Tebbetts only, and the notice thereof is signed "A. W. Sorenson, Hunsaker, Britt & Cosgrove, Attorneys for Defendant Ruth Tebbetts." Thereafter a bill of exceptions was presented to the trial judge for certification. It recites that—

"Evidence was introduced sustaining and which does sustain each and all of the findings of fact numbered 1, 2, 4, 5, 6, and 7."

It then proceeds to set forth certain testimony evidently intended to render intelligible six numbered exceptions noted therein and embraced in four specifications of error. There then follow five specifications of the particulars in which the findings are contrary to and are not supported by the evidence. These relate altogether to finding numbered 3. Then follow certain specifications wherein the decision of the court is asserted to be against law. These are followed by the stipulation of the parties by their respective counsel to the effect that the foregoing bill of exceptions was prepared within the time allowed by law and by the order of the court and correctly sets forth all of the proceedings had during the trial, except the proceedings had and evidence introduced sustaining findings 1, 2, 4, 5, 6, and 7, and which proceedings and evidence are sufficient to sustain said enumerated findings. This stipulation is signed by A. W. Sorenson and Hunsaker, Britt & Cosgrove, attorneys for defendant R. B. Tebbetts, and by Lawler & Degnan and Lloyd W. Moultrie, attorneys for plaintiff. Then follows the certification of the trial judge to the correctness of said bill of exceptions and which embraces the matters covered by the said stipulation. The clerk's certificate follows in the usual form, and this is finally followed by the printed stipulation of the same counsel as to the correctness of the printed transcript on appeal. The appellant's opening brief presented upon this appeal is signed by "A. W. Sorenson and Hunsaker, Britt & Cosgrove, Attorneys for Appellant."

In the respondent's brief filed in response thereto it is for the first time urged that this appeal must be considered and treated as an appeal upon the judgment roll alone, for the alleged reason that the defendant William F. Tebbetts, against whom the judgment herein was also rendered, nowhere in the record herein appears to have been served with a draft of the bill of exceptions or to have been given any notice of the delivery of said bill of exceptions to the judge or of the time fixed for the settlement of the same or to have been present or to have participated in person or by counsel at the settlement thereof. It is also urged that the record herein fails to show that the notice of appeal and notice of intention to move for a new trial were, or that either of them was, ever served upon said William F. Tebbetts, nor that the stipulations to the bill of exceptions or the transcript were ever signed by said William F. Tebbetts or his counsel, all of which were essential for the reason, as the respondent urges, that said William F. Tebbetts was an adverse party to Ruth B. Tebbetts, his codefendant, upon this her appeal.

[1, 2] There is no merit in the respondent's contention in the foregoing regard. When the defendants first appeared in this action with their demurrer and answer and cross-complaint, they so appeared by their attorney of record, A. W. Sorenson. The record herein fails to show that said Sorenson has ever ceased to be the attorney of record for both of the defendants herein. It is true that there are certain recitals in the findings of the court to the effect that other counsel appeared at the trial representing one or the other of these defendants, but there is no showing of any substitution of these attorneys as attorneys of record for one or the other of these defendants in the place and stead of said A. W. Sorenson, their original attorney of record herein. We must therefore assume that A. W. Sorenson continued throughout and still continues to be the attorney of record for both of said defendants. This being so, there was no necessity for any service of the notice of appeal or of intention to move for a new trial or of the bill of exceptions or of the various notices of the presentation and time of settlement thereof upon William F. Tebbetts, since he was, during all of these proceedings, represented by his attorney of record, A. W. Sorenson, whose acts and whose stipulations were, at all stages of this case upon both trial and appeal, binding upon both of said defendants. We therefore hold that this appeal is properly before this court for hearing upon the record presented herein, including the bill of exceptions prepared and presented in the manner above set forth.

This brings us to the merits of this appeal. The several contentions of the appellant herein are confined to an attack upon paragraph 3 of the findings of the trial court as to its

sufficiency, both as to what it finds and what it fails to find, to support the judgment herein in so far as it is sought thereby to bind the appellant herein as a partner in the firm of William F. Tebbetts & Co. The said finding is as follows:

"That the defendant William F. Tebbetts, for the purpose of procuring said loan from said bank, stated to said bank that the defendant Ruth Tebbetts was a partner in the firm of William F. Tebbetts & Co.; that the defendant Ruth Tebbetts signed a written statement representing herself to be a partner in said firm, which statement was delivered to said bank, and she thereby permitted herself to be represented to said bank as a partner in said firm, and thereupon, and on the faith thereof, said bank gave credit to said William F. Tebbetts & Co. and loaned said sum of \$12,500 to said firm and took said stock and securities as collateral security therefor and paid said sum to William F. Tebbetts & Co."

It must be conceded that the issue as to whether or not the appellant herein was a copartner of her codefendant, William F. Tebbetts, or was at any time whatever a member of the firm of William F. Tebbetts & Co., was squarely presented by the pleadings of the respective parties herein. It must also be conceded that the essential basis of any judgment which the trial court could render against the defendant Ruth Tebbetts herein must consist either in the fact that she was a copartner of William F. Tebbetts and a member of the firm of William F. Tebbetts & Co. at the time the transactions were engaged in and which form the foundation of the present action, or in the fact that she represented or permitted herself to be represented as such partner in the transaction with said bank, and that it, on the faith thereof, gave the credit in question to said firm. By no stretch of interpretation could it be held that the foregoing finding of the trial court amounted to a finding that Ruth Tebbetts was ever actually a member of the firm of William F. Tebbetts & Co. The utmost that can be claimed for it is that it is a finding that Ruth Tebbetts represented herself to said bank to be a partner in said firm and that upon the faith of such representation said bank gave the credit in question to said firm. Said finding was drafted upon the model furnished by section 2444 of the Civil Code, which reads as follows:

"Any one permitting himself to be represented as a partner, general or special, is liable, as such, to third persons to whom such representation is communicated, and who, on the faith thereof, give credit to the partnership."

[3-5] In the case of Nofsinger v. Goldman, 55 P. 425, 122 Cal. 609, 614, it was held that the rule of responsibility and liability declared in section 2444 of the Civil Code is founded upon the equitable doctrine of estoppel. Invoking this doctrine the appellant

argues that a plaintiff, who relies upon the equitable doctrine of estoppel as declared in said section of the Civil Code, must plead the facts establishing such estoppel, in order to be entitled to make proof of the same, or to have the benefit of a finding predicated upon said section of the Code, and hence sufficient to support a judgment against one who, while not an actual partner, has estopped herself to deny that she is not so by her representations made in that behalf and by the reliance of the creditor of the firm thereon. Such is the well-settled law. *Clarke v. Huber*, 25 Cal. 593; *Davis v. Davis*, 26 Cal. 23, 39, 85 Am. Dec. 157; *Etcheborne v. Auzeais*, 45 Cal. 121; *Newhall v. Hatch*, 66 P. 266, 134 Cal. 269, 55 L. R. A. 673; *Burk v. City of Santa Cruz*, 127 P. 154, 163 Cal. 807; *Fritz v. Mills*, 106 P. 725, 12 Cal. App. 113, 117. The difficulty in this case lies in the application of the foregoing rule to it. The plaintiff herein did not in the first instance rely upon an estoppel, but upon the defendant's written admission that she was a member of the firm of Wm. F. Tebbetts & Co. He was entitled to so rely, and hence to plead in his complaint the existence of such partnership and the liability of the appellant as a member thereof. When the said appellant for the first time in her answer denied that she was such partner, the plaintiff, without any further pleading than that which the law by way of replication interposes, was entitled to prove the facts which would constitute an estoppel and to have a finding corresponding to his proof in that regard, and upon such finding to predicate a judgment in his favor under the terms of section 2444 of the Civil Code. The judgment in this case is such a judgment, and it is supported by the pleadings and the findings in this case. As to the evidence in support of such findings we find it to be in substantial conflict, and hence, under the well-settled rule, the finding of the trial court will not be disturbed.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; LAWLOR, J.; LENNON, J.; CURTIS, J.; SEAWELL, J.

198 Cal. 341

McELWEE et al. v. BECKWITH et al.
(L. A. 8234.)

(Supreme Court of California. March 26,
1926. Rehearing Denied April 22,
1926.)

1. Specific performance §114(4) — Cross-complaint to compel conveyance of land held sufficient, as against general demurrer, to show redeposit and retender of money required to be deposited under escrow agreement.

In cross-action to compel conveyance, allegation that money deposited, pursuant to es-

crow agreement, had been withdrawn, but that prior to institution of plaintiff's suit to quiet title defendant procured the money and is ready, willing, and able to pay, held sufficient, as against a general demurrer, to show that money had been redeposited and retendered.

2. Vendor and purchaser §170—To keep tender alive under vendor's agreement to convey perfect title, it is unnecessary to maintain purchase money in escrow during period when purchaser cannot secure certificate of title.

Where vendor, having agreed to convey a perfect title, deposited deed in escrow and purchaser deposited price in escrow within time fixed but later withdrew it, held that, during period that trust company refused to issue purchaser certificate of title because of contest over title, it was unnecessary to maintain the deposit to keep the tender alive.

3. Specific performance §101—As respects right to enforce conveyance, held that during inability to convey perfect title provided for in agreement to convey, vendor cannot put purchaser in default even if latter was unable to make payment during such time (Civ. Code, § 1439).

While vendor's administrators were unable to deliver perfect title, or abstract showing clear title, as called for in vendor's option agreement, they could not put purchaser in default, as respects right to enforce performance, even if during such time he could not make payment, in view of Civ. Code, § 1439.

4. Executors and administrators §348—Decree ordering conveyance by administrator and fixing time for payment held not modification of order fixing no time, as reasonable time is to be inferred (Civ. Code, § 1657).

A decree ordering administrators to convey, and giving purchaser 30 days in which to make payment after notification of their readiness to convey, held not a modification of a prior probate court order that they convey, because, where no time is specified, a reasonable time in which to perform is to be inferred under Civ. Code, § 1657.

In Bank.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Walter T. McElwee and another, as special administrators, of the estate of Sila O. Law, deceased, against R. E. Beckwith and another, to quiet title, in which R. E. Beckwith filed an answer amounting to a cross-complaint for specific performance. From a judgment in favor of defendant R. E. Beckwith, plaintiffs appeal. Affirmed.

Henry O. Wackerbarth, L. M. Chapman, and Chapman & Chapman, all of Los Angeles, for appellants.

G. P. Adams, Seymour, Silverton, and Duke Stone, all of Los Angeles, for respondent.

LENNON, J. The plaintiffs in this action are the special administrators of the estate

of Sila O. Law, deceased. In that capacity they instituted this action against the defendant to quiet title to certain real property described in the complaint. The defendant Beckwith, answering the plaintiffs' complaint, and, in effect, by way of cross-complaint, pleaded the following facts: Prior to her death and on or about the 20th day of April, 1922, Sila O. Law, the deceased, executed an option for the purchase of the land in controversy, under the terms of which Mrs. Beckwith was granted the right to purchase the property in controversy for the sum of \$13,000 in case it should be paid within 60 days from the date of the option. Said option provided the title to be given the defendant was to be "perfect," and that defendant should have an abstract showing "clear title." The defendant further pleaded that a deed was executed and deposited in escrow on the 3d day of May, 1922, by the deceased, who shortly thereafter died, and that within the time expressed in the option the defendant deposited in escrow the sum of \$14,000 to cover the purchase price of the property and incidental expenses in connection with the transaction. Owing to the death of the deceased, the answer avers, it became necessary for the defendant to petition the probate court for an order directing the special administrators to convey the land in controversy in accordance with the option agreement, and an order so directing was made by the probate court. Thereafter one of the special administrators refused to join in the execution and delivery of a deed to the property to the defendant Beckwith, and the defendant accordingly prays in this action for a decree, directing the special administrators to execute and deliver a deed to the property in controversy here upon the payment of the agreed purchase price.

It is further alleged in the answer that, pending the delay in the perfection of the title to the property in controversy, the money deposited as a tender under the terms of the option agreement having been borrowed money, under a 30 days' time limit, was withdrawn pending the determination by the probate court of a contest of the last will and testament of the deceased based upon the ground that the decedent was of unsound mind at the time of the execution of the will, which was executed on the same day as the deed deposited in escrow by the decedent, and that prior to the institution of the present action the defendant Beckwith procured the money required to be deposited under the terms of the option agreement, and is ready, willing, and able to pay the moneys to said special administrators.

The court below rendered judgment denying relief to the plaintiffs and decreeing that the defendant Beckwith was entitled to a deed to the property involved, and ordering the administrators to execute and deliver the deed, and that "within 30 days after

plaintiffs notify her [Beckwith] in writing of their ability and readiness to convey such title and to deliver such deed, the defendant R. E. Beckwith shall pay to the plaintiffs the sum of \$13,000." It was further decreed that if the defendant Beckwith failed to pay the plaintiffs the moneys provided for in the decree, such failure, in the absence of good cause, would entitle the plaintiffs to quiet title against her.

[1] There is no merit in the contention that the answer of the defendant does not state a cause of action for the relief prayed for therein. While the answer may be ambiguous in the particular as to whether or not the money required to be deposited under the terms of the escrow agreement having been withdrawn after its deposit in the first instance was again redeposited to meet the terms of the escrow agreement, nevertheless the answer was good in this particular as against a general demurrer. Moreover, the action was tried and adjudicated upon the theory that the escrow money had been redeposited and retendered prior to the commencement of this action.

[2, 3] We find no merit in plaintiffs' contention that the evidence does not support the finding of the trial court "that the defendant R. E. Beckwith has always been ready, willing, and able to pay said purchase price, and is now ready, willing, and able to do so in accordance with the terms of said option, and that the delay in this connection has been caused by the plaintiffs." It is true that the money originally deposited in escrow by the defendant was withdrawn on the 21st day of July, 1922, and that the allegation of defendant's answer is to the effect that from and after the 23d day of May, 1923, defendant has been ready and willing and able to pay said moneys. Defendant, however, was excused from keeping said tender alive during the interim of time existing between the dates above mentioned by reason of the fact that during that time the title company would not issue a certificate of title to the defendant because a contest of the will of Sila O. Law, had been filed by one of the heirs, in which it was in substance alleged that Sila O. Law was at the date of her death, to wit, May 4, 1922, and for some time prior thereto, insane. It was the theory of the title company that a determination of insanity of the decedent upon the 3d day of May, 1922, would necessarily affect the validity of the deed executed by the deceased upon the same day. An adjudication by the court of this point in favor of the sanity of the decedent was not made until June, 1923. Regardless of the correctness of the title company's position, the fact remained that the title company did refuse to issue a certificate of title. The plaintiffs were not able to deliver to the defendant a clear title, nor an abstract showing clear title, as called for in the option agreement, and could not, there-

fore, put the defendant in default even if it be conceded that she was during that time unable to make the payment. Civ. Code, § 1439.

[4] Plaintiffs complain that the judgment in this cause contained terms that the court had no power to impose, for the reason that the defendant in this action was given 30 days after notice from the plaintiffs of their readiness to convey in which to pay the money. To permit the defendant 30 days in which to make the payment would, according to plaintiffs, change and modify the original order of sale of the court in the probate proceedings to the effect that the payment of the purchase price should be concurrent with the delivery of the deed. It will be noted, however, that the original order of the probate court directing the delivery of the deed and the payment of the money did not fix the time within which such delivery and payment should be made. No time having been specified, a reasonable time within which to perform is to be inferred. Civ. Code, § 1657. Evidently the lower court, when fixing the time of performance, deemed 30 days to be a reasonable time.

We need not discuss the question of the effect of the claim contempt proceedings had subsequent to the decree of the court, commanding the administrators to execute the deed to the defendant of the land in controversy. The record before us does not disclose the proceedings had nor the scope and effect of the judgment, if any, in said alleged contempt proceedings.

The trial court found in accordance with the allegations of the defendant's answer, and we are satisfied, from a perusal of the record, that the evidence adduced upon the whole case fully supports these findings and that the findings in turn fully support the judgment.

Judgment affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; LAWLOR, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.

176 Cal. App. 558

PEOPLE v. JENSEN. (Cr. 1279.)

(District Court of Appeal, Second District, Division 1. California. Feb. 19, 1926.
Rehearing Denied March 17, 1926.)

1. Criminal law — § 881(4)—Verdict of guilty of attempt to commit crime against nature held not precluded by acquittal of assault to commit.

Where accused was charged with assault to commit the infamous crime against nature, since an attempt might be made to commit the crime without assault on intended victim, verdict of guilty of an attempt to commit was not erroneous on theory that acquittal of assault was implied acquittal of attempt.

2. Criminal law — § 507(7)—If jury believed testimony of complaining witness that assault was without his consent, question of corroboration was unavailable to defendant (Pen. Code, § 1111).

In prosecution for infamous crime against nature, if jury believed testimony of complaining witness that alleged assault was committed against his will and without his consent, question of corroboration, under Pen. Code, § 1111, was unavailable to defendant.

3. Sodomy — § 6—Testimony of complaining witness as to commission of crime against nature held sufficiently corroborated by testimony of arresting officers (Pen. Code, § 1111).

In prosecution for infamous crime against nature, testimony of complaining witness as to commission of the offense held sufficiently corroborated, within Pen. Code, § 1111, by testimony of arresting officers.

4. Sodomy — § 6—Admitting in evidence lascivious photographs found on defendant's person at time of arrest held not error.

In prosecution for infamous crime against nature, admission in evidence of obscene photographs found on defendant's person at time of arrest, and evidence that they had been passed around among boys so that complaining witness saw them, with defendant's implied consent, held not error.

5. Criminal law — § 1037(2)—Prejudicial misconduct cannot be predicated on improper questions as to defendant's general reputation, where court was not requested to admonish or instruct with reference thereto.

Though reputation of defendant was not in issue, prejudicial misconduct cannot be predicated on questions asked witnesses as to general reputation of defendant for chastity and morality, where no assignment of misconduct was made, except as to one witness; nor was court requested to admonish or instruct jury with reference thereto.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Chris Jensen was convicted of attempt to commit the infamous crime against nature, and he appeals. Affirmed.

Oscar E. Houston and Perky & McConnell, all of Long Beach, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

HOUSER, J. Defendant was charged with the crime of assault with intent to commit the infamous crime against nature. The jury returned a verdict by which defendant was found guilty of the lesser offense of an attempt to commit the said crime. He appeals from the judgment and the order denying his motion for a new trial.

[1] The first point, as suggested by appellant, is that, because an attempt to commit the offense with which defendant was charged might be less than the crime of an

assault with intent to commit it (People v. Akens, 143 P. 795, 25 Cal. App. 373), the verdict of guilty of an attempt would be tantamount to an acquittal of an assault; and, inversely, that defendant having been acquitted of an assault, the verdict necessarily carried with it an implied acquittal of an attempt.

It is clear that an attempt might be made to commit a crime of the nature of that involved in the charge made against defendant without going so far as actually to commit an assault upon the intended victim. Of the two offenses, manifestly the attempt is the lesser and is necessarily contained within the greater offense of an assault with intent to commit it.

The principle for which appellant argues is ruled adversely to his contention in the case of People v. Dong Pok Yip, 127 P. 1031, 164 Cal. 143, wherein, as here, the defendant was charged with the crime of assault with intent to commit the infamous crime against nature, but was convicted of simple assault. In that case, among other things, the court said:

"Where the evidence clearly would support a verdict for a higher offense, the conviction of a lesser crime necessarily included therein will not be set aside. People v. Muhlner [47 P. 128] 115 Cal. 306. The only acquittal in this case was of the major crime charged, but this, as the Attorney General says in his brief, did not 'include an acquittal of an intent to take indecent liberties or to practice other lewd and lascivious acts or to commit any other unlawful act such as may constitute an assault.' We conclude, therefore, that the conviction of simple assault must be sustained under the evidence in this case."

In another case (People v. Oates, 75 P. 337, 142 Cal. 12), where the defendant was likewise accused by the information as was the defendant in the case at bar, and where the defendant was likewise convicted of an attempt to commit the crime charged, the court was called upon to consider a specification of error that the defendant had been prejudicially affected by an instruction to the jury to the effect that one who attempted to commit a crime, but who either failed in its execution, or who was prevented from, or intercepted in, the perpetration thereof, was, nevertheless, punishable for making the attempt. The court said:

"It is contended that sections 663 and 664 of the Penal Code 'apply exclusively to prosecutions for attempts to commit crime, and not for the crime itself,' and that the court erred in instructing the jury that 'a person who attempts to commit a crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable for said attempt.' The instruction is in the language of the Code (section 664), and the case falls within one of the classes of offenses mentioned therein; namely, an offense punishable by imprisonment in the state prison. The instruction was not error. * * *

"The instructions asked by defendant and refused were based upon the erroneous assumption that defendant could not be convicted of an attempt to commit the crime charged."

[2] It is next urged by appellant that, the victim of defendant's alleged assault being an accomplice, no conviction could be had on the testimony of such accomplice, unless he was corroborated by other evidence which tended to connect the defendant with the commission of the offense, and that corroboration which merely showed the commission of the offense or the circumstances thereof would be insufficient. Section 1111, Pen. Code.

[3] Defendant testified that he neither assaulted the complaining witness, as alleged in the information, nor made any attempt to commit the crime of which he was accused. The complaining witness testified to the commission of the act by the defendant, but steadfastly maintained that the alleged assault was committed against his will and without his consent. If the jury believed the testimony of the complaining witness (and the verdict would indicate that such was the case), the question of corroboration is not available to the appellant. People v. Howell (Cal. App.) 230 P. 991. But, even if it might be conceded that the appellant is entitled to raise the question, the testimony given by the two arresting officers was such that it was sufficient to completely cover appellant's objection. Each of the officers testified to finding the defendant and the prosecuting witness on a dark street, in the defendant's automobile, with its lights turned off; the only buildings in the vicinity being two warehouses. One of the officers testified that when he flashed his light in the defendant's car the defendant was in his shirt sleeves, and just getting into the driver's seat; his trousers were "unbuttoned up the front all the way * * *"; he was trying to hold them together with one hand," but that his private parts were exposed to view. Each of the officers testified that at the same time the prosecuting witness was lying on the floor of the tonneau of the automobile, with his overalls and underclothing off, which were also lying on the floor of the automobile. Each of the officers also testified to the finding of several obscene photographs in the pocket of a vest belonging to the defendant. In addition thereto, the statement made by the prosecuting witness in the presence of the defendant, and which statement was not denied by the defendant, in so many words was a charge that defendant had committed the offense of which he was accused.

As is laid down in the case of People v. Klopfer, 214 P. 878, 881, 61 Cal. App. 291, 296:

"If the [corroborative] evidence, however slight, tends in and of itself to connect the ac-

cused with the commission of the offense, it is sufficient."

And see *People v. McLean*, 24 P. 32, 84 Cal. 482; *People v. Barker*, 46 P. 601, 114 Cal. 620; *People v. Robbins*, 154 P. 317, 171 Cal. 479; *People v. Garwood*, 106 P. 113, 11 Cal. App. 665; *People v. Martin*, 125 P. 919, 19 Cal. App. 295; *People v. Flood*, 182 P. 766, 41 Cal. App. 377; *People v. Taylor* (Cal. App.) 232 P. 998.

In the case of *Dong Pok Yip*, 127 P. 1031, 164 Cal. 143, heretofore cited, the intended victim testified "that the defendant had not attempted to do anything to him." The total evidence against the defendant in that case was not stronger than the so-called corroboration of the prosecuting witness in the instant case, and yet the verdict of conviction and the judgment thereon were upheld by the Supreme Court. In the circumstances here presented, it would follow that appellant's contention cannot be sustained.

[4] Appellant specifies as error the admission in evidence, over defendant's objection, of certain obscene pictures or photographs which were found in the vest of the defendant at the time of his arrest. Some evidence was also introduced to the effect that, while defendant did not personally show the photographs to the prosecuting witness, defendant had shown them to "the other boys and the other boys passed them around," so that at least with defendant's implied consent the prosecuting witness saw them. The authorities do not sustain appellant in his contention.

In the case of *People v. Bose*, 153 P. 965, 28 Cal. App. 743, defendant was convicted of the crime of lewd and lascivious conduct with a minor child. On appeal error was predicated on the action of the trial court in admitting in evidence testimony to the effect that prior to the commission of the offense the defendant had exhibited to the child a photograph of a naked woman. In ruling upon the question of the alleged error, the appellate court said:

"But the evidence was admissible under various decisions of the appellate courts of this state. *People v. Scott* [141 P. 945] 24 Cal. App. 440; *People v. Ah Leo* [151 P. 748] 28 Cal. App. 164. In the latter case it is said by the second district court of appeal: 'The testimony is admitted as corroborative of the main charge and as tending to show the disposition of the accused and his proneness to commit the crime of the particular nature involved.'"

[5] Misconduct by the deputy district attorney in charge of the prosecution is specified by appellant as a reason why the judgment against defendant should be reversed and a new trial granted.

An examination of the transcript of the proceedings had on the trial of the action discloses that the alleged misconduct consisted in part in asking questions of witnesses as to the general reputation of de-

fendant for chastity and morality in the community in which he resided. It also appears that at no time had the reputation of defendant been put directly in issue. The remaining specification of misconduct on the part of the deputy district attorney consisted in his asking one of the witnesses, also the defendant, whether, some time before the offense for which defendant was on trial was committed, defendant had not put his mouth on the private parts of the witness who was being interrogated.

As to each of the questions relating to the general reputation of defendant for chastity and morality and the question asked of the witness to whom reference had just been had, the court sustained defendant's objection. To the particular question asked defendant, no objection was made. No assignment of misconduct of the deputy district attorney was made by the defendant, except as to one question asked one of the witnesses regarding defendant's general reputation for chastity and morality; nor was the court ever requested by defendant to admonish or instruct the jury with reference thereto. The jury, however, was instructed that—

"If any evidence has been admitted and afterwards stricken out, you must disregard the matter so stricken out, entirely; and, if any counsel has intimated, by questions which the court has not permitted to be answered, that certain things are, or are not, true, you must disregard such questions and refrain from any inferences based upon them."

In the case of *People v. Fodera*, 164 P. 22, 33 Cal. App. 8, misconduct of the district attorney was one of the grounds relied upon by the appellant for a reversal of the judgment. The alleged misconduct was similar to that heretofore described herein. In effect it was ruled that, although error had been committed by the district attorney in asking one of the character witnesses for the defendant whether he knew of certain arrests of defendant for unlawful speeding of his automobile and his pleas of guilty thereto; also of other witnesses whether they had heard that the defendant was under investigation by the police for the selling of several stolen automobiles; also of another witness whether he had ever heard discussed that defendant had been a visitor at the home of a person who had been arrested as a member of the Black Hand Society—in view of the fact that there had been no assignment by defendant as to misconduct of the district attorney in asking the several questions, no request for admonition or instruction to the jury to disregard any insinuation which might be contained in any of the questions, and the further fact that the entire matter was adequately covered by a general instruction of the court to the jury—the defendant had not been prejudicially injured.

In the case at bar it is plain that the dep-

uty district attorney was guilty of misconduct in asking each of the questions to which reference has been had; but, taking into consideration the facts as heretofore set forth herein in connection therewith, it is equally clear that, judged by the authorities heretofore cited herein, defendant is in no position to complain.

The judgment and the order denying defendant's motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

76 Cal. App. 354

**PEOPLE ex rel. LOS ANGELES BAR ASS'N
v. CALIFORNIA PROTECTIVE CORPORATION. (Civ. 4607.)**

(District Court of Appeal, Second District, Division 2, California. Feb. 1, 1926.)

1. Appeal and error $\S$ 936(1)—Where appeal is taken from order denying motion to retax costs, but record fails to show whether motion was made before or after judgment, appellate court will assume it was made after judgment.

Where record does not show whether order denying motion to retax costs was made before or after entry of judgment, and appeal has been taken from order, appellate court will assume that order was made after judgment, so as to be appealable.

2. Attorney and client $\S$ 52.

Complaint, showing corporation was engaged in rendering legal services by employing attorneys for its patrons at a yearly rate, *held* to state cause of action for exclusion of defendant from practice of law.

3. Corporations $\S$ 377½.

Corporation, contracting with patrons to furnish legal services for one year on payment of certain fee, *held* in "practice of law."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Practice of Law.]

4. Corporations $\S$ 377½ — Corporation can neither practice law nor hire lawyers to carry on business of practicing law for it (Civ. Code, § 286).

Corporation can neither practice law nor hire lawyers to carry on business of practicing law for it, notwithstanding members forming it are authorized to practice law, and though Civ. Code, § 286, permits formation of corporations for any purpose for which individuals may lawfully associate themselves.

5. Quo warranto $\S$ 16, 19.

Quo warranto *held* proper remedy to exclude corporation from practicing law and to oust its franchise.

6. Quo warranto $\S$ 32—Quo warranto, on relation of Los Angeles Bar Association, to oust corporation of assumed right to practice law is not private action by association open to objection that association had no capacity to sue.

Proceeding in nature of quo warranto to oust corporation of its assumed right to practice law, brought on relation of Los Angeles Bar Association, is not a private action by the association, and therefore not subject to complaint that association had no capacity to bring it.

7. Appeal and error $\S$ 761.

Assertions of error for which no reasons or authorities are given will not merit notice by appellate court.

8. Appeal and error $\S$ 907(3).

Where appeal is taken on judgment roll alone, without bill of exceptions, judgment will be deemed supported by necessary evidence properly adduced.

9. Appeal and error $\S$ 931(1).

Every intendment and presumption not contradicted by or inconsistent with record on appeal must be indulged in favor of judgment of superior court.

10. Corporations $\S$ 377½—Corporation, "willfully" usurping privilege of practicing law, *held* properly fined, though its members thought privilege was authorized under charter (Code Civ. Proc. § 809).

Corporation, willfully usurping privilege of practicing law, *held* properly fined, under Code Civ. Proc. § 809, though its members had no intent to violate law, but thought acts were authorized under charter; "willfully" implying simply purpose or willingness to commit the act which is in fact unlawful.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful—Willfully.]

11. Corporations $\S$ 370(3)—General laws under which corporation is formed, and not its articles of incorporation, must determine what powers have been lawfully granted.

General laws under which corporation is formed, and not its articles of incorporation, must determine what powers have been lawfully granted, and assumption by incorporators of power or privilege not permitted by laws is unauthorized and void, even though corporation be valid entity.

12. Appeal and error $\S$ 709 — On appeal from judgment roll alone, denial of motion to retax costs cannot be reviewed, unless record is prepared, under Code Civ. Proc. § 953a et seq., in absence of showing of improper items on face of record.

On appeal from judgment roll alone, which does not include memorandum of costs, denial of motion to retax costs cannot be reviewed, where record is not prepared, under Code Civ. Proc. § 953a et seq., in absence of anything on face of judgment to show allowance of improper items.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Quo warranto by the People of the State of California, on the relation of the Los Angeles Bar Association, against the California Protective Corporation, to exclude the latter from the practice of law, oust it from all corporate franchises, and fine it \$5,000. From the judgment for plaintiff, and an order denying motion to retax costs, defendant appeals. Affirmed.

Charles G. Young, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Leon French, of San Francisco, and Kenyon F. Lee, of Los Angeles, for respondent.

FINLAYSON, P. J. This is a proceeding in quo warranto brought by the Attorney General, in the name of the people, upon the information and complaint of the Los Angeles Bar Association, to exclude defendant from the practice of law, to oust it from all corporate franchises, and to fine it in the sum of \$5,000.

[1] Defendant filed a demurrer to the complaint, which was overruled. An answer was then filed which denied some, but not all, of the allegations of the complaint. In its answer defendant undertook again to demur to the complaint. The first demurrer was both general and special. It specified, as the sole ground for special demurrer, that plaintiff has not legal capacity to sue. The second demurrer was like the first, except that it added, as an additional ground of special demurrer, that there is a defect of parties defendant. The action came on for trial August 8, 1923, and, defendant failing to appear, the court, after overruling the second demurrer, filed findings of fact in favor of plaintiff and entered a judgment which restrained the corporation from the practice of law in this state, excluded it from the exercise of all corporate franchises in California, and imposed upon it a fine of \$1,000. The judgment also provides that plaintiff shall recover costs, taxed in the sum of \$84.05. The appeal is from the judgment and from an order denying defendant's motion to retax costs. The appeal comes to us upon the judgment roll alone, without any bill of exceptions. Whether the order denying defendant's motion to retax was made before or after the entry of the judgment does not appear from any duly authenticated record before us; but since such an order is appealable only when made after the entry of judgment (7 Cal. Jur. 298, 299), we shall assume, an appeal having been taken from that order, that it was made after judgment, and that, therefore, the appeal is from an appealable order.

Briefly, the case as alleged in the complaint is this: The Los Angeles Bar Association is an unincorporated association of at-

torneys at law. The defendant, a corporation having its principal place of business in the city of Los Angeles, was incorporated under the laws of this state in November, 1921. The purposes for which it was incorporated, as set forth in its articles of incorporation, are:

"To collect debts due to its members or clients, to employ attorneys for its said members or clients, and to pay for such legal services for and on behalf of its said members or clients."

Defendant has been, and still is, entering into contracts of employment with its "patrons" in the manner following: Each patron is required to sign an instrument entitled "Application for Contract," which document, omitting its caption and certain nonessentials, reads:

"The undersigned herein agrees to take service contract with California Protective Corporation, Inc., for one year and to pay for same \$24.00. Said California Protective Corporation, Inc., is authorized as agent to employ attorney for the undersigned for one year. With this application is paid to representative the sum of _____. Signed _____. Make all checks payable to the corporation. Cash or checks to accompany application."

Upon the execution of this document by the patron and the payment by him of \$24 to defendant, the latter delivers to the applicant an instrument entitled "Service Certificate." That instrument, omitting the caption and other nonessentials, reads:

"This certifies that _____ has paid for one year from date hereof, and is entitled to the following service: Special yearly agreement with high class attorney whose name appears below and who will render the following legal services unlimited: Legal advice and consultation on all business, personal and private matters at the attorney's office. No charge. Legal papers—notes, mortgages, deeds, bills, leases, contracts, wills, partnership agreements, liens, attachments, notices, foreclosures, etc., drawn up or examined. No charge. (Stenographic fee only.) Court Work—Attorney will represent you in all civil or criminal actions in police or justice of the peace courts, of this city, without charge. Information and advice on new state laws and city ordinances, swindling schemes, counterfeits, fake charities, etc. Business rules, forms and business letters. No charge. * * * Application approved and contract issued this _____ day of _____ 192—."

The answer admits the allegations which constitute the basis for the foregoing statement of the case shown by the complaint.

[2-4] We think it clear that a cause of action is alleged in the complaint, and that the general demurrer was properly overruled. It is manifest from the statement of the purposes for which appellant was incorporated, as set forth in its articles of incorporation, coupled with the terms and provisions of the contracts of employment which it has been and still is making with its patrons, members, or clients, that appellant is engaged in

rendering legal services to any and all persons who are willing to pay it the sum of \$24 for one year's service. Without doubt, the services which its patrons are entitled to receive from the attorneys in its employ constitute the "practice of law," as that term is generally understood alike by judges, lawyers, and laymen. *People v. Merchants' Protective Corp.*, 209 P. 363, 189 Cal. 531—particularly page 535, and cases there cited. Equally clear is it that these attorneys are employed by appellant and paid by it. In its articles of incorporation it is declared that one of the purposes for which it is incorporated is:

"To employ attorneys for its said members and clients, and to pay for such legal services for and on behalf of its said members and clients."

In the written applications which are signed by its patrons it is provided that appellant "is authorized as agent to employ attorney for the undersigned for one year." In the so-called "Service Certificate" which appellant signs and delivers to each of its patrons, it is declared that there shall be no charge to the patron for any of the legal services performed by the attorney. The \$24 which the patron pays to the corporation is the only consideration which he gives for the legal services he is to receive. It thus appears that the attorneys retained and paid by the corporation are its agents, and that their acts are its acts. It follows, therefore from the admitted allegations of the complaint, that appellant was engaged in the practice of law. *People v. Merchants' Protective Corporation*, supra; *State ex rel. v. Merchants' Protective Corporation*, 177 P. 694, 105 Wash. 12; *In re Co-operative Law Co.*, 92 N. E. 15, 198 N. Y. 479, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879. A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it. In *Ruling Case Law* (quoted in *People v. Merchants' Protective Corporation*, supra) it is said:

"Since, as has been seen, the practice of law is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts, and, as these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. As it cannot practice law directly, it cannot do so indirectly, by employing competent attorneys to practice for it, as that would be an evasion which the law will not tolerate." 2 R. C. L. 946.

The fact that the Legislature has authorized the formation of corporations for any purpose for which individuals may "lawfully" associate themselves (section 286, Civ. Code) does not make it lawful for appellant to practice law. It is true that individuals who are duly licensed members of the bar may "lawfully" associate themselves in any

unincorporated form of association, such as a partnership, for the practice of law; but such individuals may not associate themselves for the practice of law under the ægis of a corporation. Though all the directors and officers of the corporation be duly licensed members of the legal profession, the practice of law by the corporation would be illegal nevertheless. At any time those directors and officers, by death or by the transfer of their shares, might be succeeded by laymen, none of whom possessed the right to practice law. As was said by the Washington Supreme Court in *State ex rel. Lundin v. Merchants' Protective Corporation*, supra:

"The right to practice law attaches to the individual and dies with him. It cannot be made a subject of business to be sheltered under the cloak of a corporation having marketable shares descendible under the laws of inheritance."

[5] A proceeding in the nature of quo warranto is the proper remedy in this case. The right to practice law "is in the nature of a franchise from the state," says the court in *Re Co-operative Law Co.*, supra. When a corporation is assuming to exercise a privilege or franchise which it is unlawful for it to exercise, a proceeding in quo warranto lies to secure a judgment of ouster and seizure of its franchises. In *People v. Dasha-way Ass'n*, 24 P. 278, 84 Cal. 117, 12 L. R. A. 117, it is said that—

When corporations "do acts which are not authorized or are forbidden them to do, the state may forfeit their franchises and dissolve them by an information in the nature of a quo warranto."

See, also, *People v. Milk Producers' Ass'n*, 212 P. 957, 60 Cal. App. 439.

[6] In support of its contention that respondent has no legal capacity to sue, appellant says that "the relator," the Los Angeles Bar Association, "is not a corporation, and therefore has no standing in court to sue in the name of the association." This contention betrays an inexplicable misunderstanding of the nature of this proceeding and of the relation thereto of the "people" as plaintiff. The wrong of which complaint is made is of public, not private, concern. The only connection of the bar association with the case is shown by the opening of the complaint, wherein it is recited that the "people," by their Attorney General, "upon the information and complaint of the Los Angeles Bar Association," complain of defendant and allege the cause of action. The addition of the name of the bar association to the complaint did not make this a private action. It, doubtless, is true that the arm of the law moved as the result of information given to the Attorney General by the bar association; but that did not make the association the plaintiff in the action. In *People v. Sutter Street Ry. Co.*, 49 P. 737, 117 Cal. 612, the court says:

"When the proceeding is in the interest of private persons, in whole or in part, they are said to be by relation, and, under the provisions of the Code, the relator may be required to give security for costs. * * * If the proceeding is one in which a private person can have no interest, the proceeding is not properly by relation. But the Attorney General had the power to institute the proceeding, and in either form it is by him. If unnecessarily he has added that it is by relation of a named person, that does no harm. It does not convert the proceeding into a private action."

See, also, *People v. Milk Producers' Ass'n* supra, and *People ex rel. v. Garrett* (Cal. App.) 237 P. 829.

[7] What we thus far have said disposes of all the points presented by the first demurrer. Appellant makes no attempt to point out wherein the ruling on the second demurrer is erroneous. All that is said in appellant's brief upon this subject is:

That "the court erred as a matter of law in overruling the demurrer filed with defendant's answer."

No authority is cited and no reason is assigned in support of appellant's bald assertion that the court erred.

"It is due to this court from the members of the bar to point out clearly and concisely the rulings complained of as erroneous and the reasons why they are so, with reference to authorities, if any. In case counsel will not take the trouble to do so, we shall deem the matter as of not sufficient importance to merit notice in an opinion." *People v. McLean*, 67 P. 771, 135 Cal. 309.

[8, 9] Appellant claims that the trial court erred in rendering judgment without receiving any evidence in support of the complaint. Unfortunately for this contention there is nothing in the record to sustain it. As the appeal is taken upon the judgment roll alone, without any bill of exceptions, it necessarily is admitted that all evidence necessary to support the judgment was properly adduced. Every intendment and presumption, not contradicted by or inconsistent with the record on appeal, must be indulged in favor of judgments of the superior court. 2 Cal. Jur. 852. This presumption is further fortified in this case by a clause in the judgment expressly reciting that evidence "was introduced in support of the petition." Moreover, as we already have pointed out, respondent was entitled to judgment upon the uncontradicted allegations of the complaint.

[10] There is no merit in the claim that the court erred in imposing a fine of \$1,000. It is not contended that in proceedings of this character the corporation is not subject to a fine under section 809 of the Code of Civil Procedure. What appellant does claim is: (1) That no evidence was introduced to justify the fine; and (2) that it did not *willfully* usurp the franchise or privilege of practicing law, since it did only that which its

articles of incorporation purport to authorize. The claim that no evidence was introduced to warrant the fine has been disposed of by what has already been said. Equally without merit is the claim that appellant did not "willfully" usurp the privilege of practicing law. What it did was done by it knowingly and intentionally, though its officers may not have realized that its acts were unlawful. It is enough that through its governing body it did the unlawful acts purposefully and willingly. In this class of cases the fine is imposed as a punishment; and in so far as the infliction of this punishment is concerned the case bears a criminal aspect. "The judgment of fine," says the court, in *People v. Sutter Street Ry. Co.*, 62 P. 104, 129 Cal. 545, 79 Am. St. Rep. 137—

"was solely for the purpose of punishment, and was not based on any evidence of loss or damage. * * * It would, we think, be more proper to speak of it as a sentence or judgment imposed on the defendant than to say it was a judgment recovered against him. * * * The fine could be inflicted upon defendant only on its being 'adjudged guilty of usurping,' etc. (Code Civ. Proc. § 809); which further illustrates that the case has a criminal aspect as to this feature of it."

The word "willfully," as used in the criminal law, implies simply the purpose or willingness to commit the unlawful act. It does not require any intent to violate law or to injure another. When the law forbids an act to be done, and it is done intentionally, guilty intent is conclusively presumed, although the offender was honestly mistaken as to the meaning of the law. *People v. McCalla*, 220 P. 436, 63 Cal. App. 783. The fact that appellant mistakenly supposed that its articles of incorporation gave it the right to practice law could be taken into consideration by the trial court, as it doubtless was, in fixing the amount of the fine; but appellant's belief that its conduct was lawful supplied no legal justification for its acts, nor did it afford a reason why its unlawful usurpation of the privilege of practicing law should go unpunished.

[11] It is argued that under its articles of incorporation a franchise to practice law was "granted" appellant by the state, and that, the franchise having thus been "granted," appellant should be allowed to exercise it "without being subjected to fine for doing so." The notion that the state "granted" a franchise to practice law involves a palpably mistaken conception of the principles governing this class of cases. While it is true that appellant usurped, or unlawfully exercised, the privilege or franchise of practicing law, it is not true that such privilege or franchise was "granted" to it. The practice of law by a corporation is, as we have seen, unlawful. The statute did not authorize appellant's incorporators to call it into being for an unlawful purpose. Mr. Fletcher, in his monumental work on Private Corporations, says:

"In most of the states, perhaps in all, statutes expressly require that the purpose for which corporations are formed shall be lawful, or that they shall not be 'inconsistent with the Constitution and laws of the state.' *Indeed, this would be implied in the absence of any express provision* [italics ours], and it may therefore be laid down as the rule in all the states that a corporation cannot be organized for a purpose which renders it contrary to the common or statute law of the state, or contrary to public policy." 1 Fletcher's Cyclopedia of Corporations, § 114.

Where a corporation is formed under general laws, the law of the sovereign state from which its powers are derived, and not its articles of incorporation, must determine what powers have been lawfully granted. If the incorporators under a general statute, in drawing their articles, assume to embody therein a power or a privilege which the laws of the state do not permit, such assumed power or privilege is unauthorized and void; and though the corporation may be a valid corporate entity, and as such authorized to exercise its lawful powers, all acts done by it in the exercise of its assumption of unauthorized and illegal power are invalid and unlawful. The rule is thus stated in Corpus Juris:

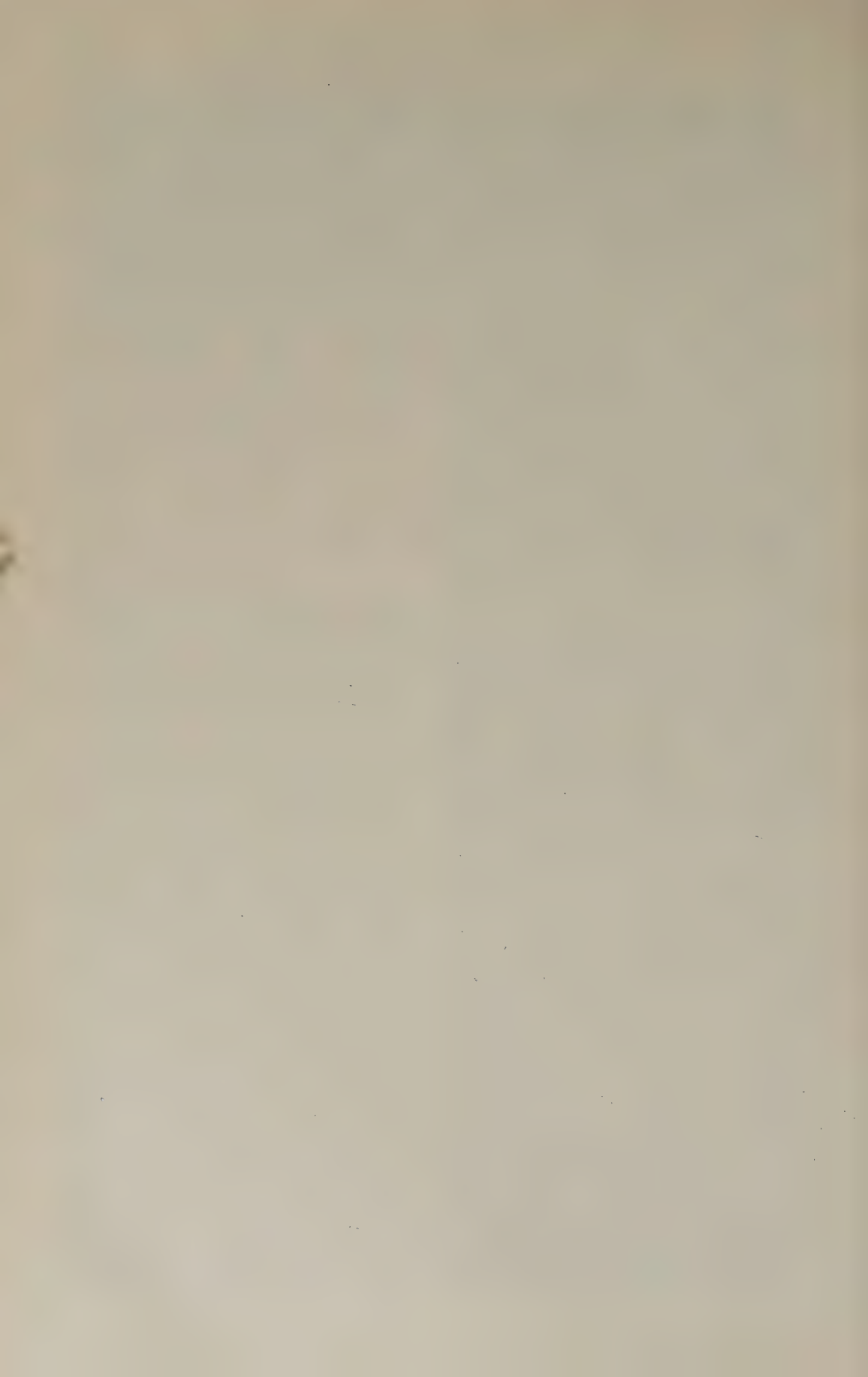
"There is no valid incorporation if the purposes or powers specified in the charter, certificate or articles of incorporation are illegal or unauthorized by the statute, even though they have been approved by the court or officer, or have been filed; but it is established by a number of cases that if the incorporators under a general statute, in drawing their articles, certificate or charter, incorporate therein a grant or assumption of greater powers or privileges than the governing statute allows, this will not necessarily prevent them from becoming incorporated since the law will reject the excessive powers or privileges as surplusage. *In such a case the illegal or unauthorized matter is void*, and all acts done in pursuance thereof will be invalid." 14 C. J. 139. (Italics ours.)

[12] We cannot review the order denying appellant's motion to retax costs, because of the insufficiency of the record on appeal. That record was prepared under the original method, and not under the alternative method sanctioned by section 953a et seq. of the Code of Civil Procedure. As we stated earlier in this opinion, there is no bill of exceptions in the record before us. The memorandum of costs is no part of the judgment roll, and there is nothing on the face of the judgment to show that the trial court allowed any improper item of costs. If the costs were not regularly taxed, it was incumbent upon appellant to bring up the memorandum of costs, the motion to retax, and the affidavits, if any, presented therewith, in a bill of exceptions certified as settled by the trial judge, or else bring them up in the manner provided for by the alternative method.

Appellant having failed in this regard, there is nothing before this court which we may consider. *Kelly v. McKibben*, 54 Cal. 192. Neither the certificate of the clerk nor the stipulation of the attorneys found at the end of the printed transcript on appeal can take the place of the judge's certificate, so as to constitute the transcript a sufficient record under section 953a. *Pouchan v. Godeau*, 131 P. 879, 21 Cal. App. 365. See, also, *Leasure v. Hutton*, 199 P. 549, 52 Cal. App. 711.

The judgment and the order appealed from are affirmed.

We concur: WORKS, J.; CRAIG, J.



CALIFORNIA REPORTER

245 PACIFIC REPORTER

2. Municipal corporations  294(2) — Notice necessary to confer on council jurisdiction to order work (Street Opening Act 1903, §§ 2, 3, as amended by St. 1921, pp. 566, 567).

Proceeding for street assessments being in invitum must, to charge property of owner, be based upon compliance with provisions of statute authorizing work, and hence giving of notice required by Street Opening Act 1903, §§ 2, 3, as amended by St. 1921, pp. 566, 567, is one of steps necessary to confer on council jurisdiction to order work done.

3. Municipal corporations  293(2) — Ordinance of intention must describe improvement with reasonable certainty (Street Opening Act 1903, § 2, as amended by St. 1921, p. 566).

Ordinance of intention required by Street Opening Act 1903, § 2, as amended by St. 1921, p. 566, must briefly describe improvement proposed with reasonable certainty so that a person of ordinary understanding may know what is proposed to be done, and description of the improvement must not be so ambiguous as to be misleading.

4. Municipal corporations  293(1), 294(2) — Passage of ordinance of intention and publication of notice essential to confer jurisdiction to order street improvements (Street Opening Act 1903, § 3, as amended by St. 1921, pp. 566, 567).

In view of section 3, Street Opening Act, as amended by St. 1921, p. 567, failure of board of public work to post notices along line of proposed improvement no longer affects jurisdiction of council to order work under Street Opening Act, but passage of proper ordinance of intention and publication of sufficient notice of public work are under Street Opening Act 1903, as amended by St. 1921, p. 566, essential to confer jurisdiction upon council to order improvements.

5. Municipal corporations  293(2) — Official name of street affected by improvement must be correctly given (Street Opening Act 1903, §§ 2, 3, as amended by St. 1921, pp. 566, 567).

Under Street Opening Act 1903, §§ 2, 3, as amended by St. 1921, pp. 566, 567, names of streets affected by proposed improvement must be correctly given in the description, and none other than official name may be employed; a street having but one name in contemplation of law, that being its official name.

6. Municipal corporations  293(2), 294(4) — Ordinance of intention and notice held fatally defective, where description of improvement incorrectly designated street and failed to describe opening of proposed street (Street Opening Act 1903, §§ 2, 3, as amended by St. 1921, pp. 566, 567).

Ordinance of intention passed pursuant to Street Opening Act 1903, § 2, as amended by St. 1921, p. 566, and notice of public work given pursuant to section 3 thereof, held fatally misleading and defective, where description therein incorrectly designated streets affected and failed to describe the opening of proposed new street.

198 Cal. 308

**O. T. JOHNSON CORPORATION et al. v.
CITY OF LOS ANGELES et al.**
(L. A. 8724.)

(Supreme Court of California. March 24,
1926.)

I. Pleading 129(1), 214(1).

Material allegations of complaint are admitted to be true by demurrer and refusal of defendants to answer.

7. Municipal corporations $\S$ 293(2), 294(4)—Phrase "to extend" street, as used in ordinance of intention and notice, could not be used to convey idea of opening entirely new street paralleling street officially named (Street Opening Act, $\S$ 2, 3, as amended St. 1921, pp. 566, 567).

The phrase "to extend," as used in description in ordinance intention and notice of public work under sections 2 and 3 of Street Opening Act as amended by St. 1921, pp. 566, 567, could not be used to convey the idea of opening an entirely new street paralleling the street officially named and described as the one to be opened, widened, and extended; the words "to extend" being used in conjunction with the words "to open," and "to widen" meaning prolongation of street from one of its termini and in the same general direction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Extend—Extension.]

8. Municipal corporations $\S$ 294(4) — When description is misleading, notice of improvement is insufficient to sustain assessment (Street Opening Act 1903, $\S$ 2, 3, as amended by St. 1921, pp. 566, 567).

Where description in ordinance of intention and notice of public work under sections 2 and 3, Street Opening Act 1903, as amended by St. 1921, pp. 566, 567, is so defective as to be misleading, the notice of improvement is insufficient and assessment proceedings will not be sustained.

9. Municipal corporations $\S$ 294(4)—Notice of improvement naming street to be opened, widened, and extended, but not new street, held not substantial compliance with statute (Street Opening Act 1903, $\S$ 2, 3, as amended by St. 1921, pp. 566, 567).

Where ordinance of intention and notice of public work under sections 2 and 3, Street Opening Act, as amended by St. 1921, pp. 566, 567, designated an officially named street in the description as one to be opened, widened, and extended, but proposed work contemplated the opening of entirely new street paralleling the one designated, there was not substantial compliance with such provision of the statute requiring a brief description of improvement to be given.

10. Municipal corporations $\S$ 294(4)—Notice containing no intimation of improvement of new street did not comply with statute because it referred to "further particulars" in ordinance of intention (Street Opening Act 1903, $\S$ 3, as amended by St. 1921, pp. 566, 567).

Notice of public work under section 3, Street Opening Act 1903, as amended by St. 1921, pp. 566, 567, which contained no hint or intimation in its description of proposed improvement of new and unnamed street, did not comply with the statute, because it referred to further particulars in ordinance of intention; phrase "further particulars," as used in statute providing for reference to ordinance of intention, contemplating "some" particulars of the proposed improvement be given in descrip-

tion in order that property owners may be charged by reference with the further particulars.

11. Municipal corporations $\S$ 294(4)—Under notice to open, widen, and extend officially named street, attempt to open new street paralleling officially named street was unauthorized (Street Opening Act 1903, $\S$ 2, as amended by St. 1921, p. 566).

Under notice pursuant to section 2, Street Opening Act 1903, as amended by St. 1921, p. 566, to open, widen, and extend an officially named street, attempt to open new street paralleling such officially designated street for four-fifths of a mile, and failing to improve officially named street, was contrary to law.

12. Municipal corporations $\S$ 266.

City electing to proceed under Street Opening Act 1903, p. 376, was bound by terms of act.

13. Municipal corporations $\S$ 294(4)—Property owners are entitled to have frontage which is given right of protest made certain of ascertainment (Street Opening Act 1903, $\S$ 2, as amended by St. 1921, p. 566, and section 4 as amended by St. 1913, p. 431).

Property owners along streets sought to be improved under Street Opening Act of 1903 are entitled to have the frontage which is given the right of protest under section 4, as amended by St. 1913, p. 431, made certain of ascertainment, and hence Street Opening Act 1903, $\S$ 2, as amended St. 1921, p. 566, requiring percentage of city's portion of expense to be designated, must be complied with; for, unless that percentage be definitely stated, there is no way of ascertaining the total frontage, and therefore no basis for determining the sufficiency of protest on which council may legally act.

14. Municipal corporations $\S$ 293(1)—When city is to pay portion of cost of improvement, percentage of cost and name of fund should be stated in ordinance of intention (Street Opening Act 1903, $\S$ 2, as amended by St. 1921, p. 566).

When city is to pay portion of the cost of improvement, Street Opening Act 1903, $\S$ 2, as amended by St. 1921, p. 566, requires definite percentage of the total cost and the name of the fund from which the payment is to be made to be stated in the ordinance of intention, and, these requirements being jurisdictional, an ordinance which failed to comply therewith was defective.

15. Statutes $\S$ 105(1)—Constitutional provision requiring subject of act to be embraced in its title must be liberally construed, being met by reasonably intelligent reference to subject to which legislation is to be addressed (Const. art. 4, $\S$ 24).

The requirement of Const. art. 4, $\S$ 24, requiring the subject of act to be embraced in its title, must be liberally construed, and constitutional requirement is met where there is a reasonably intelligent reference to the subject to which the legislation is to be addressed.

16. Statutes $\Leftrightarrow$ 123(7)—Title of Street Opening Act providing in general terms for condemnation of property necessary for improvement held to sufficiently embrace subject of amendment providing for payment of portion of cost by city (Street Opening Act 1903, as amended by St. 1921, p. 565; Const. art. 4, § 24).

The title of Street Opening Act 1903, p. 376, which provides in general terms for the condemnation of property necessary or convenient for the laying out, opening, widening, and extending of public streets within municipalities, held sufficiently broad to embrace subject of amendment St. 1921, p. 565, providing for payment of portion of the costs by the city, and hence amendment was not violative of Const. art. 4, § 24.

17. Municipal corporations $\Leftrightarrow$ 871—Appropriation for proposed street improvement held not gift of public money, contrary to Constitution (Const. art. 4, § 24; St. 1903, p. 376, § 2, as amended by St. 1921, p. 566).

Where city, in ordinance of intention passed pursuant to section 2, Street Opening Act 1903, as amended by St. 1921, p. 566, provided for appropriation of \$1,500,000 as its portion of cost of such improvement, held, that such attempted appropriation did not constitute a gift of public money, contrary to Const. art. 4, § 24, as against contention that proposed improvement was of benefit only to property owners in district and not generally to the public.

18. Municipal corporations $\Leftrightarrow$ 293(1)—Declaration in ordinance of intention that property shall be assessed for improvement held to be read with provision for payment of portion of cost's (Street Opening Act 1903, § 2, as amended by St. 1921, p. 566).

Declaration in ordinance of intention passed pursuant to section 2, Street Opening Act 1903, as amended by St. 1921, p. 566, providing that property in district shall be assessed to pay cost of improvement, held not to mean payment of whole cost, but was to be read in connection with provisions of ordinance for payment of portion of cost of improvement.

19. Municipal corporations $\Leftrightarrow$ 321(1)—Opening, widening, and extending street question of legislative determination, which will not be inquired into in absence of fraud.

It must be assumed that the opening, widening, and extending of a public street within city is matter of general public concern, extent of such interest and concern being a question of legislative determination which will not be inquired into in absence of fraud.

20. Municipal corporations $\Leftrightarrow$ 867(1)—Ordinance of intention proposing to pay city's portion of cost of street improvement held not to violate Constitution as incurring debt without consent of electors (Street Opening Act 1903, § 2, as amended by St. 1921, p. 566; Const. art. 11, § 18).

Mere fact that ordinance of intention passed pursuant to Street Opening Act 1903, § 2, as amended by St. 1921, p. 566, provided for payment of \$1,500,000 as its portion of cost of proposed improvement, did not violate Const. art. 11, § 18, prohibiting city from incurring

indebtedness or liability in any year exceeding the revenue or income of such year without consent of two-thirds of qualified electors inasmuch as it was mere declaration of purpose not amounting to covenant which could be then enforced.

21. Municipal corporations $\Leftrightarrow$ 112(1)—Ordinance of intention under Street Opening Act held not required to be entitled (Street Opening Act 1903, § 2, as amended by St. 1921, p. 566; Pol. Code, § 4459).

Ordinance of intention passed pursuant to Street Opening Act 1903, § 2, as amended by St. 1921, p. 566, held not required to be entitled as required by Pol. Code, § 4459, providing that official advertising when published must be preceded by words "describing or expressing in general terms character of notice intended to be given."

22. Municipal corporations $\Leftrightarrow$ 78.

Manner of enacting ordinances is municipal affair.

23. Municipal corporations $\Leftrightarrow$ 79—Legislative requirement of Political Code could not be imposed on city with respect to entitling ordinances, in view of Constitution (Pol. Code, § 4459; Const. art. 11, § 6, as amended in 1914).

Legislative requirement of Pol. Code, § 4459, relative to entitling of official advertising when published, could not be imposed upon city with respect to entitling of ordinances, in view of amendment of 1914 to Const. art. 11, § 6.

24. Municipal corporations $\Leftrightarrow$ 297(1)—Charter provision postponing effective date of ordinances held to have no effect on ordinance of intention passed pursuant to Street Opening Act 1903, § 2, as amended by St. 1921, p. 566; City Charter, § 198g.

City Charter, § 198g, postponing effective date of ordinances until 30 days after publication, held to have no effect upon ordinance of intention under Street Opening Act 1903, § 2, as amended by St. 1921, p. 566, later being within charter exception relating to opening, widening, extending, or straightening of streets, and hence since such ordinance was effective at publication, hearing of protests conceded to be made after last day for filing protests, if such was the effective date of the ordinance, were properly refused.

25. Constitutional law $\Leftrightarrow$ 290(3)—Municipal corporations $\Leftrightarrow$ 266—Street Opening Act held to meet requirements of Constitution as to notice (St. 1903, p. 376).

Street Opening Act of 1903 held to meet requirements of due process with respect to notice and opportunity to be heard.

In Bank.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by the O. T. Johnson Corporation and others against the City of Los Angeles and others to enjoin street improvement proceedings. Judgment for plaintiffs, and defendants appeal. Affirmed.

Jess E. Stephens, City Atty., and Lucius P. Green, Asst. City Atty., both of Los Angeles, for appellants.

E. R. Young and C. E. Spencer, both of Los Angeles, for respondents.

SHENK, J. This action was brought to enjoin the defendants the City of Los Angeles and certain of its officers from expending any money in furtherance of a proceeding initiated under the Street Opening Act of 1903 (Stats. 1903, p. 376), including the cost of the prosecution of a pending action in condemnation. A general demurrer to the complaint was overruled. The defendants stood on their demurrer and declined to answer, whereupon a judgment of injunction was entered as prayed. From this judgment the defendants appeal.

On January 22, 1923, the council of said city adopted an ordinance entitled:

"An ordinance declaring the intention of the city of Los Angeles to order the opening, widening and extending of Mines avenue between the easterly boundary of the city of Los Angeles and a point distant three hundred feet, more or less, westerly of Lorena street, and Ninth street between Lorena street and San Julian street, and of Tenth street between San Pedro street and Burck place, and of Country Club drive between Burck place and a point one hundred twenty-five feet westerly from said Burck place, in the city of Los Angeles, county of Los Angeles, state of California."

This ordinance was approved by the mayor and published on February 1, 1923. In and by said ordinance it was ordained in section 1 thereof that the public interest and convenience required, and it was the intention of the council to order, that the streets therein named (described precisely as set forth in the title) be opened, widened, and extended. Section 2 described more particularly the lands to be taken. This description is a technical description by courses and distances of the exterior boundaries of the proposed improvements, covering 18 pages of printed transcript. A series of maps prepared by the city engineer in August, 1923, for use in connection with the condemnation proceeding, was submitted at the oral argument for our enlightenment upon this appeal. From these maps, but not from the technical description in the ordinance, it is ascertained that the proposed improvement contemplates a street of uniform width extending from the easterly to the westerly boundaries of the city. Section 3 of the ordinance contains a description of the assessment district by courses and distances, covering 40 pages of printed transcript. Section 4, among other things, directs the board of public works to post notices of the improvement as required by law. Section 5 ordains that improvement bonds may issue to represent assessments as provided by the Im-

provement Bond Act of April 27, 1911. Section 6 provides as follows:

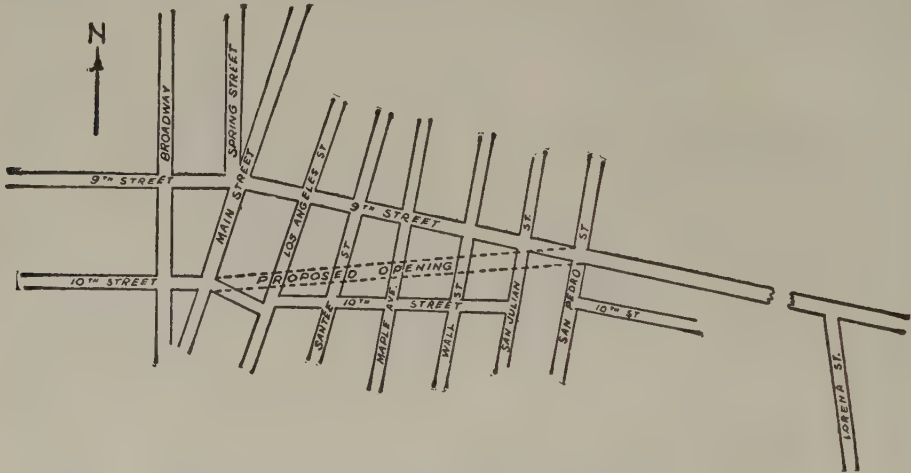
"It is further ordered and declared by said city council of the city of Los Angeles that a percentage of the expense of said improvement, in section 1 of this ordinance described, to wit: That percentage which the sum of \$1,500,000 bears to the entire expense of said improvement shall be paid by the city of Los Angeles out of such fund as said city council may designate."

Thereafter, on February 2 and 5, 1923, the board of public works caused notices of public work to be posted. These notices described the proposed improvement precisely as described in the title of the ordinance of intention and not otherwise. The same form of notice was published in the official newspaper on February 7 and 8, 1923.

Within 30 days after March 4, 1923, the alleged effective date of the ordinance of intention, written protests against the proposed improvement were filed. The council heard protests filed on and prior to March 9, 1923, but refused to hear or consider protests filed after that date. Thereafter the council on June 28, 1923, adopted the final ordinance ordering the opening, widening, and extending of said streets, describing the same in the identical language used in the title and in section 1 of the ordinance of intention and in the notices of public work as posted and published. The city attorney then instituted an action in the superior court to condemn the lands alleged to be necessary for the improvement claimed by the city to have been authorized by the proceedings preliminary thereto, but the said action has not proceeded to judgment. The plaintiffs are the owners of lands within the assessment district which are subject to assessment on account of said improvement if the same be carried to completion as proposed.

[1] Because of the demurrer and the refusal of the defendants to answer, all of the material allegations of the complaint are, of course, admitted to be true. From these allegations and the record before us, it appears that Mines avenue is a public street extending from the easterly boundary of the city in a general westerly direction to a point where it meets the easterly terminus of Ninth street, approximately 150 feet westerly from Lorena street, which is an intersecting north and south street; that Ninth street extends westerly from its easterly terminus for a distance of about 8 miles; that Tenth street extends from its easterly terminus at its intersection with Central avenue in a general westerly direction and approximately parallel with Ninth street a distance of about 2,600 feet to its intersection with San Pedro street, which is a north and south street intersecting both Ninth and Tenth streets; that from San Pedro street to San Julian street, a distance of one block, Tenth street is not open; that Tenth street from San Julian street to Main street is, for

a distance of some 1,800 feet, an open public street approximately paralleling Ninth street between the same intersecting streets; that both Ninth and Tenth streets for many years have been open, improved, and used public streets of the city and commonly known by their respective names; that it is not contemplated in the proposed proceeding to open, widen, or extend Tenth street between San Pedro and Main streets, but the proposed improvement contemplates the opening of an entirely new street through private improved property diagonally from the intersection of Ninth and San Pedro streets to the intersection of Tenth and Main streets. The situation may be better understood by reference to the accompanying diagram:



In section 2 of the Street Opening Act of 1903 as amended (Stats. 1921, p. 566), it is provided that before ordering any improvement therein authorized the city council shall pass an ordinance declaring its intention so to do, which ordinance "shall briefly describe the improvement and the land necessary or convenient to be taken therefor." Section 3 requires that a "notice of public work," shall be posted along the line of the proposed improvement and be published by an insertion in a newspaper designated by the city council for that purpose, which notice shall "briefly describe the improvement proposed, and refer to said ordinance of intention for a description of the assessment district and for further particulars."

[2-4] The respondents first attack the proceedings on the ground that the improvement actually intended and sought to be carried out by the condemnation proceeding and the improvement described in the ordinance of intention and notices of public work are fatally at variance, in that the improvement described in the ordinance of intention and notices includes the opening and widening of Tenth street between San Pedro street and Main street and the improvement as actually attempted to be carried out between San

Pedro street and Main street consists of the opening of an entirely new and unnamed street between Ninth and San Pedro streets and Tenth and Main streets, and that therefore the property owners within the assessment district were not charged with notice of the proposed improvement as required by law. We think this contention must be sustained. The proceeding is in invitum. It is conceded by counsel for appellants that in such a proceeding the property owner "is entitled to an accurate compliance with those specific requirements of the statute which the Legislature deems important to safeguard his interests. These are the mandatory and jurisdictional provisions of the statute." This statement is in line with the

well-established rule that the requirements of the statute essential to jurisdiction must be complied with. *Flynn v. Chiappari*, 215 P. 682, 191 Cal. 139; 19 Cal. Jur. 166, 167, 168, and cases cited. An ordinance of intention properly affording notice is essential to the jurisdiction of the council to order the improvement. *Pacific Paving Co. v. Verso*, 107 P. 590, 12 Cal. App. 362. The act requires that the ordinance "briefly describe the improvement proposed," and it has been held that the description of the work as required by the statute is a jurisdictional prerequisite. *Fay v. Reed*, 60 P. 927, 128 Cal. 357; 19 Cal. Jur. 237, and cases cited. "Unquestionably the giving of the notice required by the act is one of the steps necessary to confer upon the council jurisdiction to order the work done. 'Proceedings for street assessments, being in invitum, must, in order to charge the property of the owner, be based upon a compliance with the provisions of the statute authorizing the assessment, in so far, at least, as those provisions have to do with the giving of notice or other steps precedent to the jurisdiction of the board to order the work done.'" *Ferri v. City of Long Beach*, 169 P. 385, 176 Cal. 645. The ordinance of intention must

briefly describe the improvement proposed with reasonable certainty so that a person of ordinary understanding may know what is proposed to be done (19 Cal. Jur. 239, and cases cited), and the description of the improvement must not be so ambiguous as to be misleading. *Piedmont Paving Co. v. Allman*, 68 P. 493, 136 Cal. 88. Because of the concluding paragraph of section 3 of the act as amended in 1921 (Stats. 1921, p. 567), the failure of the board of public works to post the notices no longer affects the jurisdiction of the council to order the work, but the passage of a proper ordinance of intention and the publication of a sufficient notice of public work are, under the statute, steps necessary to confer jurisdiction. *Ferri v. City of Long Beach*, supra; 19 Cal. Jur. 214.

[5, 6] With the foregoing considerations in mind, the question is: Does the description in the ordinance of intention and in the notice of public work as published meet the requirements of the law? It is to be observed that said description specifies Tenth street between San Pedro street and Burck place as one of the streets to be opened, widened, and extended. Reference to the map discloses that Burck place is many blocks west of Main street. It also appears that Tenth street approaches and extends to San Pedro street from the east and proceeds westerly from San Julian street. Between San Pedro street and San Julian street Tenth street is not open. When the ordinance of intention proposed to open, widen, and extend Tenth street from San Pedro street to a point westerly from Main street, the only reasonable inference or conclusion to be drawn from the language employed in the description was that it was contemplated to open Tenth street from the point of its intersection with San Pedro street westerly therefrom where at the time it was not then open, and thus provide a through street. But instead of carrying out the improvement as so described the appellants admittedly propose to open an entirely new and unnamed street from the intersection of Ninth and San Pedro streets to Tenth and Main streets. It is conceded by the appellants that "the names of streets affected by the improvement must be correctly given, and none other than the official name may be employed, for in contemplation of law a street has but one name—its official name." *Peck v. Stassforth*, 103 P. 918, 156 Cal. 201. It appears without question that Tenth street is officially named as such easterly from San Pedro street and westerly from San Julian street. Tenth street westerly from its intersection with San Pedro street was definitely and specifically named as one of the streets affected and to be improved, but that portion of Tenth street between San Pedro street and Main street, by the admission of the appellants, is not to be opened, widened, extended, or otherwise improved, and a new street some 1,800 feet in

length and not referred to in the brief description of the proposed improvement is to be opened through private improved property. As to the improvement attempted to be carried out, the description employed incorrectly designates the streets affected and also fails to describe the opening of the proposed new street. There is therefore not only a failure of description, but a misdescription of the proposed improvement, and the ordinance of intention and the notice of public work were fatally misleading and defective.

[7, 8] It is insisted by the appellants that the opening of the new street from Ninth and San Pedro streets to Tenth and Main streets should, considering the improvement as a whole, be deemed an extension of Tenth street from San Pedro street to Burck place. It is urged and it may be assumed that, in a comprehensive and unrestricted sense, the phrase "to extend" means to enlarge or to expand in any direction. But when used in conjunction with the phrases "to open" and "to widen," they can only mean a prolongation of the street from one of its termini and in its same general direction. *Mayor of Monroe v. Ouachita Parish*, 17 So. 498, 47 La. Ann. 1061; *Owen v. Chicago*, 53 Ill. 95. Certainly it may not be said that the phrase "to extend" may thus be used to convey the idea of opening an entirely new street paralleling for some 1,800 feet a street officially named and described as the one to be opened, widened, and extended. It has been held that, when the description is so defective as to be misleading, the notice of the improvement is insufficient and the assessment proceedings will not be sustained. *McNutt v. City of Los Angeles*, 201 P. 592, 187 Cal. 245; *Park v. Pacific Fire Extinguisher Co.*, 173 P. 615, 37 Cal. App. 112; *Sanger v. Chicago*, 48 N. E. 309, 169 Ill. 286; *Fry v. Salem*, 164 P. 715, 84 Or. 184.

[9] Appellants again insist that, in view of the magnitude of the project, a substantial compliance with the statute has taken place. The record may not be so construed. If, under the notice given in this case, the city may not only fail to improve the street noticed for improvement for a distance of 1,800 feet, but also open a new street parallel therewith for that distance and not noticed for improvement, it might be urged with equal assurance that a new and unnamed and unmentioned street could be opened paralleling the street described in the notice for a mile or more—a proposition not possible of approbation under our street laws.

[10] It is also insisted by the appellants that, as section 3 of the act as amended provides for a reference in the notice of public work to the ordinance of intention for a description of the assessment district "and for further particulars," and as the notice in this case contained such reference, and as the 18-page description by courses and distances in section 2 of the ordinance of

intention was, from an engineering standpoint, a correct description of the land to be taken, therefore the notice was sufficient. But the phrase "further particulars" contemplates that the brief description contains some particulars of the essential parts of the proposed improvement, in order that the property owner be charged by reference with the further particulars (*White v. Harris*, 48 P. 382, 116 Cal. 470), and there is no hint or intimation in the brief description of the proposed improvement of the new and unnamed street. Our conclusion on this point would not require that the brief description be greatly extended. It would seem to be a simple matter to have included therein a reference to "a new street from Ninth and San Pedro streets to Tenth and Main streets" with, of course, the omission of any reference to Tenth street between San Pedro and Main streets, if, as is admitted here, that portion of Tenth street was not to be improved.

[11] A similar defective and omitted description is alleged by respondents to have occurred as to the proposed opening of a new and unnamed street approximately 900 feet in length westerly from Lake street to Hoover street, whereas Tenth street westerly from Lake street and running in the same general direction as the proposed new street and being easterly from Burck place is not to be improved. Respondents likewise question the right of the city to open a new street, approximately 1,400 feet in length, from Crenshaw boulevard westerly to Burck place under a notice to open, widen, and extend Tenth street, when, as a matter of fact, Tenth street is, and was at the time of said notice, a public street known as such by the official name of Tenth street and running in the same general direction between the said termini and is not to be improved. Other defects in the description are alleged but need not be noted. But from those referred to, it will be seen that, under a notice to open, widen, and extend Tenth street between San Pedro street and Burck place, the respondents are attempting to open about four-fifths of a mile of new street through private property when the same territory is traversed by a street officially known as Tenth street and running in the same general direction and which is not to be improved. Further argument should not be required to support the conclusion that such a proceeding is contrary to law.

The case of *McGarry v. Ellis*, 202 P. 463, 54 Cal. App. 622, cited and relied on by appellants, does not sustain their position. In that case, the language of the Improvement Act of 1911 (St. 1911, p. 730) was involved wherein the notice was required "to briefly describe the work or the assessment district or both" and to refer to the ordinance of intention for further particulars. The notice in that case described the work and also the assessment district as including the entire

city, but did not state that certain lots were excepted from the district. Said notice was properly held sufficient because the property owner was given notice that his property was included in the district, and the omission to state that certain lots were excepted was declared immaterial.

[12] A serious objection is also urged by the respondents to the sufficiency under the statute of the provisions of section 6 of the ordinance of intention. The city had the option to proceed under the Street Opening Act of 1903 (*Hayes v. Handley*, 187 P. 952, 182 Cal. 273; *Barber v. City of Los Angeles*, 215 P. 897, 191 Cal. 253), and when it elected to proceed thereunder it was bound by the terms of the act (*Osburn v. Stone*, 150 P. 367, 170 Cal. 480; 19 Cal. Jur. 410, and cases cited). Section 2 of that act as amended in 1921 (Stats. 1921, p. 566) appears to contain the only authority for the city to pay a portion of the cost of an assessment proceeding taken under the act. It is there provided:

"Said city council may, in its discretion, order and declare that the whole or any percentage of the expense of said improvement be paid out of the treasury of the municipality from such fund as the council may designate, in which case it shall be so stated in said ordinance of intention."

It is the contention of the respondents that as neither the percentage of the cost of the improvement to be borne by the city nor the fund from which such expenditure was to be made were ordered, declared, or designated in the ordinance of intention, the failure to follow the terms of the act in those respects resulted in a lack of jurisdiction to proceed. Section 4 of the act of 1903 as amended by Stats. 1913, p. 431, provides that protests against the improvement on the part of the owners of a majority of the frontage of the property fronting on the streets within the assessment district shall effectually bar all further proceedings under said ordinance of intention. Said section further provides:

"For the purpose of passing upon and determining the sufficiency of such protests in cases where by a resolution of intention it is declared that the city shall pay a percentage of the expense of the improvement, the city shall be deemed to be the owner of frontage within the assessment district bearing the same proportion to the whole frontage therein as the proportion of the expense which it is to pay, and the actual frontage of property within such district shall be increased by the addition of such amount as is necessary to produce said result, and the amount of frontage as so increased shall be the total frontage to be used in determining whether a protest is signed by the owners of a majority of the frontage of the property fronting on streets or parts of streets within said assessment district."

[13] It will be noted that in section 6 of said ordinance, the city did not declare the amount of the city's proportion of the cost of the improvement in definite terms of per-

centage, but only "that percentage which the sum of \$1,500,000 bears to the entire expense of said improvement." From this declaration it is impossible to determine whether the amount to be paid by the city is 5, 10, 50, or any other percentage of the entire cost of the improvement. In the absence of a definite percentage of the entire cost to be borne by the city, it is likewise impossible to determine to what extent the frontage in the district is to be enlarged for the purpose of ascertaining protest frontage. It is no answer to this contention to say that, if a definite percentage be not declared, there would be no consequent enlargement of the frontage and no prejudice to the protestants. In order that the statute be given effect, there must be an enlargement of the frontage in proportion to the percentage of the contribution of the city. Unless that percentage be definite there is no way of ascertaining the total frontage and therefore no basis for determining the sufficiency of protests and no basis on which the council may legally act on protests. The property owners are entitled to have the frontage which is given the right of protest made certain of ascertainment, and the statute in such matters must be followed. *Dehail v. Morford*, 30 P. 593, 95 Cal. 457; *Beck v. Ransome-Crummey Co.*, 184 P. 431, 42 Cal. App. 674.

[14] Respondents contend that there was also a fatal noncompliance with the statute when the ordinance of intention failed to designate the fund from which the city's portion of the expense was to be paid. Appellants in reply state that it is no concern of the property owner from what fund the city's portion is to be paid and that the language of the act is reasonably susceptible of the construction that the ordinance shall state merely that the city's portion shall be paid "out of such fund as the city council may designate." We think the proper construction of the language of the act requires that the fund be designated in the ordinance of intention and that such designation is for the benefit of the property owner and jurisdictional. The appellants concede the correctness of the rule laid down in *Dehail v. Morford*, supra, wherein this court said that "every requirement of the statute which has a semblance of benefit to the owner must be observed, in order to give the municipal jurisdiction in the premises." If the fund be designated as the general fund or the reserve fund or the unappropriated balance, the property owner might be satisfied with the expenditure from that source as entailing no additional burden on his part, but if the fund be designated as a fund to be derived from a general bond issue to be thereafter authorized and to satisfy which his property would be subject to an additional tax, or a fund from which the payment of the city's portion could for some reason not legally be made, he would know

or be charged with knowledge of the additional burden to be borne by him and be governed accordingly in deciding whether or not he would protest. We therefore hold that the statute requires that when the city is to pay a portion of the cost of the improvement, a definite percentage of the total cost and the name of the fund from which the payment is to be made be stated in the ordinance of intention, and that these statutory requirements are jurisdictional.

[15, 16] The respondents attack the said proceeding on additional grounds which are treated rather extensively in the briefs. Some consideration of these further objections is deemed essential to a proper disposition of the case. It is insisted by them that the amendment to the Street Opening Act of 1903 authorizing the municipality to pay a portion of the cost of improvement is void for the reason, so it is claimed, that the title of the act does not embrace the subject of the amendment and is therefore legislation contrary to the provision of section 24 of article 4 of the Constitution. *Estate of Melone*, 74 P. 991, 141 Cal. 331, is relied upon. In that case the specific enumeration of subjects in the title of the act in question was held to be exclusive. Here the title is general and does not assume to be an index of the particular matters embraced in the act. In general terms it provides for the condemnation of property necessary or convenient for the laying out, opening, widening, and extending of public streets within municipalities. The constitutional provisions requiring the subject of the act to be embraced in its title must be liberally construed, and "all that is required to be contained therein in order to meet the constitutional requirement is a reasonably intelligent reference to the subject to which the legislation is to be addressed." *Estate of Wellings*, 221 P. 628, 634, 192 Cal. 506, 519; *McClure v. Riley* (Cal. Sup.) 243 P. 429. When so construed, it is obvious that the payment by the city of a portion of the cost of the improvement might be properly provided for under the designation in the title of the general purposes of the act. *Davies v. City of Los Angeles*, 24 P. 771, 86 Cal. 37.

[17-19] Again, it is contended that the attempted appropriation of \$1,500,000 by the city constitutes a gift of public money contrary to section 31 of article 4 of the Constitution. It is argued that, inasmuch as the city council has declared that the property within the assessment district is to be benefited by the proposed improvement, it must therefore follow that the improvement is of benefit to the property in the district and is of no benefit to the general public over and above that ordinarily received by the general public from all streets. It is further argued that, as the ordinance of intention provides that the property in the district shall be assessed to pay the cost of

the improvement, such declaration means the payment of the whole cost. We think the declaration referred to must be read in connection with the provisions of section 6 of the same ordinance, which provides for the payment of a portion of the cost of the improvement. It must be assumed that the opening, widening, and extending of a public street within a city is a matter of general public interest and concern (Sinton v. Ashbury, 41 Cal. 528), and the question of the extent of such general public interest and concern is primarily one of legislative determination, and in the absence of fraud, and none is here suggested, such determination may not be inquired into (City of Oakland v. Garrison, 228 P. 433, 194 Cal. 298).

[20] It is alleged in the complaint that at the time of the adoption of the ordinance of intention there was not, nor was there at any time during the fiscal year ending June 30, 1923, in the city treasury of Los Angeles any sum or amount sufficient to enable the city to pay the \$1,500,000 proposed to be paid, and that the electors had not authorized the said indebtedness. As this allegation was admitted, it is insisted that the indebtedness thus attempted to be incurred was unauthorized and contrary to the provisions of section 18 of article 11 of the Constitution, which provides that no city shall incur any indebtedness or liability in any year exceeding the income and revenue provided for such year without the consent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose. We think the order and declaration of the council as embodied in section 6 of said ordinance do not constitute the incurring of an indebtedness as contemplated by the section of the Constitution referred to. The mere declaration of a purpose is there evidenced which does not amount to a covenant which could then be enforced. The proceedings may be abandoned or the improvement may be delayed for many years. Notwithstanding the facts as alleged and as admitted, such a state of the city's finances may not be in existence at the time the appropriation is actually to be made.

[21-23] It is contended that the ordinance of intention was not properly entitled as required by section 4459 of the Political Code. It is therein provided that official advertising when published, must be preceded by words "describing or expressing in general terms the purport or character of the notice intended to be given." This section was added to the Political Code in 1903. In 1908 it was said by this court in *Ex parte Young*, 97 P. 822, 154 Cal. 317, 22 L. R. A. (N. S.) 330, that there was at that time no statute which required ordinances of boards of supervisors to be entitled. In the same year the District Court of Appeal made the same declaration in *Ex parte Yung*, 94 P. 594, 7 Cal. App. 440. It is true that in each of those

cases *Ex parte Haskell*, 44 P. 725, 112 Cal. 412, 32 L. R. A. 527, decided in 1896, was cited as authority for the declaration; but then again in *Re Johnson*, 190 P. 852, 47 Cal. App. 465, decided in May, 1920, it was said that a title was not an indispensable part of a city ordinance. The section of the Political Code referred to does not appear to have been considered in any of those decisions, but it is significant that since their rendition the section has not been amended. Moreover, if that section be deemed to require that ordinances of boards of supervisors and of cities operating under general law be entitled, it would not necessarily follow that they would impose a like requirement on ordinances of a city operating under a freeholders' charter. The manner of enacting city ordinances is a municipal affair. In *re Pfahler*, 88 P. 270, 150 Cal. 71, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911; *Morton v. Broderick*, 50 P. 644, 118 Cal. 474. The charter of the city of Los Angeles at the time of the passage of the ordinance of intention contained provisions relating to the enactment of ordinances, and although it does not appear that there was then any regulation that ordinances be entitled or that they need not be entitled, it is clear that since the amendment in 1914 of section 6 of article 11 of the Constitution the legislative requirement of section 4459 of the Political Code could not be imposed on the city. *Civic Center Ass'n v. Railroad Commission*, 166 P. 351, 175 Cal. 441; *Morgan v. City of Los Angeles*, 187 P. 1050, 182 Cal. 301; 18 Cal. Jur. 784, and cases cited.

[24] At the time of the adoption of the ordinance of intention, section 198g of the City Charter provided that an ordinance making or authorizing any contract should not go into effect until the expiration of thirty days from its publication, with certain exceptions, including contracts that require the payment by the city of less than \$25,000, and it is urged that the ordinance in question authorized a contract for an expenditure in excess of \$25,000 and therefore was not within the exception. But said section 198g at that time also contained a provision excepting from the 30-day restriction "an ordinance * * * relating to * * * the opening, widening, straightening or extension of streets." The ordinance of intention appears to be in this excepted classification and the 30-day postponement provision had no effect upon it. It is not disputed that if the ordinance of intention was in effect on the date of its publication, then March 9 was the last day for the filing of protests. The city council therefore proceeded correctly in refusing to consider or pass upon protests filed after that date.

[25] Finally, it is insisted that the act of 1903 does not provide for a hearing to be had on the question of the respective portions of the general public and local benefits, and

therefore due process of law is not accorded the property owners on that question. Without prolonging the discussion, it is sufficient to say that we think the said act provides for all the notice and opportunity to be heard essential in that connection to the requirements of due process.

From what has been said as to the failure of the appellants to observe jurisdictional requirements, it necessarily follows that the demurrer was properly overruled, and that the judgment should be affirmed. It is so ordered.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; CURTIS, J.; LAWLOR, J.; LENNON, J.

198 Cal. 327

Viola BOGUE and Herminia Badham, Plaintiffs and Respondents, v. CITY OF LOS ANGELES (a Municipal Corporation), Boyle Workman, Ralph L. Criswell, Edwin Baker, Fred Wheeler, Walter Mallard, W. C. Mushet, Miles Gregory, Robert M. Allen, and W. J. Sanborn, as Members of and Constituting the City Council of the City of Los Angeles; John S. Myers, City Auditor of said City; Ned T. Powell, City Treasurer of said City; Edward J. Delorey, Arthur Eldridge and Hugh J. McGuire, as Members of and Constituting the Board of Public Works of said City, Defendants and Appellants. (L. A. 8725.)

(Supreme Court of California, March 24, 1926.)

In bank.

Appeal by defendants from a judgment of the Superior Court of Los Angeles County, Hartley Shaw, Judge, in an action to enjoin street improvement proceedings. Affirmed.

Jess E. Stephens, City Atty. and Lucius P. Green, Asst. City Atty., both of Los Angeles, for appellants.

E. R. Young and O. E. Spencer, both of Los Angeles, for respondents.

SHENK, J. The purpose of this action is to enjoin the city of Los Angeles and the other defendants, officers of said city, from carrying forward to completion improvement proceedings initiated under the Street Improvement Act of 1903 (Stats. 1903, p. 376). Following an order overruling a general demurrer to the complaint, the defendants refused to answer, whereupon a judgment of injunction was entered against them as prayed. From said judgment the defendants appeal.

The improvement proceedings and the issues involved herein are the same as those involved in the case of O. T. Johnson Corporation et al. v. City of Los Angeles et al. (L. A. No. 8724) 245 P. 164, this day decided, with the exception that the plaintiffs herein, who are the owners of property proposed to be taken for the opening of the new street from Ninth and San Pedro streets to Tenth to Main streets,

in addition to the matters set out in the complaint in the other action, charge the defendants herein with knowingly proceeding under a misleading ordinance of intention and notice of public work with the intent to deceive and defraud the plaintiffs, and that they, the plaintiffs, were deceived thereby to their damage. They allege that they knew of the adoption of said ordinance and of the notice of public work and relied thereon, believing that the improvement contemplated by the description therein contained was the opening, widening, and extending of the streets named therein, including the opening of Tenth street from San Pedro to San Julian streets and the widening of Tenth street from San Julian street westerly therefrom, and that because of their reliance on said description they did not protest against the said improvement and did not discover the fact that the city proposed to take their lands for the purpose of opening a new street not described until the time for protest had expired. The defendants argue that their admission of the said allegations does not amount to an acknowledgment of fraud for the reason, so they contend, that said description and notice were sufficient, and therefore the plaintiffs could not be misled; but inasmuch as the judgment herein must be affirmed because of the failure of the defendants to observe jurisdictional requirements, as set forth in the opinion in the other case, we deem it unnecessary to enter upon a discussion of the effect of these additional admissions in the pleadings, even though we should hold, as plaintiffs contend, that they in themselves are sufficient to sustain the action of the trial court.

On the authority of the case above referred to and this day decided, it is ordered that the judgment herein be and the same is hereby affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; CURTIS, J.; LAWLOR, J.; LENNON, J.

198 Cal. 301

SMITH v. BOARD OF TRUSTEES OF BARNES CITY et al. (L. A. 9188.)

(Supreme Court of California, March 22, 1926.)

1. Municipal corporations ~~§~~ 149(2)—Trustees of city of sixth class, elected at special incorporation election, hold office only until next general municipal election (Municipal Corporations Act [St. 1883, p. 93] §§ 1-3, inclusive; section 352, as amended by St. 1919, p. 19; section 3 as amended by St. 1923, p. 103, § 2).

Trustees of city of sixth class, incorporated under Municipal Corporations Act, §§ 1-3, inclusive, elected at special incorporation election, hold office under section 3 as amended by St. 1923, p. 103, § 2, only until next general municipal election, the amendment to section 3 providing for their holding for such term as hereinafter provided, not referring to four and two year terms of such officers, under section 352, as amended by St. 1919, p. 19.

2. Statutes $\Rightarrow$ 230—Section of statute, after amendment, should be construed as original legislation, giving effect to each part consistent with entire statute.

Section of statute after amendment should be construed in the same light as an entirely new and original piece of legislation, giving to each part, if possible, some effect consistent with the entire statute.

3. Statutes $\Rightarrow$ 207—Provision of act more in harmony with fundamental purpose of statute should be given effect in case of irreconcilable conflict with another provision without regard to its order of position.

Where different provisions of act are in irreconcilable conflict, the provision which is more in harmony with the fundamental purpose of the statute should prevail without regard to whether it comes first or last in order of position.

4. Statutes $\Rightarrow$ 207—Though change in language is sometimes warranted to give effect to legislative intent, such is not justifiable to change clear import of word in one provision to give effect to provision of uncertain and doubtful meaning, which is inimical to general purpose and intent of statute as well as irreconcilably inconsistent with associated provision harmonizing with legislative intent.

Though change in language is sometimes warranted to give effect to legislative intent, such is not justifiable to change clear import of word in one provision in order to give force and effect to entirely different provision that is of uncertain and doubtful meaning, and inimical to general purpose and intent of statute as well as irreconcilably inconsistent with associated provision harmonizing with legislative intent.

In Bank.

Original mandamus by Leslie E. Smith against the Board of Trustees of Barnes City and others to compel respondents to call and provide for holding of an election of city officers. Peremptory writ issued.

Frederick Baker, of Los Angeles, for petitioner.

Geo. DeLany Blair, of Los Angeles, and C. A. Lindeman, of Yuma, Ariz., for respondents.

FINLAYSON, Justice pro tem. This is a proceeding in mandamus brought by an elector of Barnes City to compel respondents to call and provide for the holding of an election of city officers on the second Monday in April, 1926.

On February 13, 1926, pursuant to a special election held on the 3d day of that month (hereinafter referred to as the incorporation election), Barnes City was incorporated as a city of the sixth class under the provisions of sections 1 to 3 inclusive, of the Municipal Corporations Act (St. 1883, p. 93). The respondent trustees and the other elective officers enumerated in section 852 of the act were elected at the incorporation election,

and are now acting as such officers. Petitioner has demanded that the respondent trustees call a general municipal election to be held on the second Monday in April next, for the choice of successors to themselves and to the other elective officers of the municipality. Respondents neglected to comply with this demand, and, therefore, this proceeding was initiated. The case turns upon the construction to be placed upon a certain provision in section 3 as amended in 1923. All the parties to the proceeding seem to be animated solely by a desire to secure an authoritative construction of the statutory provision in question.

Prior to its amendment in 1923, section 3 of the Municipal Corporations Act provided that the officers chosen at the incorporation election should hold their respective offices "only until the next general municipal election to be held in such city or town, and until their successors are elected and qualified." In 1923 the Legislature so amended the section that it now provides that the officers chosen at the incorporation election shall hold their respective offices "only until the next general municipal election to be held in such city or town, *or for such term as shall be hereinafter provided for officers of cities of the class to which the same may belong*, and until their successors are elected and qualified." Stats. 1923, p. 103. We have italicized the new matter added by the amendment.

Section 852, which has been amended at three different sessions of the Legislature, has always contained a provision to the effect that the elective officers of cities of the sixth class shall be chosen "at a general municipal election" to be held "on the second Monday in April in each even-numbered year." As that section now reads (Stats. 1919, p. 19), it is further provided that the elective officers, i. e., the members of the board of trustees, the clerk, and the treasurer, "shall hold office for the period of four years from and after the Monday next succeeding the day of such election, and until their successors are elected and qualified." The section also provides that the "respective terms of the members of the first board of trustees elected under the provisions of this section shall be determined as follows: The two members elected by the highest number of votes shall hold office for four years, and the three members elected by the lowest number of votes shall hold office for two years."

[1] If section 3 of the act read now as it did prior to the amendment of 1923, it is obvious that the respondent trustees and the other elective officers chosen at the incorporation election would hold their respective offices only until the election and qualification of successors to be voted for at a general municipal election held on the second Monday in April next. But it is claimed that, because the amendment of 1923 added to section

3 the words "or for such term as shall be hereinafter provided for officers of cities of the class to which the same may belong," the respondent trustees and the other elective officers chosen at the incorporation election are entitled to hold their respective offices until the election and qualification of successors to be elected not earlier than the second Monday in April, 1928.

The amendment cannot be given the effect claimed for it. Under the language added by the amendment such officers as may come within its purview, if any there be, are to hold for such "term" as shall be provided for officers of cities of the class to which they belong. If it were held that this new provision refers to officers in cities of the sixth class, it would be necessary to hold that the "term" referred to by the amendment is the same "term" which is provided for by section 852 of the act—that being the only section of the statute which purports to fix the term of office in cities of the sixth class. Section 852 provides for a general term of four years—running from the Monday next succeeding the general municipal election at which the officers are elected—and likewise for a special term of two years for three of the members of the first board of trustees chosen at the general municipal election following the incorporation of the city.

It cannot be that the word "term" in the clause added to section 3 by the amendment was intended to include the general four-year term mentioned in section 852. Had that been the legislative intent it would have been easy to say so in plain and unambiguous language. Moreover, the four-year term provided for in section 852 commences on the Monday next succeeding the second Monday in April in the year in which the general municipal election is held. If the officers elected at the incorporation election held for a four-year term—and that is the only term provided for officers of cities of the sixth class, if we except the special two-year term provided for certain of those officers—then that four-year term must either commence at the time when the certificates of election are filed in the office of the secretary of state as provided by section 3 or it must commence on the next succeeding third Monday of an even-numbered year. If a four-year term for such officers commenced with the filing of their certificates of election in the office of the secretary of state, it might expire almost two years before the election and qualification of their successors, as would be the case if the incorporation election were held shortly after the second Monday in April of an even-numbered year. In that event the officers chosen at the incorporation election would have to hold over their four-year term until their successors had been elected and had qualified, in which case their total tenure of office would be little short of six years. The same result would follow if a four-year term

were tacked on to the period intermediate the filing of the certificates of election with the secretary of state and the ensuing third Monday of an even-numbered year. It follows, therefore, that a construction of the word "term," as used in section 3, which would give to that word such a scope and meaning that it would include the four-year term provided for by section 852, would be entirely out of harmony with the general purpose and intent of the statute, for the general design of the act contemplates the creation of self-governing municipalities, the electors whereof, at least in so far as cities of the sixth class are concerned, shall be accorded the privilege of voting for their city officers as often as once in every two years.

[2, 3] Moreover, any construction of the word "term," as used in section 3, which would cause it to include the four-year term provided for by section 852, would bring this part of section 3 into irreconcilable conflict with the immediately preceding legislative declaration that the officers chosen at the incorporation election shall hold their respective offices "only until the next general municipal election to be held in such city or town." In construing the two seemingly inconsistent provisions in that part of section 3 which is now under consideration we must not lose sight of the fact that the first of those provisions—the one which declares that the officers chosen at the incorporation election shall hold office "only until the next general municipal election"—was re-enacted at the time of the amendment. It cannot be assumed that the intention to enact and to publish the new portion was any more clear and direct than was the intention to re-enact and to republish the old portion of the section. The whole section, since its amendment, should be construed in the same light that an entirely new and original piece of legislation would be viewed, giving to each part, if possible—the old as well as the new—some effect consistent with the entire statute. *Donlon v. Jewett*, 26 P. 370, 88 Cal. 530. Nor does it necessarily follow, merely because the old words are placed before the new ones which the 1923 amendment added, that therefore the former are supplanted by the latter if there is any irreconcilable inconsistency between them. True, it has sometimes been stated as a rule of construction that, where there is an irreconcilable conflict between different provisions of a statute, that provision which is last in order of position will prevail as being the latest expression of the legislative will. But this purely arbitrary rule of construction, which, if it exists at all, springs from the necessity for some rule in peculiar cases, is not to be applied when the provision standing first in the act is the one which is more in harmony with the general purpose of the statute. 25 R. C. L. p. 1012. In the present instance it is clear that the provision which comes first in the order

of position—the one to the effect that the officers chosen at the incorporation election shall hold “only until the next general municipal election”—is the one which is more in harmony with the fundamental purpose of this statute, for, when the act is considered in its entirety, it is at once apparent that it was enacted for the creation and organization of self-governing municipalities, the electors whereof should be accorded the privilege of voting for their respective municipal officers at least as often as once in every two years.

[4] If the word “term,” as used in the added clause of section 3, were held to include the special two-year term provided for in section 852, and that is precisely what respondents claim, then it would be possible, in certain cases, for the officers elected at the incorporation election to hold office for a period just short of four years, as, for example, where the incorporation election was held shortly after the second Monday in April of an even-numbered year. The reasons already stated for holding that the word “term” in section 3 should not be construed as including the four-year term provided for by section 852 apply with equal cogency to any construction which would cause that word to include the special two-year term provided for by section 852. And there is this further objection: That part of section 852 which relates to the special two-year term reads: “The respective terms of the members of the first board of trustees elected under the provisions of this section shall be determined as follows,” etc. In order to give the word “term,” as used in section 3, the meaning contended for by respondents, it would be necessary to construe this part of section 852 as though it read: “The respective terms of the members of the first board of trustees elected under the provisions of this act shall be determined,” etc.; thus substituting the word “act” for the word “section.” It may be conceded that the canons of construction sometimes warrant a change in the language of a statute where it is necessary to do so in order to give effect to the manifest intention of the Legislature. But this license of construction is not justifiable, where, as here, it is sought to change the clear import of a word in one provision in order to give force and effect to an entirely different provision that is of uncertain and doubtful meaning and is inimical to the general purpose and intent of the statute as well as irreconcilably inconsistent with an associated provision which does harmonize with the general legislative purpose and intent.

Summarizing our views, we may say: In order to give to the clause added to section 3 by the amendment of 1923 the meaning claimed for it by respondents, two drastic acts of judicial legislation would be necessary. First, it would be necessary to cut down and to entirely extirpate the provision

in section 3 which declares that officers elected as respondents were shall hold office “only until the next general municipal election”; and, secondly, it would be necessary to substitute in section 852 the word “act” for the word “section.” For the reasons stated we think any such invasion of the legislative function is wholly without warrant. It follows, therefore, that it is the duty of respondents to call, and to provide for the holding of, a general municipal election on the 12th day of April next.

Let the peremptory writ of mandate issue as prayed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; CURTIS, J.; SEAWELL, J.

198 Cal. 329

In re SPENCER'S ESTATE. (S. F. 11539.)

(Supreme Court of California. March 24, 1926.)

1. Domicile ⇨8—No presumption is indulged that unmarried man, whose employment suggests no permanency of abode, would continue to live for any length of time in place where he last voted.

No presumption is indulged that unmarried man, whose employment suggests no permanency of abode, would continue to live for any great length of time in place where he voted.

2. Executors and administrators ⇨29(3) — Finding that deceased was resident of county held sustained by evidence and conclusive on motion to dismiss proceedings.

Finding that deceased was resident of county held sustained by evidence and conclusive on collateral attack five years after issuance of letters of administration by motion to dismiss proceedings.

3. Courts ⇨475(2, 3)—Superior court, where petition for letters of administration is first filed, has exclusive jurisdiction to determine question of decedent's residence.

Court in which petition for letters of administration is first filed has exclusive jurisdiction to determine question of decedent's residence, and its determination is reviewable only by appeal.

In Bank.

Appeal from Superior Court, Alameda County; George Samuels, Judge.

In the matter of the estate of J. Marshall Spencer, deceased. From an order of the Superior court of Alameda county denying a motion to dismiss probate proceedings, the Public Administrator of the County of Sacramento appeals. Order affirmed.

W. Rigby, of Sacramento, Fabian H. Hillebrandt, of San Francisco, and Hugh H. Sydenham, of Sacramento, for appellant.

David J. Clark, of Oakland, for respondent.

SEAWELL, J. This appeal was taken from an order made February 2, 1925, by the superior court of the county of Alameda, denying appellant's motion as public administrator of the county of Sacramento, for an order dismissing the probate proceedings in the above-entitled matter inaugurated in said county of Alameda, April 20, 1920, wherein letters of administration were regularly issued to respondent by said superior court upon the estate of the decedent, J. M. Spencer, on the 13th day of May, 1920. No proceedings for the administration of said estate were pending in any other court of this state. The sole ground of the motion, as stated in the notice, was that said court did not have "jurisdiction of the proceedings." Said notice of motion constituted the first and only objection made by appellant, or by any other person, to the issuance of letters of administration to respondent, and it was not made until the expiration of a period of almost five years following the day upon which said letters were issued.

The jurisdictional defects were not specifically pointed out in the notice of motion, but were attempted to be shown by the evidence taken at the hearing of the motion, and were grounded upon the claim that the domicile of the decedent at the time of death was in the county of Sacramento, and not in the county of Alameda, as found by the probate court of the latter county. The evidence presented at the hearing upon which the court was called upon to determine the question of the domicile or place of residence of said decedent at the time of his death was very meager. Decedent was a native of the state of Illinois, and unmarried. Respondent, Gordon A. Dize, his cousin, was his only known relative residing within this state, or elsewhere, so far as the record shows. The earliest account by any one that knew decedent as a resident of this state commenced with the year 1913. During that year he registered as an elector of the city of Sacramento, and gave as his occupation, "carpenter" and the city of Sacramento as his place of residence. In 1916 he registered as a resident of Natoma, county of Sacramento, and gave as his occupation "dredgeman." He became attached to the American forces in the World War some time thereafter, and received wounds or injuries while in the line of duty from which he died at Lincoln, England, in 1918. There is evidence in the record to the effect that at the time of his enlistment, or shortly prior thereto, he was residing at the city of Berkeley, Cal., where he kept his trunk and his personal effects. Just prior to entering the service he made his cousin, respondent, the custodian of his trunk and personal effects. Said personal property was appraised at the value of \$50. He also had on deposit with a bank in the city of Sacramento approximately the sum of \$300. He obtained from the government a war risk

insurance policy in the sum of \$10,000, which constituted by far the greater part of his estate.

There is no room for serious controversy as to the correctness of the statement of facts as above outlined. On the other hand, however, a former acquaintance of the decedent, who was a resident of the county of Sacramento at all the times decedent was a resident thereof, testified that the latter was a resident of said county continuously from 1913 to the day he became attached to the American forces, while his cousin, respondent, testified that decedent was a resident of the city of Berkeley, county of Alameda, during the particular period in dispute. There was proof arising from inferences, and also supported by direct evidence, tending to sustain the finding that decedent was a resident of Berkeley, county of Alameda, at and immediately prior to the time he was enlisted for active service. He had no other property, personal or real, than said personal effects which were left with the respondent, at his Oakland home, and moneys on deposit mentioned above. The first person to be informed of the decedent's death was respondent, to whom letters of administration were issued May 13, 1920. A bond in the sum of \$510, covering the deposit in bank at Sacramento and the personal property in the county of Alameda, was executed, and respondent entered upon the administration of the estate. The estate has been kept open for the purpose of collecting the proceeds of the \$10,000 war risk policy issued aforesaid.

[1-3] It has been heretofore held by this court that the mere fact that one is registered in a certain place and has voted therein is not conclusive evidence upon the question of his domicile. *Bradley v. Davis*, 104 P. 302, 156 Cal. 267; *Quinn v. Nevills*, 93 P. 1055, 7 Cal. App. 231. Such a circumstance would be proportionately weakened as evidence if it should be shown that the person, whose residence is the subject of inquiry, was an unmarried man, unattached by domestic or family ties, and was not engaged in any business or employment that would suggest permanency as to a place of abode, and, further, that such person, as shown here, had actually changed both his residence and occupation at least once within a period of three years. No presumption could be indulged that a person so circumstanced would continue to live for any great period of time in the place in which he was last registered. The rule that prohibits interference on the part of an appellate court with the orders or findings of the trial court in case of a conflict of evidence as to the establishment of probative facts would alone compel an affirmation of the order. The proceeding before us amounts to nothing more or less than a collateral attack upon a judgment made nearly five years after its entry. The issuable fact as to the residence of the decedent was before the court,

and upon proofs directed to that point—there being no objection or opposition thereto—the court determined that the decedent was a resident of the county of Alameda at the time of his demise. It cannot be claimed that the judgment or order is void upon its face or that any one connected with its procurement was guilty of practicing extrinsic fraud in any manner whatsoever. It has many times been held by this court that the superior court of the county in which the petition for letters of administration is first filed has exclusive jurisdiction to determine the question as to the residence of the decedent, and the courts of other counties must abide the determination of that court, which is reviewable only upon appeal. Surely the court had jurisdiction to weigh the evidence and consider its sufficiency to establish the residence of the decedent, and, if it erred in that respect, the proper remedy was by appeal within the time allowed by law. In the instant case no appeal was taken. In the absence of a claim of fraud as to the procurement of the order, and no such claim is made, and there being no reasonable ground to support the claim that the order is void upon its face, it stands impregnable to the belated attack made upon it. *Estate of Griffith*, 23 P. 528, 24 P. 381, 84 Cal. 107; *Estate of Latour*, 73 P. 1070, 74 P. 441, 140 Cal. 414; *Estate of Damke*, 65 P. 888, 133 Cal. 433; *Dungan v. Superior Court*, 84 P. 767, 149 Cal. 103, 117 Am. St. Rep. 119; *Miller v. Superior Court*, 199 P. 805, 186 Cal. 453; *Hill v. Superior Court*, 205 P. 430, 188 Cal. 352; 11 Cal. Jur. 355.

The order appealed from is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; SHENK, J.; LAWLOR, J.; LENNON, J.

198 Cal. 278

MARR v. SOUTHERN CALIFORNIA GAS CO. et al.

FARMERS' & MERCHANTS' BANK et al. v. MARR.

(L. A. 8223.)

(Supreme Court of California. March 15, 1926.)

1. Appeal and error ⚡544(3).

On appeal from judgment prosecuted on judgment roll alone, only error appearing on face of judgment roll may be considered.

2. Appeal and error ⚡907(2)—In absence of evidence, finding of trial court that special assessment district was entirely within boundaries of city will be presumed to be supported by evidence.

In suit to enjoin levy of taxes to pay special improvement bonds, where description of assessment district contained in ordinance of intention was technical, making it impossible

to determine whether territory of improvement district was entirely within limits of city, in absence of evidence presented to trial court, it will be presumed on appeal that finding of trial court that all district was within city was supported by evidence.

3. Municipal corporations ⚡450(2)—Statement of court in conclusions of law description of boundaries of improvement district as shown on map controlled description in ordinance of intention to form district, and ordinance calling bond election held not finding variance existed (St. 1915, p. 100, § 2, subd. 4, as amended by St. 1919, p. 671, § 3).

In suit to enjoin levy of taxes to pay special improvement bonds, statement of trial court in conclusions of law that description of boundaries of district shown on map on file in office of city clerk controlled description of boundaries as set forth in city ordinance of intention to form district, and ordinance calling election to authorize bonds, in so far as there was any variance between description on map and in ordinance, was but declaration of law contained in St. 1919, p. 671, § 3, amending St. 1915, p. 100, § 2, subd. 4, and was not finding that such variance actually existed.

4. Municipal corporations ⚡450(4)—Refund of special assessment on land outside district held not to affect proceedings to organize improvement district.

In suit to enjoin levy of taxes to pay special assessment district bonds in which trial court found that refund of tax to certain person was because his land was not within district, such refund did not affect proceedings for organization of district or for issuance of bonds and did not render tax levy on lands within district invalid.

5. Municipal corporations ⚡513(7)—Denial of complaint to enjoin levy of taxes in improvement district held to present issue of omission of property from levy.

In suit to enjoin levy of taxes to pay special assessment district bonds and for other relief, denial of allegation of complaint that city council threatened to omit from tax levy three parcels of land within district, by at least one of opposing parties, was sufficient to present such issue.

6. Municipal corporations ⚡513(8)—Finding levy of taxes was made on all property within improvement district, and council would in future, unless restrained, levy taxes on all taxable property, held sufficient.

In suit to enjoin levy of taxes to pay special assessment district bonds, finding that levy of certain year was made on all property within district, and that city council would in future, unless restrained, levy taxes on all taxable property within district to pay principal and interest on bonds, was sufficient.

7. Municipal corporations ⚡917(1)—Failure of ordinance and bonds to refer to statute as amended held not to invalidate bonds (St. 1915, p. 99; St. 1919, p. 670).

That ordinance authorizing issuance of special improvement district bonds recited that proceedings for such authorization were in pur-

suance of St. 1915, p. 99, and bonds as issued and sold refer to such act without referring to it as amended by St. 1919, p. 670, did not render bonds void.

8. Evidence ⚡83(2)—Employment of attorney by council, in bond issue proceeding, presumed regular (Glendale City Charter, art. 8, § 4 [St. 1921, p. 2218]).

In suit to enjoin levy of taxes to pay special assessment district bonds, in absence of showing to contrary, it will be assumed that city council regularly pursued authority under its charter (Glendale City Charter, art. 8, § 4), in employing attorney in bond issue proceeding.

9. Municipal corporations ⚡513(8)—Right to compensation for services of attorney, not party to suit to enjoin levy of taxes in improvement district, could not be adjudicated.

Rights of attorney, not made party to suit to enjoin levy of taxes to pay special improvement district bonds, to compensation for services in bond issue proceeding, could not be adjudicated therein.

10. Municipal corporations ⚡513(8)—Injunction cannot issue to restrain expenditure of money already paid to attorney by improvement district for services in bond issue proceedings.

In suit to enjoin levy of taxes to pay special improvement district bonds, injunction could not be issued to restrain expenditure of money already paid out to attorney for services in bond issue proceedings.

11. Municipal corporations ⚡887—Expenditure of money on warrants drawn on bond fund to credit of fund of other city departments on account of "incidental expenses" in connection with improvement held proper (St. 1915, p. 100, § 2, subd. 3).

In special improvement district bond proceedings, transferring from bond fund, on warrants duly issued, money to credit of funds of other city departments as payment on account of expenses of city generally, presumably for engineering work and drafting, was proper, as coming within "incidental expenses" in connection with improvement proceedings, under St. 1915, p. 100, § 2, subd. 3.

[Ed. Note.—For other definitions, see Words and Phrases, Incidental Expenses.]

12. Municipal corporations ⚡886—Paying interest received from bond fund deposits pending determination of controversy as to validity of bonds into general funds of city held proper (Glendale City Charter, art. 11, § 14 [St. 1921, p. 2224]).

In suit to enjoin levy of taxes to pay special assessment improvement district bonds, paying interest from bond fund deposits pending determination of controversy into general funds of city instead of into bond fund was proper, under Glendale City Charter, art. 11, § 14, creating general budget fund and providing that revenues from various enumerated sources including interest on bank deposits should be credited to such fund.

13. Municipal corporations ⚡886.

Provision of Glendale City Charter, art. 11, § 14 (St. 1921, p. 2224), that revenues including interest on bank deposits should be credited to general budget fund, held proper.

14. Municipal corporations ⚡513(8)—Judgment, in suit to enjoin levy of taxes to pay improvement district bonds, directing deficiency tax levy, held proper.

In suit to enjoin levy of taxes to pay bonds of special improvement district, in which complaint in intervention on behalf of bondholders sought to compel city authorities to levy tax to pay principal and interest on bonds accrued and to become due, were ordinance authorizing bond issue and provision of bonds themselves as sold and delivered made \$12,000 principal and interest due August 1, 1923, and \$2,000 principal and \$2,460 interest due August 1, 1924, and tax levy of 1922 and 1923 provided for aggregate of only \$7,500, judgment which directed deficiency tax levy of \$8,960 was proper.

15. Appeal and error ⚡694(1)—Finding that allegation that much property of special improvement district had been sold and other taxable property had been removed therefrom was not true held not subject to attack on appeal, in absence of evidence.

In suit to enjoin levy of taxes to pay special improvement district bonds, finding that allegation that much property had been sold and other taxable property removed from district, relied on to show that certain deficiency levies constituted taking property without due process of law, was not true, in absence of evidence, was not subject to attack on appeal, and, even if it had been true, would not have defeated levies necessary to provide interest and principal of bonds.

16. Constitutional law ⚡290(1)—Levy to pay special improvement district bonds held not to constitute taking of property without due process of law, because district was formed after first Monday in March in year in which levy was made (St. 1915, p. 99, as amended by St. 1919, p. 670).

Where, before first Monday in March, city, municipal corporation, was in existence, with power to tax property within improvement district, and to enforce lien as of such date, and there was in existence at such time property within district, under St. 1915, p. 99, as amended by St. 1919, p. 670, levy for 1922 to pay special assessment bonds and interest did not constitute taking property without due process of law because district was formed after first Monday in March, 1922.

17. Taxation ⚡301(1)—If property is subject to lien of tax as of first Monday in March, when political subdivision or other governmental entity of state vested with power to tax also exists, if not prohibited by statute or otherwise by law, tax may be levied to meet debts incurred after such date and before tax levy is fixed.

Where property is in existence and subject to lien of tax as of first Monday in March, when there is also in existence political subdivision or other governmental entity vested

with power of imposing tax, when not prohibited by statute or otherwise by law, tax may be levied to discharge financial obligations incurred after first Monday in March and before tax levy is fixed.

18. Municipal corporations ⚡943(3)—**Improvement district and taxpayer held estopped to set up defects or irregularities against bona fide purchasers.**

In suit to enjoin levy of taxes to pay special improvement district bonds and for other relief, finding that bonds were negotiable instruments, and that, by reason of recitals and promise of city contained therein, special improvement district and any taxpayer therein were estopped to set up any alleged defects or any irregularities against bondholders, bona fide purchasers for value before maturity and without notice of defects, was proper.

19. Municipal corporations ⚡935—**Bonds of improvement district held validated by statute** (St. 1923, p. 272; St. 1915, p. 99; St. 1919, p. 670).

Under St. 1923, p. 272, validating bond issues under St. 1915, p. 99, or as amended (St. 1919, p. 670), where bonds of special improvement district were authorized by more than two-thirds qualified electors voting at election at which they were authorized and were sold at par and at a premium, alleged irregularities subsequent to formation of district which, even if proved, were not of jurisdictional nature, would have been wiped out.

20. Evidence ⚡29—**Court takes judicial notice of passage of statutes** (St. 1923, p. 272; St. 1915, p. 99; St. 1919, p. 670).

Court takes judicial notice of passage of statutes, and fact that St. 1923, p. 272, validating bond issue under St. 1915, p. 99, or such act as amended (St. 1919, p. 670), was not pleaded and proved in suit to enjoin levy of taxes to pay special improvement district bonds, would not prevent its being considered.

In Bank.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Suit by Winifred F. Marr against the Southern California Gas Company and others, in which the Farmers' & Merchants' Bank and others intervened to have proceedings for formation of a special improvement district and the issue of bonds declared null and void, and to enjoin a levy of taxes to pay such bonds. From a judgment for defendants and interveners, plaintiff appeals. Affirmed.

Winifred F. Marr, in pro. per.

Thos. J. Reynolds, Musick, Burr & Pinney, O'Melveny, Millikin, Tuller & Macniel, Paul E. Schwab, Edward T. Bishop, County Counsel, and J. N. O'Connor, Asst. County Counsel, all of Los Angeles, and Ray L. Morrow, of Glendale, for respondents.

SHENK, J. Commencing May 10, 1922, proceedings were taken under the statute

(Stats. 1915, p. 99, as amended Stats. 1919, p. 670) for the formation of municipal improvement district No. 6 in the city of Glendale and for the issuance of \$50,000 in bonds of the district to acquire or construct works for supplying the people of the district with gas. The proceedings were completed and the bonds were authorized, issued, and sold to the respondent William R. Staats Company and were by them resold to the interveners prior to the commencement of this action. The appellant, a resident and taxpayer within the district, brought this action for the purpose of having it judicially declared that the proceedings for the formation of the district and for the issuance and sale of said bonds were null and void and to enjoin the city authorities from levying and collecting taxes on the property within the district to discharge the obligation represented by said bonds. In her amended complaint as amended and in her supplemental, second supplemental, and third supplemental complaints the appellant alleged numerous grounds of irregularity and illegality in said proceedings. All of the material allegations contained in these pleadings were put in issue by the answers of the defendants named therein or by some one of them. A complaint in intervention was filed on behalf of the holders of said bonds, wherein it was sought to have the proceedings declared valid and to have the city authorities compelled to levy a tax to pay the principal and interest of said bonds accrued and to become due.

[1] After trial on the merits the court found and concluded that the proceedings were regular and valid in all respects, and that the said bonds were binding obligations on the property of said district and rendered judgment accordingly. It also rendered judgment in favor of the respondent interveners directing the council of said city to levy and collect a tax each year upon the taxable property of said district sufficient to pay the principal of and interest on said bonds as the same should become due and to levy and collect an additional sum to make up a deficiency in the levies of 1922 and 1923 on account of said bonds. This appeal from the judgment is prosecuted on the judgment roll alone. We are therefore confined to a consideration of alleged errors appearing on the face of said judgment roll. *Neale v. Morrow*, 161 P. 1165, 174 Cal. 49; 2 Cal. Jur. 525. The record is certified by the clerk and contains some 550 printed pages. The contentions of the appellant on that record will first be considered and as far as may be in the order of their presentation.

[2] 1. It is contended that a portion of the district is outside of the boundaries of the city of Glendale and that the proceedings for the formation of the district are therefore void on the authority of *Mulville v. City of*

San Diego, 192 P. 702, 183 Cal. 734. The appellant's pleadings alleged that a portion of the district was outside of the city and the answer of at least one of the respondents denied that allegation. The court found that Ordinance No. 578, being the ordinance of intention to form the district, contained a correct description of the exterior boundaries of the proposed district and referred to a map on file in the office of the city clerk for all details as to the extent of the district and that the exterior boundaries of said district were entirely within the exterior boundaries of the city of Glendale. The district embraces several square miles of territory and the description contained in the ordinance of intention is a technical one covering about five printed pages. From a reading of this description it is impossible to determine whether or not said territory is or is not entirely within the limits of said city, and, as the evidence is not before us, the finding of the trial court will be presumed to speak the truth and be supported by the evidence. Estate of Shirley, 138 P. 994, 167 Cal. 193; 2 Cal. Jur. 525, and cases cited.

[3] 2. Ordinance No. 590, being the ordinance calling the election at which the bonds were authorized, also contained a detailed description of the boundaries of the district. It is claimed by the appellant that this description particularly shows that a portion of the district is outside the city. There is nothing in this description, however, from which it is possible, without the aid of evidence, to determine that such is the case. For like reasons it must also be concluded that there is nothing in that ordinance which would render the findings unsupported. It is not contended that the map on file in the office of the city clerk did not properly delineate the boundaries of the district as entirely within the city limits, but it is insisted that the statement of the trial court found in the conclusions of law to the effect that the description of the boundaries of the district as shown on said map control over any description of said boundaries as set forth in said Ordinances Nos. 578 and 590, "in so far as there may be any variance between the descriptions on said map and in said ordinances," is in effect a finding that there was such variance, and that therefore the council had no jurisdiction over the district with boundaries at variance with the description set forth on said map. The statement of the court cannot be taken either as a finding or a conclusion that such variance actually existed, but only that if such variance did exist the map should control. Said statement is but a declaration of the law as contained in the amendment of subdivision 4 of section 2 of the act that "said map shall govern for all details as to the extent of the said district." Stats. 1919, p. 671.

[4] 3. It is contended that the record shows

that it was intended by the city council to tax only a portion of the territory within the district for the payment of said bonds. In this connection it was alleged in the supplemental complaint that the lands of G. B. Woodberry were within the district and that the council had refunded to him the tax on his land resulting from the levy of 1923. The refund was admitted by the city, but it was denied that said land was within said district. The court found that said tax was refunded for the reason that the land of Woodberry was not within the boundaries of said district. It is not pointed out how this refund could affect the proceedings for the organization of the district or for the issuance of said bonds and it may not be said that such refund affords any ground for the conclusion that the tax levy on the lands within the district was invalid. The finding of the court on the issue squarely raised as to the location of said land is a conclusive answer to the contention.

[5, 6] 4. In her second supplemental complaint the appellant alleged in effect that the city council threatened to levy a tax and thereafter to continue to levy taxes within said district to satisfy said bonded indebtedness, but threatens to omit from said levy three parcels of land within the district. The claim is made that the allegation was not sufficiently denied. It was, however, denied by at least one of the respondents and this denial was sufficient to present the issue. It is also asserted that the court failed to find upon the issues presented. The court did find that the levy of 1922 was made upon all the property within the district and that the council would in the future, unless restrained by the court, levy taxes upon all the taxable property within the district to pay the principal and interest on said bonds. This finding was unquestionably sufficient.

[7] 5. The ordinance authorizing the issuance of said bonds recited that the proceedings for such authorization were in pursuance of the act approved April 20, 1915, and the bonds as issued and sold contained the provision that—

"Under and by virtue of an act of the Legislature of the state of California entitled [quoting title], approved April 20, 1915, municipal improvement district No. 6 of the city of Glendale, state of California, by its governing body, the mayor and city council, promises out of the fund hereinafter described, to pay to the bearer," etc.

The title of the act was amended in 1919 by striking out the word "therein." Stats. 1919, p. 670. Neither the ordinance nor the bonds, in referring to the act under which the proceedings were taken, referred to the act "as amended," and it is claimed that for that reason the said bonds are a nullity. There is no merit in the contention. Reference to the act was merely for the purpose of identify-

ing the proceedings as taken under a particular enabling act and was but a declaration that the proceedings were had and the bonds issued under said act as it existed when the proceedings were taken and the bonds were issued. *Steele v. Village of River Forest*, 30 N. E. 1034, 141 Ill. 302.

[8-11] 6. The court found that at the time of the trial there was in the treasury of the city of Glendale to the credit of municipal improvement district No. 6 bond fund the sum of \$49,081.57. The difference between that sum and the entire proceeds from the sale of said bonds the appellant alleged was illegally expended by the city. One item consisted of the payment of \$750 to an attorney for legal services rendered in connection with said proceedings, including those for the issuance of said bonds. The court found that this attorney was neither an officer nor an employee of the city and that the expenditure had been made on the 14th of September, 1922. No specific finding is made with reference to the alleged illegality of said expenditure, but it is found and concluded generally that the challenged acts and proceedings of the city were regular and valid. The city council had the power to engage an attorney to assist the city attorney in connection with proceedings in which the city was interested. Charter (Stats. 1921, p. 2218). In the absence of a showing to the contrary, and none is shown, it will be assumed that the council regularly pursued its authority. Furthermore, the said attorney was not made a party to this action and the expenditure was made prior to the commencement of this action. Under such circumstances the rights of said attorney to the money received could not be adjudicated in said action nor could an injunction be issued to restrain the expenditure of money already paid out. There was also transferred from said bond fund, on warrants duly issued, the sum of \$171.38 to the credit of funds of other city departments as payment on account of expenses of the city generally, presumably for engineering work, drafting, etc. Objection is made to this expenditure from the bond fund, but appellant has advanced no reason, and we have discovered none, why the said expenditures should not rightly be made as "incidental expenses in connection" with the improvement district proceedings as mentioned in subdivision 3 of section 2 of the act. Stats. 1915, p. 100.

[12, 13] 7. Pending the final determination of this controversy, the city placed the moneys in said bond fund on deposit at interest in certain banks. The interest received from these deposits was paid into the general funds of the city. The appellant insists that the said interest should accrue to the bond fund and that the city should be enjoined from paying said interest into its general fund. Section 14 of article 11 of the city charter (Stats. 1921, p. 2224) would seem to

be full authority for the course followed by the city. That section of the charter creates the "general budget fund" and provides that revenues from various enumerated sources, including interest on bank deposits, shall be credited to said fund. There appears to be no reason why the charter may not properly so provide.

[14] 8. Appellant contends that the findings do not support that portion of the judgment which directed a deficiency tax levy of \$8,960. According to the ordinance authorizing the issuance of the bonds and the provisions of the bonds themselves as sold and delivered, \$9,000 principal and \$3,000 interest were to become due on August 1, 1923; also \$2,000 principal and \$2,460 interest were to become due August 1, 1924. The tax levies of 1922 and 1923 provided for an aggregate of only \$7,500. Mathematical computation discloses that the amount of the deficiency was correctly figured and provided for in the judgment.

[15] 9. It is further contended that the deficiency levies for 1922 and 1923 constitute the taking of appellant's property without due process of law. She predicates her contention on the assumption that since the levy of 1922 much property of the district has been sold and other taxable property been removed from the district. This allegation was denied and the court found that the allegation was not true. Whatever may be the fact as disclosed by the evidence, the finding, in the absence of evidence, is not subject to attack. It may also be said that, even if the allegation be true, no reason appears why the change in the status of the taxable property in the district could defeat the levies necessary to provide for the interest and principal of said bonds. See *Berkey v. Board of Commissioners*, etc., 110 P. 197, 48 Colo. 104, 20 Ann. Cas. 1109.

[16] 10. Appellant next contends that the levy of 1922 was further in violation of the constitutional guaranty that property shall not be taken without due process of law because the district was formed after the first Monday in March, 1922. She cites and relies on the case of *East Bay Municipal U. Dist. v. Garrison*, 218 P. 43, 191 Cal. 680. In that case the act under which the petitioning district elected to avail itself of the assessments made by the county assessors as a basis for the district taxation provided:

That the board of directors of the district "shall declare its said election by ordinance and file a certified copy of the same with the auditor or auditors of the county or counties in which the district is situated, on or before the first Monday in February of each year."

The petitioning district was not organized until May 22, 1923, and on the 31st day of the same month the board of directors adopted an ordinance electing to avail itself of the assessments made by the assessors of the counties of Alameda and Contra Costa for

the purpose of district taxation to be assessed, levied, and collected for the year 1923, and filed a certified copy of said ordinance with the auditor of each of said counties and demanded that the proper officers of said counties compute and enter in the assessment books the assessments for the sums to be paid as a district tax upon the property within the East Bay municipal utility district. Upon their refusal the proceeding was commenced to compel them to do so. It was therein properly held that the time provision of the statute was mandatory and that, since the required ordinance had not been adopted prior to the first Monday of February of that year, no duty devolved upon the respondent county officers to levy and collect the district tax as demanded by the petitioner. As an additional reason why the writ should be denied in that case it was stated in effect that inasmuch as the East Bay municipal utility district was not in existence on the first Monday in March, 1923, the property in said district was not subject to the lien of the tax as of that date for the support and maintenance of the district for that year; in other words, the governmental body under whose authority the tax was to be levied and the governmental entity for whose support and maintenance the funds were required were not in existence on the first Monday in March, 1923, consequently there was no legal obligation on the part of the taxpayers in the district and no legal purposes of the district for which a lien for any tax could attach on the first Monday in March, 1923. That case, when examined in the light of the facts there presented, is not authority for plaintiff's position.

[17] When the property is in existence and is subject to the lien of the tax as of the first Monday in March, and there is also on that date in existence a political subdivision or other governmental entity of the state vested with power to impose the tax, it is obvious that, when not prohibited by statute or otherwise by law, a tax may be levied to discharge financial obligations incurred after the first Monday in March and before the tax levy is fixed. In the present case there was in existence on the first Monday in March, 1922, the city of Glendale, a municipal corporation, vested with power to tax the property within municipal improvement district No. 6 and to enforce the lien as of that date. There was also in existence at that time the property within the district which was subject to taxation and there was also in effect the act of 1915 through the medium of which the obligation of said bonds could be incurred and the payment thereof provided for. No statute or decision has been referred to which would indicate that the tax under such circumstances could not be levied.

[18] 11. The court found and concluded that the said bonds were negotiable instruments and that all of the purchasers thereof,

interveners and respondents herein, were bona fide purchasers for value before maturity and without notice of any defects. It also found and concluded that, by reason of the recitals and the promise of the city contained in said bonds, the district and any taxpayer in the district were estopped to set up any alleged defects or irregularities against the bondholders. These findings are supported by the record and the conclusions are legally sound. *Baxter v. Vineland Irr. Dist.*, 63 P. 601, 136 Cal. 185; *Miller v. Perris Irr. Dist.* (C. C.) 99 F. 143; *Tulare Irr. Dist. v. Shepard*, 22 S. Ct. 531, 185 U. S. 1, 46 L. Ed. 773.

[19] The Legislature of 1923 adopted a validating act wherein it was provided that in all cases where the legislative branch of any municipality had called an election under the act approved April 20, 1915, or under said act as amended, for the purpose of forming a municipal improvement district thereunder and the incurring of an indebtedness by the issuance of bonds of the district, and where at such election two-thirds of the electors voting thereat should vote in favor of incurring such indebtedness—

"the power to issue such bonds and all the acts and proceedings of said municipality leading up to and including the issuance and sale or the proposed issuance and sale of such bonds are hereby legalized, ratified, confirmed and declared valid to all intents and purposes." Stats. 1923, pp. 272, 273.

That act contains a proviso to the effect that the said act shall not operate to legalize any bonds of any municipal improvement district of a municipality that have not at the time of the passage of the act been authorized by a vote of not less than two-thirds of the qualified electors in such improvement district voting at any such election or any bonds that have been sold for less than their par value. It was alleged and found herein and is not disputed that the said bonds received a favorable vote of more than two-thirds of the qualified electors voting at the election at which the bonds were authorized and that the said bonds were sold at par and at a premium. It therefore appears that the bond issue here in question was properly included within the conditions of said ratifying act. Assuming that irregularities alleged by the appellant subsequent to the formation of the district had been proved, they were not jurisdictional and the curative act would have wiped them out. *Los Angeles County Flood Control Dist. v. Hamilton*, 169 P. 118, 177 Cal. 119; 23 Cal. Jur. 611, and cases cited.

[20] There is no merit in the contention of the appellant that the said ratifying act may not be considered because it was not pleaded and proved by the respondents. The court takes judicial notice of the passage of that statute. 23 Cal. Jur. 664, 665.

Other points made by the appellant do not

require discussion, and, in view of the foregoing determinations, it is unnecessary to pass upon other contentions made by the respondents.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; LENNON, J.; CURTIS, J.; LAWLOR, J.

198 Cal. 365

GENERAL MOTORS ACCEPTANCE CORPORATION v. DALLAS, Sheriff of Stanislaus County. (Sac. 3835.)

(Supreme Court of California. March 30, 1926.
Rehearing Denied April 29, 1926.)

1. Trover and conversion *§*16.

Plaintiff in conversion must prove either ownership and right of possession or actual possession at time of conversion.

2. Appeal and error *§*173(5)—Defendant in conversion held entitled to set up Motor Vehicle Act for first time on appeal, to show that plaintiff failed to meet burden of proving ownership and right of possession to automobiles at time of conversion (Motor Vehicle Act 1915, § 8, as amended by St. 1919, p. 199, § 7).

In action for conversion of automobiles, of which plaintiff was not in actual possession at time of conversion, since burden was on plaintiff to prove ownership and right of possession in itself, defendant, for first time on appeal, was entitled to set up Motor Vehicle Act 1915, § 8, as amended by St. 1919, p. 199, § 7, to sustain contention that plaintiff failed to meet burden of proof resting on it.

3. Automobiles *§*19—One suing for conversion of automobiles, not having had actual possession, must prove compliance with Motor Vehicle Act (Motor Vehicle Act 1915, § 8, as amended by St. 1919, p. 199, § 7).

One suing for conversion of automobiles of which it did not have actual possession at time of conversion is required to prove that it complied with Motor Vehicle Act 1915, § 8, as amended by St. 1919, p. 199, § 7.

4. Automobiles *§*19—Assignee of conditional sales contract, suing for conversion of automobiles, held to have failed to meet burden of proof, where it failed to show compliance with Motor Vehicle Act (Motor Vehicle Act 1915, § 8, as amended by St. 1919, p. 199, § 7).

One suing as assignee of conditional sales contract, for conversion of automobiles of which it did not have actual possession at time of alleged conversion, by failing to prove compliance with Motor Vehicle Act 1915, § 8, as amended by St. 1919, p. 199, § 7, at time conditional sales contracts were signed to it held to have failed to meet burden of proving ownership and right of possession.

In Bank.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action of conversion by the General Motors Acceptance Corporation against Robert L. Dallas, as Sheriff of Stanislaus County. Judgment for defendant, and plaintiff appeals. Affirmed.

Charles W. Haswell, of San Francisco (Cecil A. Borden, of San Francisco, of counsel), for appellant.

J. W. Hawkins, of Modesto, for respondent.

LAWLOR, J. This is an action by the General Motors Acceptance Corporation, a corporation, against Robert L. Dallas, as sheriff of the county of Stanislaus, for damages resulting from an alleged wrongful conversion of two automobiles under a writ of attachment levied upon said automobiles by the sheriff on February 15, 1922, and issued in an action against the Modesto Motor Company, a corporation, plaintiff's predecessor in interest. The General Motors Acceptance Corporation alleges that it was the owner and entitled to the possession of the automobiles in question at the time the sheriff levied upon them. Judgment was entered by the trial court in favor of the sheriff whereupon the General Motors Acceptance Corporation appealed. The District Court of Appeal reversed the judgment.

It appears that the appellant's claim of ownership to said automobiles is based upon written assignments to it, dated, respectively, April 9, 1921, and July 20, 1921, by the Modesto Motor Company, for a cash consideration, of two conditional sales contracts purporting to have been entered into between the Modesto Motor Company and the purchasers named in said conditional sales contracts, wherein the respective titles to said automobiles were reserved in the seller until the purchase prices were fully paid. Subsequent to the purported assignment of the conditional sales contracts to the appellant, and at the time of the levy on the automobiles in question, they were left in the possession of the Modesto Motor Company, assignor, as, so appellant states, the agent of the assignee, appellant here. The trial court, among other things, found that the appellant was not the owner of the automobiles in question at the time of the alleged conversion by the sheriff. This finding was apparently, based upon the theory that the appellant had failed to prove the existence of valid conditional sales contracts covering the said automobiles, and therefore acquired nothing by the assignment to it of the purported contracts. However, on the appeal, the respondent refers to certain provisions of the Motor Vehicle Act (Stats. 1919, c. 147, p. 191) as supporting his contention that appellant had failed, in the trial court, to prove title in itself.

Section 8 of the Motor Vehicle Act of 1915, as amended by St. 1919, p. 199, § 7, reads, in part:

"Upon the transfer of ownership of any motor vehicle, the person in whose name such vehicle is registered and the person to whom ownership of such vehicle is to be transferred shall forthwith join in a statement of said transfer indorsed upon the reverse side of the certificate of registration of said motor vehicle in the space provided for said purpose, which statement shall be signed by the transferor and the legal owner in the manner and form of his signature contained on the face of said certificate and which statement shall likewise be signed by the transferee, who shall also set forth below his signature his post office address. Said statement shall include an application by the transferee for registration of said vehicle in his name. Said certificate so indorsed and bearing upon the reverse side thereof the signatures of the transferor and transferee, shall be forwarded by the transferee within ten days to the department together with proper fee of one dollar required by section seven of this act. The department shall file said certificate so jointly indorsed by transferor and transferee and upon receipt of the proper fee as above provided, the department, if satisfied of the genuineness and regularity of said transfer, shall register said motor vehicle in the name of said transferee.

"Upon such registration the department shall issue and forward to the applicant without further charge than as provided in section seven of this act, a new registration certificate in the manner and form as hereinabove provided for original registration. Until said transferee has received said certificate of registration and has written his name upon the face thereof in the blank space provided for said purpose by the department, delivery of said motor vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose. * * *

The 1923 act (Stats. 1923, c. 266, p. 517, § 45) is identical in substance, but provides also for a "certificate of ownership" which is to be signed by the parties to a transfer and forwarded to the motor vehicle department.

It is contended by the sheriff that:

"This being an action in conversion, the burden was upon the plaintiff [appellant] to prove its own title, and it was compelled to recover on the strength of its own title and not on the weakness of its adversary. * * * We maintain that the Motor Vehicle Act of 1919 * * * provides for the exclusive method of the transfer of title and right of possession of a motor vehicle. Said act provides that upon the transfer of ownership of a motor vehicle certain acts shall be done by the purchaser and the seller concerning the registration of the automobiles in question. * * * So in the instant case, appellant having failed to conform with the provisions of the Motor Vehicle Act, the lien created by reason of the levy of the attachment was superior to any interest acquired by the appellant. The title to the automobiles never passed, and * * * the title was still vested in the Modesto Motor Company, Inc. The sheriff had the right, and it was his duty, to attach that interest. If such were not the law, a sheriff could never attach property of one

person while it was in the possession of a third party. It is a complete defense to an action in conversion to show title in a third person. *Seymour v. Peters*, 35 N. W. 62, 67 Mich. 415. * * * Appellant must base its right of recovery on the assignments alone. It did not comply with the requirements of the statute, and therefore the 'intended transfer' is not valid or effective for any purpose."

On the other hand, the appellant urges:

"It is elementary that an attaching creditor only acquires by virtue of his levy such interest as the creditor has at the time of the levy. This being so, it is inconceivable that the attaching creditor could acquire any greater title in the automobiles than the Modesto Motor Company had. It is admitted that the Modesto Motor Company had, at the time of the levy of the attachment, absolutely no title to the automobiles, they having divested themselves of every interest that they might have had by virtue of the assignment to the plaintiff, and, further, there is in evidence the contract of bailment showing the conditions under which the automobiles were held by the Modesto Motor Company. * * *

"We will now discuss the point * * * whether or not, under sections 7 and 8 of the Motor Vehicle Act of 1919, the appellant was required to prove in the lower court that he [it] had complied with this section before he [it] could maintain an action in conversion. It is to be noted that this question is raised for the first time upon appeal. There is not one iota of evidence nor was there any question raised in the trial court as to whether the General Motors Acceptance Corporation [appellant] was or was not the legal or registered owner of this property under this section of the act. * * * Not one iota of evidence was introduced by the respondent to show that the plaintiff had failed to comply with section 8 of the Motor Vehicle Act, nor was the act ever mentioned. This point is disposed of in Cal. Juris. § 393, vol. 2, where it is held that matters raised for the first time on appeal will be given no consideration. Likewise it has been repeatedly held by this honorable court that it is not necessary to have legal title in a motor vehicle in order to maintain an action in conversion or replevin. * * * In other words, we contend that a prima facie case is made up when we prove an equitable interest in and to the property, or a special interest which is sufficient to maintain a conversion action, and we are not required to prove that we have the legal title of the property by exhibiting any legal ownership certificates issued by the motor vehicle department."

We do not think the principle advanced by the appellant—that matters raised for the first time on appeal will not be considered by the reviewing court—can have application to the instant case. Though the provisions of the Motor Vehicle Act were not advanced or relied upon by the sheriff at the trial or before the District Court of Appeal, and were, for the first time, referred to on rehearing before the latter tribunal, we are of the opinion that this court may properly consider their bearing on the ultimate fact in the case, namely, the ownership of the

two automobiles at the time of the alleged conversion.

[1, 2] As this is an action in *conversion*, and not one in *replevin*, as assumed by the District Court of Appeal, it was incumbent upon the appellant to sustain the affirmative of the issue and prove either ownership and the right of possession or actual possession of said automobiles in itself at the time of the alleged conversion thereof. *Green v. Burr*, 63 P. 360, 131 Cal. 236, 238; *Zaro v. Dakan*, 18 P. 680, 76 Cal. 565, 566, and 567; *Moody v. Goodwin*, 200 P. 733, 53 Cal. App. 693, 694; *Brinkley-Douglas Fruit Co. v. Silman*, 166 P. 371, 33 Cal. App. 643, 651; 24 Cal. Jur. pp. 1025 and 1043. If the appellant failed to prove either that it was the owner of the automobiles and entitled to their possession or that it was in the actual possession thereof when the alleged conversion took place, judgment was properly entered against it. The evidence clearly shows, as already indicated, that the appellant was *not* in the *actual* possession of the automobiles at the time of the asserted conversion. The burden therefore rested upon it of proving ownership and the right of possession in itself. To adopt appellant's contention that the sheriff should have introduced evidence at the trial to show a want of ownership in appellant within the meaning of the Motor Vehicle Act, and having failed so to do is now precluded from relying on that act, would, in effect, be to shift the burden of proof to the sheriff and make it necessary for him to prove a want of ownership in the appellant. It is plain, therefore, that the sheriff, at this time, may have recourse to the Motor Vehicle Act, or any other law, to sustain his contention that the appellant, in the absence of actual possession, utterly failed to meet the burden of proof resting upon it to show ownership and right of possession in itself at the time of the asserted conversion.

[3, 4] Only one question remains, and that is whether or not the appellant, in the absence of such actual possession, did prove ownership and the right of possession in itself. The recent case of *Parke v. Francis*, 228 P. 435, 194 Cal. 284, involved a consideration of section 8 of the Motor Vehicle Act. Though that case concerned an action in claim and delivery—a mere possessory action in which it is not essential to prove ownership in the plaintiff—certain of the court's language is pertinent and may be referred to here. In that case the conditional sale vendor, in whom title had been retained, assigned the conditional sale contract to the plaintiffs, but did not deliver the registration certificate to the assignees, nor was the automobile ever registered in the names of the assignees. Subsequently the vendee under the conditional sale contract sold the automobile to the defendant Francis, in whose name the car was then registered.

Upon being informed of this latter sale, the assignees of the conditional sale contract brought an action in claim and delivery, alleging they were the owners and entitled to the immediate and exclusive possession of the automobile in question. The court stated in part:

"The first question presented is whether the failure to comply with the requirements of section 8 of the Motor Vehicle Act (Stats. 1919, p. 191), as to the transfer of ownership in motor vehicles which are registered under the act, precludes the passage of the title to such vehicle. * * * The provision in question declares that, until the transferee of the 'ownership' in the car has received the original certificate of registration, and has written his name upon the face thereof in the blank space provided for that purpose by the department, the delivery of said motor vehicle shall be deemed not to have been made and title not to have passed, and said intended transfer shall be deemed to be incomplete and not to be valid or effective for *any purpose*. * * * The failure of the transferee of the 'ownership' in the car to procure the registration certificate properly indorsed does not make the sale void ab initio, but in the terms of the statute it is incomplete. * * * In the case at bar it is clear that the certificate of registration, which serves the purpose of the certificate of ownership and the certificate of registration provided for in the act of 1923, must have been properly indorsed upon the reverse side thereof by the transferee of the 'ownership' or title or interest in the car, filed with the motor vehicle department, and a new certificate of registration issued in the name of appellants, before title was completely vested in them, and before the transfer could be effective or valid for any purpose. * * * Appellants are the transferees of the 'ownership' of the automobile within the meaning of the third paragraph of section 8. Therefore the failure of appellants to obtain the certificate of registration, properly indorsed by themselves and McNabb, and to forward it, together with an application for re-registration, to the department within 10 days renders their title invalid as against the respondent. We have shown, in answer to the first proposition, that compliance with section 8 is essential to the transfer of title. * * *

The court then reiterates that the action was one in claim and delivery—a mere possessory action—and that in such an action it is not essential to plaintiff's recovery that he establish *ownership* in himself. However, it was concluded by the court, from the existence of circumstances peculiar to that case, that an estoppel precluded a recovery even in such a possessory action.

It is readily apparent from this recent interpretation of section 8 of the Motor Vehicle Act that re-registration in the name of the transferee of an automobile, within the time prescribed, "is a prerequisite to the passing of title." This being so, and, in the absence of actual possession by the appellant at the time of the alleged conversion, it was, in our view, incumbent upon the appellant at the trial to prove that it had complied

with the provisions of this section. The appellant, however, though more than the 10 days had elapsed between the dates of the assignments to it of the conditional sales contracts and the date of the levy by the sheriff, utterly failed to offer any evidence that it had fulfilled the requirements of the act, and it cannot be held, therefore, that the burden of proof resting upon it of establishing ownership and the right of possession in itself has been met. The judgment of the trial court in favor of the sheriff, though apparently based upon a different theory, will nevertheless have to be sustained.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; LENNON, J.; RICHARDS, J.; CURTIS, J.; SEAWELL, J.

193 Cal. 346

LAND DEVELOPMENT CO. et al. v. JORDAN, Secretary of State. (S. F. 11733.)

(Supreme Court of California. March 29, 1926.)

Corporations §62—Refusal of secretary of state to accept for filing articles of incorporation providing for entire issue of nonpar stock held improper (Const. art. 12, §§ 3, 12; Civ. Code, §§ 290b, 290e, 307, 322).

Refusal of secretary of state to accept for filing articles of incorporation providing for an entire issue of nonpar stock, under Civ. Code, §§ 290b, 290e, was improper under Const. art. 12, §§ 3, 12; Civ. Code, §§ 307, 322, inasmuch as the constitutional requirements are complied with when each share of a corporation represents the same interest as every other share, and there is a unity of liability as between all the shares.

In Bank.

Application for mandamus by the Land Development Company and others to be directed to Frank C. Jordan, as Secretary of State, to compel him to file articles of incorporation providing for the issuance of stock without par value. Peremptory writ granted.

Arnold C. Lackenbach, of San Francisco, for petitioners.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Deputy Atty. Gen., for respondent.

LAWLOR, J. Petition for a writ of mandate. It appears from the petition of the Land Development Company, H. Grecian, M. D. Steen, and Frederic C. Benner that on the 7th day of August, 1925, they presented to the respondent secretary of state certain articles of incorporation, accompanied by the requisite filing fees, with the request that said articles be filed. The secretary of

state did then and there refuse, and ever since has refused and declined, to file the said corporate articles, and advanced the following reasons for such refusal: (1) That this court, in *Del Monte Light & Power Co. v. Jordan*, 238 P. 710, has held section 290b of the Civil Code unconstitutional in so far as it purported to authorize the issuance of par and nonpar stock by the same corporation; and (2) that the proposed articles of incorporation violate sections 3 and 12 of article 12 of the Constitution, which require corporations to have shares of a "single par value."

The articles of incorporation presented to the secretary of state for filing provide for an entire nonpar issue of stock. The question then is whether or not such entire issue of nonpar stock by a corporation would be in conflict with the principles announced in *Del Monte Light & Power Co. v. Jordan*, supra, and in violation of sections 3 and 12 of article 12 of the Constitution.

It will aid in the solution of the question presented to set forth the respective contentions at some length.

Petitioners urge—

"that the requirements of sections 290 and 362 of the Civil Code requiring the preferred and common shares to be of the same par value can only have application to the stock structure of a corporation composed of more than one class of stock. It is evident that the only thought in the mind of the Legislature at the time of the enactment of this statute was to prevent a mixture in a corporation, a certain par value for the preferred stock, and a different par value for the common stock. And this because of the difficulties such a mixture would lead to, as pointed out in the case of *Film Producers, Inc., v. Jordan*, 154 P. 605, 171 Cal. 664. * * *

"The whole idea of the nonpar value stock statute is to abolish (a) capital stock, (b) divided into shares; for a capital stock stated in terms of dollars compel the capital stock to be divided into shares stated also in terms of dollars. In corporations having all nonpar value stock the participation is not to be expressed in dollars, but in an aliquot part of the assets of the corporation.

"By reason of the fact that each share of stock in the proposed corporation represents the same aliquot part of the assets of the corporation, it is manifest that all of the shares have the same par value.

"The proposed articles of incorporation do not violate section 12 of article 12 of the state Constitution or section 307 of the Civil Code. * * *

"Each share, representing the same aliquot part of the net value of the corporation's property, is given exactly the same voting power. * * *

"None of the objections pointed out in the *Film Producers' v. Del Monte Light & Power Cases* are present in the instant case.

"The proposed articles of incorporation do not violate section 3 of article 12 of the Constitution or section 322, Civil Code. * * *

"The nonpar stock statute makes no provision for capital stock and therefore the provision in section 3 of article 12 of the Constitution which makes a stockholder liable in the proportion that the (monetary) amount of stock owned by him bears to the whole subscribed (monetary) capital stock has no application.

"Section 290e of the Civil Code expressly provides that the liability is as the number of shares owned by the stockholders bears to the whole number of shares.

"Again we find that the conclusions of the Supreme Court in the Film Producers' and Del Monte Light & Power Cases have no application to the case at bar. In each of those cases the stock structure of the corporation was composed of two classes of stock with different par values and therefore it became impossible to determine the liability of the respective stockholders."

On the other hand, it is contended by the Attorney General on behalf of the secretary of state that—

"while in such a case [involving an entire issue of nonpar stock] the shares have the same voting right, and represent equal interests, there is no way of determining the liability of each share, not because it is not possible to do so by applying the constitutional formula upon the numerical basis, but because the Constitution requires that formula to be applied upon a monetary basis, and, as there is no monetary basis upon which it can be applied, the shares being all of no par value, the stockholder's liability cannot be attached in the manner required by the Constitution, and hence such corporate stock structure is not permissible to a California corporation."

Continuing, the Attorney General states:

"It is not our contention that California corporations must have a capital stock—we fully recognize the power of the Legislature to provide for corporations without capital stock, as it has done, for example, in sections 653 et seq. of the Civil Code. We do, however, contend that in authorizing the formation of corporations with a capital stock the Legislature must recognize the demands of section 3 of article 12, and must require that the shares of stock shall have a monetary value, and that it cannot sanction a stock structure which will not permit of the application of that constitutional provision upon a monetary basis.

"* * * We submit, therefore, that the true construction of the language of that section in the light of its history and the intent of its framers requires that the formula therein declared be applied upon a monetary basis."

As to the petitioners' final point that section 12 of article 12 of the Constitution is not violated by the creation of a corporation having all nonpar stock, it is answered by the Attorney General that—

"We may admit that section 12 may be given due application if such stock otherwise satisfies the provisions of section 3."

Before passing on the main question it will be well to make clear that the opinion of this court in *Del Monte Light & Power Co. v. Jordan*, supra, did not decide or attempt to de-

cide whether or not the Constitution requires all corporate shares to have a par value, for that question was not presented. Indeed, the Attorney General apparently appreciates this fact, as evidenced by the following quotation from his brief:

"Counsel for petitioners states in his brief that the case of *Del Monte Light & Power Co. v. Jordan* does not hold that all corporate shares must have a par value. While it is true that in the opinion in that case the court used the expression 'single par value,' and subsequently at the oral argument in the present case the Chief Justice stated in effect that it was not thereby intended to lay stress upon the word 'par,' but rather thereby to signify the requirement of one value, yet it certainly was not held in that case, nor suggested at the oral argument in this case, that the shares need not have a stated monetary value."

We quote portions of sections 3 and 12 of article 12 of the Constitution:

"Sec. 3. Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock, or shares of the corporation or association. * * *

"Sec. 12. In all elections for directors or managers of corporations every stockholder shall have the right to vote, in person or by proxy, the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them, on the same principle, among as many candidates as he shall think fit. * * *

We find nothing in section 12 to support a claim that its terms would be violated by an entire issue of nonpar stock by a corporation. The provisions of said section may be given effect in a corporation having all nonpar stock. As already indicated, this seems to be conceded by the Attorney General, for he states that—

"We may admit that section 12 may be given due application if such stock otherwise satisfies the provisions of section 3."

The issue would then seem to reduce itself to the proposition whether or not the provisions of section 3 of article 12 of the Constitution would be violated by an entire issue of nonpar stock.

We are not in accord with the Attorney General's interpretation of this latter section. In our view, the terms of the section do not require that the individual liability of stockholders to creditors of the corporation be ascertained and computed solely on a monetary basis. It may be computed on either a monetary or share basis. The requirements of this constitutional section are complied with

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(L. A. 8839.)

(Supreme Court of California. April 1, 1926.)

when each share of a corporation represents the same interest as every other share and there is a unity of liability as between all the shares.

If the entire issue of a corporation is non-par, each share will carry with it an equality of interest, and each stockholder thereof will be liable to the creditors of the corporation as the number of shares held by him bore to the whole number of shares outstanding when the debt was contracted by said corporation. Obviously no inequality of liability would result from such a computation. There would, unquestionably, be a unity of liability as between the outstanding shares.

In our view, the very language of section 3 suggests an alternative method of computing a stockholder's liability, and does not attempt to confine such computation to a monetary basis. A stockholder is liable to the creditors of the corporation "as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock, or shares * * *." It would seem from the quoted portion of the section that both a monetary and a numerical or "share basis" method of computation of stockholder's liability are authorized.

The Attorney General admits "that, when all the shares are of no par value, it is mathematically possible to apply the formula on the numerical basis and produce a proportionate liability for each share while at the same time maintaining an equality of interest, voting right and liability, * * *" but contends "it is not possible to apply the formula upon a monetary basis when the shares have no par value." In view of our construction that the constitutional section is complied with when each share represents an identical interest, and there is a unity of liability as between the shares, this latter contention of the Attorney General would seem to be without merit. The method of computation is secondary so long as there exists a unity of liability.

Neither Film Producers, Inc., v. Jordan, supra, nor Del Monte Light & Power Co. v. Jordan, supra, is in conflict with this view. Those cases, in effect, merely hold that in this state every share of a corporation must be of the same value in order to represent that equality of interest and to give rise to that unity of liability required by the Constitution. As already stated, the decisions in those cases did not pass upon the point whether the shares must all be of the same par value or whether they might all be nonpar shares.

For the foregoing reasons, the writ of mandate is made peremptory. Let such writ accordingly issue.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.

1. Municipal corporations $\S$ 973 — Assessor's discretion as to valuations of property will not be interfered with by court in absence of showing of fraud or bad faith (Const. art. 13, $\S$ 1, 2; Pol. Code, $\S$ 3617, 3627, 3650; San Diego Charter, art. 6, c. 1, $\S$ 3, 6).

In exercise of powers conferred by Const. art. 13, $\S$ 1, 2, Pol. Code, $\S$ 3617, 3627, 3650, and San Diego Charter, art. 6, c. 1, $\S$ 3, 6, city assessor was invested with a large measure of discretion as to valuations to be placed for purposes of taxation on property, which discretion would not be interfered with by courts in absence of showing of fraud or bad faith.

2. Municipal corporations $\S$ 977 — Fraud on part of assessor in placing valuations on property need not be shown expressly to invalidate assessment, but may arise by implication.

It is not necessary that fraud or bad faith on part of city assessor in placing valuations on property for taxation be expressly shown in order to invalidate assessment, since it may arise by implication in that assessment, when taken as a whole, discloses such a degree of discrimination between properties of same class or different classes, as to clearly evince a willful and systematic disregard of assessor's discretionary powers.

3. Taxation $\S$ 40(8) — Essential question in determining validity of assessment is whether Constitution and statutory provisions as to uniformity and equality have been conformed to.

In determining validity of assessment of property for taxation, essential question is whether provisions of Constitution regarding uniformity in valuations, and laws declaring how uniformity and equality in distribution of burdens of taxation are to be ascertained and applied, have been fairly conformed to, or systematically, and intentionally and grossly disregarded.

4. Taxation $\S$ 412 — Constitution and statute only require valuations of property fixed by assessor to be separately stated by him in his assessment books (Const. art. 13, $\S$ 2; Pol. Code, $\S$ 3627).

Const. art. 13, $\S$ 2, and Pol. Code, $\S$ 3627, requiring that land and improvements thereon shall be separately assessed, do not refer to valuations to be placed upon such two classes of taxable property, but merely that valuations thereof fixed by assessor shall be separately stated by him in his assessment books.

5. Taxation $\S$ 40(8) — Assessment by city assessor of improvements on real estate, based on removal or wreckage value, and disregarding elements ordinarily determining values, held invalid where actual discrimination resulted.

Assessment made by city assessor in accordance with systematically and intentionally adopted theory in placing valuation of improve-

ments upon real estate, at its removal or wreckage value, and disregarding elements of age, state of repair, location, cost of construction or of replacement, *held* invalid, where actual discrimination resulted from such assessment.

6. Taxation ☞40(8)—Assessor's good faith in making assessment will not validate assessment, which is discriminatory and lacking in uniformity.

Assessor's good faith in assessment of property at its cash value will not validate an assessment, where it is discriminatory and lacking in uniformity and owners are entitled to invalidate it when they pursue proper statutory method to recover taxes thus improperly imposed.

7. Taxation ☞459—Acts of board of equalization in perpetuating discriminatory assessments by assessor held subject to review.

Acts of board of equalization in perpetuating arbitrary and discriminatory assessment of property by assessor for purposes of taxation *held* subject to review on application by taxpayers for relief.

In Bank.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by B. Franklin Mahoney against the City of San Diego, a municipal corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

S. J. Higgins, Arthur F. H. Wright, and Frank M. Downer, Jr., all of San Diego, for appellant.

Ralph Jenney, Wright & McKee, and Sloane & Sloane, all of San Diego, for respondent.

RICHARDS, J. The plaintiff herein sought by his amended complaint herein the recovery from the defendant, a municipal corporation, of the sum of \$1,663.93, with interest, which said sum he alleged he had been compelled to pay and did pay to said municipality under protest as taxes illegally imposed upon his property within said municipality and by its officials charged under its charter and the general laws with the levy and collection of taxes in and for said city. In his said amended complaint he alleges that during all the times mentioned therein he was the owner of the particular parcels of real property described therein, together with the improvements thereon; that the city of San Diego is and during all of said times was a municipal corporation organized and operating under a freeholders' charter and having among its officials a city assessor possessing the powers enumerated in said charter and in the general laws; that the said property of the plaintiff was assessed for the fiscal year 1923, and that in so assessing the same the said assessor assessed the several lots or parcels of land so described separately from the

improvements thereon; that the said several lots or parcels of land were thus assessed at a total valuation of \$84,900, which sum was equal to the full cash value thereof; and that the amount of taxes thereafter levied and charged against said lots and parcels of land was levied at the regular tax rate of \$2 upon each \$100 of said valuation. The plaintiff then proceeds to allege that said assessment and tax levy were and each of them was and is unlawful for the reason "that the said city assessor of said city of San Diego, in assessing all the property within said city for city taxes for the fiscal year of 1923, adopted and pursued a systematic, arbitrary, willful, and intentional scheme and method for such assessment which was contrary to law, in that in pursuance of said scheme and method he assessed all land within the said city at from 80 to 100 per cent. of its full cash value, and assessed all taxable improvements on land at not to exceed 25 per cent. of their cash value, and assessed personal property at not to exceed 60 per cent. of its cash value. That such arbitrary, systematic, willful, and intentional scheme and method was deliberately adopted and pursued by the said city assessor with the intent and purpose of discriminating against one class of property, to wit, land, as distinguished from the improvements thereon, and as distinguished from personal property, and in discrimination against the owners of said land, and that such arbitrary, systematic, willful, and intentional scheme and method was adopted and pursued by the said city assessor contrary to the provisions of the Constitution of the United States and Constitution and laws of the state of California and of the charter of said city of San Diego, which require that all property shall be assessed and taxed in proportion to its value. That such scheme and method was pursued for the avowed purpose of carrying into effect the unauthorized policy and belief of said city assessor that the revenue for the maintenance of the city government should be derived mainly from an unequal and discriminating tax on land, and that such method was adopted and followed in fixing said taxes upon the above-described property.

The plaintiff further proceeds to allege that the improvements upon said several lots or parcels of land do not exceed in the aggregate the sum of \$10,350, but the same were assessed by said assessor in said year at a total valuation of \$2,570, which was not to exceed 25 per cent. of their full cash value; and that not only were the said improvements upon the plaintiff's said real estate thus assessed at a valuation not in excess of 25 per cent. of the full cash value thereof, but that all taxable improvements situate upon all of the lots and lands throughout the entire city of San Diego were also assessed at not to exceed 25 per cent. of their full cash value; and that in so assessing the same the said assessor acted

in accordance with an arbitrary, systematic, willful, and intentional scheme and method, and that as a result thereof the tax fixed and levied upon plaintiff's said lots and lands is invalid and unjust and imposes upon said plaintiff and upon his said lands the burden of paying a greater amount of taxation thereon in proportion to its cash value than was assessed and imposed upon other kinds of property subject to taxation for municipal purposes within said city. The plaintiff then proceeds to allege that after making the assessments of the plaintiff's said properties as above alleged and in the manner above set forth, the said assessor transmitted the assessment roll embracing his said assessments to the city clerk for the use of the board of equalization of said city in the performance of its functions as prescribed in the charter of said city, and that the said board of equalization in regular session had and held a hearing thereon whereat the plaintiff herein appeared before said board and presented to said board all of the facts in his complaint herein alleged as to the irregularity and invalidity of said assessment and demanded the correction and equalization of the same, but that the said board at said hearing denied said plaintiff said relief, and that said action was taken by said board with full knowledge of all of the facts pleaded herein and was taken arbitrarily and capriciously and without regard to said facts and in disregard of the evidence then before said board showing said facts, which evidence was without conflict or contradiction; and that the said action of said board was taken in ratification and indorsement of the unlawful scheme and method of assessment adopted and pursued by said assessor. The plaintiff further and finally alleged the demand made upon him for the payment of the taxes so illegally assessed and exacted and his payment of the same under protest as provided in section 3819 of the Political Code; and his demand upon said defendant thereafter and in due course and form for the repayment of the same, and of the refusal of the said defendant to comply with said demand.

In its answer to the plaintiff's amended complaint, the defendant municipality specifically denied that the said assessment or any part or portion thereof was or is unlawful or invalid or unfair or that its said assessor adopted or pursued any such systematic or arbitrary or willful or intentional or unlawful scheme or method as is set forth in said complaint; and denies that his assessment of the improvements upon the plaintiff's said lots and parcels of land was at other than the full cash value thereof; and denies that his assessment of the taxable improvements upon lots and lands within said city was at a valuation of not to exceed 25 per cent. of the full cash value thereof, or was at other than their full cash value; and denies that in their action upon the plaintiff's demand for an ad-

justment and equalization of the assessment upon the plaintiff's said properties or upon the valuations of any and all other of the taxable properties within said city the board of equalization acted either arbitrarily or capriciously or without due regard for the facts or the evidence before it, or that the action of said board was taken in ratification or indorsement of any unlawful scheme or method adopted or pursued by said assessor; and denies that any refund of taxes to said plaintiff should be made. The cause came on for hearing, together with certain other causes involving similar actions brought by other protesting taxpayers and presenting identical pleadings and which it was stipulated should be heard together.

The evidence of the respective parties having been presented, the several causes were submitted to the court for decision, and the court thereafter made and filed its findings and conclusions thereon. In its said findings of fact the trial court found the facts to be substantially as set forth in the plaintiff's amended complaint and practically in the identical language thereof, and as its conclusions of law based upon said findings of fact decided that the assessments in question upon the properties of the several plaintiffs in said consolidated cases were and each of them was illegal and void, and accordingly ordered and adjudged a repayment of the taxes as sued for in each of said actions. Judgment having been so entered, the defendant in each of said actions has taken, and now prosecutes, its several appeals.

The questions presented upon each of these consolidated appeals are of great importance, involving, as they do, not only the powers and duties of the assessor and of the board of equalization of this particular appellant, but involving also the powers and duties generally of the like officials of municipal corporations and political subdivisions of the state of California in the matter of the assessment and equalization of taxes upon real estate and the improvements thereon. The Constitution of the State of California provides, in section 1 of article 13 thereof, that—

"All property in the state except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, * * * as provided by law, or as hereinafter provided."

By section 2 of article 13 of the Constitution it is provided that—

"Land, and the improvements thereon, shall be separately assessed. Cultivated and uncultivated land, of the same quality, and similarly situated, shall be assessed at the same value."

Section 3627 of the Political Code provides that—

"All taxable property must be assessed at its full cash value. Land and improvements thereon shall be separately assessed. Cultivated and uncultivated land, of the same quality, and sim-

ilarly situated, shall be assessed at the same value."

While section 3617 of the Political Code, under the subject of definitions, provides that—

"The terms 'value' and 'full cash value' mean the amount at which the property would be taken in payment of a just debt from a solvent debtor."

Section 3650 of the same Code provides for assessment books in which must be listed all taxable property and showing "the improvements to be assessed against the particular section, tract or lot of land upon which they are located," and the cash value thereof. Subject to the foregoing provisions of the Constitution and of the statutes of the state, the general laws thereof, the charters of the several municipal corporations operating under the same contain provisions for the assessment, equalization, and collection of taxes upon real and personal property. These are in the main similar, and in the case of chartered cities the provisions of their organic laws relating to the powers and duties of their officials who are charged with the assessment and collection of local taxes are usually drawn in harmony with or in subordination to the general laws. Such is the case with the city of San Diego by the charter of which city it is provided in article 6, chapter I, section 3 thereof, as follows:

"Except as in this charter otherwise provided, the assessment of property taxable in the city for municipal purposes, the equalization and assessment of taxes, and sale of property for unpaid taxes, and the redemption of property sold for taxes shall be made in the same manner and with like effect as now or may be hereafter provided by law for the assessment of property, equalization of assessments, levy and collection of taxes, and the sale of property for unpaid taxes for state and county purposes and the redemption thereof; and all provisions of law applicable to such assessments, equalization, levy, collection and sale for state and county purposes, are hereby applied to and shall be the law governing such assessment, equalization, levy, collection and sale for municipal purposes; and the respective officers of the city shall have, possess and perform the same powers and duties in all matters concerning revenue and taxation for municipal purposes as are or may be by law conferred or imposed upon county officers in matters concerning revenue and taxation for state and county purposes."

[1-6] It is provided in section 6 of the same article of said charter that—

"The terms 'real' and 'personal property' as used in this charter shall have the same meaning as the same terms used in the revenue laws of this state; and all property subject to taxation aforesaid shall be assessed at its full cash value which in the judgment of the assessor it has at 12 o'clock m. on the first day of January and the lien of the annual city tax levy shall attach at said hour."

By section 8 of the same article in said charter it is provided that—

"A committee of the common council selected as in this charter provided, shall constitute a board of equalization, and shall, after the assessor shall have completed and handed in his assessment roll to the city clerk, and after five days' notice published in the official newspaper of this city, hold meetings to hear and determine all complaints respecting the valuation of property as fixed by the assessor in such roll; provided, however, that before raising any assessment, the board shall notify the person interested by letter deposited in the post office or express, post paid, and addressed to such person at least three days before action taken, of the day fixed when the matter will be investigated. Any member of said board shall have power to administer oaths, and affirmations in the matters before said board, and the sessions of said board shall be held from time to time, as in its notice specified, for the period of two weeks, and no longer."

These various provisions of the Constitution, the statutes, and the city charter determine and define the powers, duties, and functions of the city assessor and the board of equalization of the city of San Diego. In the exercise of the foregoing powers and functions assessors, both by the general laws and by the charters of those municipalities in respect to the properties within which the duties of their offices are to be performed, are invested with a large measure of discretion in the exercise of their judgment as to the valuations to be placed for purposes of taxation upon the several kinds of such property subject to such taxation; and it has been generally held that when this judgment and discretion of assessing officers has been exercised, even though erroneously, within the limitations imposed by the foregoing provisions of the Constitution and of the laws under which they operate, such judgment and discretion will not, as to the results reached by their exercise, be interfered with by the courts in the absence of a showing of fraud or bad faith. It is not, however, necessary that such fraud or bad faith on the part of the official shall be expressly shown; it may arise by implication out of the fact that the assessment when taken as a whole and viewed with respect to the assessable values of the various kinds of taxable properties within the province of his office discloses such a degree of discrimination between properties of the same class or properties of different classes as to clearly evince a willful and systematic disregard of the requirements of the Constitution and of the provisions of the statute or charter governing and limiting the exercise of the assessor's discretionary powers. This court had occasion to so declare in the case of *Los Angeles G. & Elec. Co. v. County of Los Angeles*, 121 P. 384, 162 Cal. 164, 168, 9 A. L. R. 1277, which was a case wherein the action of the assessor and of the board of equalization sustaining

the same was upheld as not having been clearly or satisfactorily brought within the foregoing principles, the application of which would have been essential to the overthrow of the assessment. It was likewise so held by this court in the case of *Southern Pacific Land Co. v. San Diego Co.*, 191 P. 931, 183 Cal. 543, wherein it appeared from the averments of the plaintiff's complaint that a systematic, willful, and intentional undervaluation of lands of the same class as those belonging to plaintiff, but belonging to persons other than the plaintiff, was adopted and carried into effect by both the county assessor and county board of equalization, while plaintiff's lands of the same class had been, with like systematic and willful intent, overvalued. In upholding the sufficiency of the plaintiff's complaint, this court quoted approvingly its language in the case of *Los Angeles G. & Elec. Co. v. County of Los Angeles*, supra, and further proceeded to hold, in conformity with the ruling in that case, that while it was not claimed that there was any actual fraud or corrupt intent on the part of the officials making and sustaining the assessment in question, there was, nevertheless, such a violation of plain duty on the part of such officials as to constitute "fraud" or "something equivalent to fraud," within the meaning of those terms as used in the decisions relative to the review of the action of assessing officers, entirely regardless of the motive actuating them in the matter of such an assessment. The foregoing principles, while applied in the case last decided to property of the same class, would be in our opinion equally applicable to assessable properties of different classes where the proofs were plain. The essential question with respect to the assessment of properties of the same or different classes to be determined is as to whether the provisions of the Constitution regarding uniformity in valuations and of the laws declaring how uniformity and equality in the distribution of the burdens of taxation are to be ascertained and applied have been fairly conformed to or systematically, and intentionally and grossly disregarded.

The declaration of these principles brings us to the immediate assessment under review upon these several appeals. With respect to the several classes of assessable property in the City of San Diego in its fiscal year of 1923 there is no dispute; nor is there any material dispute as to the plan or method adopted and put into operation by the assessor of said city with regard to the respective valuations placed upon these several classes of property, nor as to the actual effect thereof upon the assessment of property values as a whole. The assessor was called upon to deal with three main classes of property in the course of the performance of his official duties. These were (a) real estate; (b) improvements upon real estate; and (c) personal property. With respect to the valuations placed by

him upon all assessable real estate within said city considered separately from the improvements or want of improvements thereon, no substantial question is raised as to the fairness of his assessment thereof; nor is there any sufficiently tangible objection made to the valuation placed by him upon personal property. It is with reference to the said assessor's method and basis of valuation of improvements upon the real estate situate within said city that the main issue in these cases arises. Upon that subject the plaintiffs have alleged, and the trial court has found, as hereinabove in this opinion fully set forth. The question is whether the evidence sustains said findings in accord with the averments of said complaint. That evidence is also practically uncontradicted and is embraced in the testimony of the assessor himself as a witness in his own behalf before the board of equalization and before the trial court. The assessor testified that in entering upon his assessment of improvements upon real estate for the fiscal year 1923 he found that the Constitution (art. 13, § 2) required that "Land, and the improvements thereon, shall be separately assessed," and that the statute (Pol. Code, § 3627) contained practically the same requirement; and that he obeyed these requirements in making his valuations of improvements upon real estate. The fundamental error of the assessor, however, consisted in his misinterpretation of the meaning of these requirements of the Constitution and of the statute. The foregoing provisions of the Constitution and of the statute do not refer to the valuations to be placed upon these two classes of taxable property, but merely to the fact that the valuations thereof fixed by the assessor in conformity with the other provisions of the Constitution and statutes relating to the basis of the assessment of property values shall be separately stated by him in his assessment books. The context of both the constitutional and the statutory provisions would seem to make this sufficiently obvious, since in immediate juxtaposition to the above requirement is to be found the requirement that "cultivated and uncultivated land shall be assessed at the same value." In order to make effectual this, as well as the other requirements of the law, that improved and unimproved real estate shall have a uniform basis of valuation, it was essential that the valuations to be placed upon land and upon the improvements thereon, whether in the form of buildings or crops or trees, should be separately set forth in the making of assessments thereon. But this assessor, as his evidence conclusively shows, interpreted these provisions of the Constitution and statute to mean that in making his valuations of improvements upon real estate he was required to treat this form of property as though its physical separation from the real estate upon which it stood was contemplated by the framers of the organic law, and that the valuation

to be thus arrived at was to be such as that class of property would be taken at by a creditor in payment of a solvent debt with the idea of its removal from the real estate upon which it was affixed. In a word, the testimony of this assessor sufficiently shows that the basis adopted by him for his valuation of improvements upon real estate in the city of San Diego was, when reduced to its last analysis, its removal or wreckage value. That this was the assessor's concept of his duty, for whatever purpose he may have had in view, is ineluctable when his testimony is read as a whole. He says:

"The methods employed in the assessment of the improvements was that I found that under the law I was to separately assess the improvements from the real estate, and that I should use the same definition of value that was prescribed by law in fixing a value of the property; and that I used every method I was able to use to determine what would be the full cash value of an improvement on real estate, separated from the real estate. Now, in doing that I ascertained, first, the production cost of that improvement, or what it would cost to reproduce the building or improvements; and then, separating it from the real estate on which it stood, I arrived at what I concluded and determined was a full cash value of that property. I used the building permits of the city as a basis, general basis, for the values or the price or cost of that improvement. I then took a value that I felt would be a fair cash—or full cash value of that improvement after it was separated from the real estate on which it stood."

Again he says:

"I had to assess the building as to its value separated from the real estate, and as to the elements of value that I considered in determining it to be worth twenty-five per cent., why, you could put any element of value in there, wreckage value, or removal value, or value of a man who wanted the property for some particular purpose, who would buy it for that purpose."

And he still further states:

"In arriving at the initial cost or production price of buildings, as far as percentage was concerned, I assessed old buildings and new buildings the same. They were all taken from the building permits of the city, and there was, I believe, no reduction for depreciation. I arrived as near as I could at the cost of the building and then took a percentage of that for the value of the building."

Finally, and upon cross-examination, he testified:

"We assessed it without taking into consideration the real estate upon which it stood, and while the law says it is a part of the real estate, it is a peculiar proposition, yet it says we must assess it separately. It is either that proposition or that buildings must be assessed and put on the books of the city exactly what it costs to put up, less the depreciation. There are only two constructions, and I took the

construction which I thought was best for the entire city of San Diego; the best and most reasonable construction. My firm judgment is that improvements should be encouraged in every possible way.

"Q. Is there any possible value to be put on improvements to property if not taken in connection with the land except a value for removal purposes? A. A nominal value.

"Q. What value would there be except a salvage value? A. Or for leased purposes, or something of that kind.

"Q. That was what you tried to arrive at, removal value? A. Yes. To make it a basis of assessment."

It is true that the assessor also testifies and repeats that he assessed all of the improvements upon real estate at the full cash value, but in practical application, as his evidence taken as a whole abundantly shows, he did no such thing. Take, for example, his testimony wherein he states that after ascertaining the original cost of construction of buildings of the three general classes designated by him as (a) concrete buildings, (b) brick and tile buildings, and (c) frame and stucco buildings, he assessed these several classes of structures entirely regardless of their age or location or depreciation from any cause in the following manner, viz.: He placed an arbitrary valuation upon frame and stucco buildings of 15 per cent. of their cost of construction; upon brick or tile buildings of 20 per cent. of their cost of construction; and upon concrete buildings of 25 per cent. of their cost of construction. He admits that in each instance this was an entirely arbitrary percentage of valuation. His entire departure in so doing from the basic principles laid down in the Constitution and statutes as guaranties of uniformity and equality in the ascertainment and admeasurement of property values for purposes of assessment is made doubly obvious by the specific examples to which reference is made in the testimony of the assessor, wherefrom it appears the elements of age, of state of repair, or availability for productive uses, and of actual productivity, were all eliminated from the assessor's calculation as bases for his estimates of assessment values; and that the elements of original cost of construction or even of present cost of replacement were only taken account of as being points of departure in his arbitrary fixation of valuations at a small percentage of such cost, depending upon the type of structure assessed. The assessor insists that he ought not to take account of the element of location of a building in estimating its assessment valuation as to do so would amount to double taxation, since the real estate upon which such building stands had already been assessed at a valuation depending upon its favorable location. But even in this the assessor is in error, since in common knowledge and experience each of these two classes of property possess in themselves and independent of the other an actual or ex-

changeable value dependent upon the location; as, for example, a vacant piece of real estate in a favorable location has an assessable value equal to that of other like pieces of real estate of like favorable location whether improved or not. On the other hand, a building upon leased premises has an assessable value dependent upon its favorable location, regardless of the ownership of the land. The fact that the favorable location of such building for business purposes was taken account of by the assessor in laying a suitable burden of taxation upon its owner, and that the same element was also considered in taxing the owner of the land, would not in such case constitute double taxation; no more would it do so if the ownership of the land and of the building were united in the same person. We do not say that in assessing improvements upon real estate the elements of age, state of repair, location, cost of construction, or of replacement are or that any one of them is controlling upon the assessor in the exercise of his judgment and discretion as to what valuations he shall place upon assessable improvements upon real estate; but what we do hold is that an assessment, made by an assessor in accordance with a systematic and intentionally adopted theory for the arrival at valuations to be placed upon that form of property, which omits to take into consideration any of the foregoing elements which in common experience ordinarily determine values, and in place thereof substitutes an arbitrary basis for the fixation of values upon the several classes of such form of property for purposes of assessment upon a percentage plan, from which the foregoing elements for determining values are expressly excluded, will not be upheld when it sufficiently appears that actual discrimination has resulted from an assessment thus arrived at. When the determining principles leading to uniformity in distributing the burdens of taxation have been lost sight of or willfully abandoned in the making of the assessment complained of, the asseveration of the assessor that he assessed the form of property "at its full cash value" will not avail him in the presence of the actual and admitted facts supplied from his own lips; nor will his assertion, even though it be admitted to be true, that he acted honestly and in good faith in making the assessment in question, suffice to compel the upholding of an assessment when the assessor making it, however honest and well-intended, has willfully adopted and deliberately pursued a plan of assessment which is violative of the fundamental principles which should be his guide in the performance of his official duty; and when such an assessment is sufficiently shown to be replete with discrimination and lacking in uniformity in the burdens it imposes upon the owners of assessable property, such assessment will be invalidated at the instance of those property owners who shall pursue the proper

statutory method to recover the taxes thus improperly imposed.

[7] We are satisfied that the record in this case discloses that such discrimination and lack of uniformity exists upon the face of the assessment in question. It is true that the plaintiffs herein are the owners respectively of real estate holdings of large value upon which there are in each case improvements of less but yet of considerable value, and that it might well be said that these particular plaintiffs have not been substantially affected or injured by too low an assessment, however arbitrarily imposed upon the improvements upon their real estate which latter form of property they admit has been assessed at its full cash value. But the injury which these plaintiffs have suffered, and of which they have a right to complain with respect to said assessment, is that resulting from a general and systematic undervaluation of all improvements upon real estate within said city, as a result of which an undue and unequal burden of taxation has been laid upon all real estate therein. An equalization upon a proper basis of the valuations of both real estate and the improvements thereon would have resulted in relieving the former of the undue proportion of its burden, and to such measure of relief the owners of real estate, whether improved or unimproved, were entitled upon proper application to the city board of equalization. It is urged by the appellant herein that the plaintiffs herein made such application, and that they and each of them had a full and fair hearing thereon; and that upon such hearing their application for such or any relief was denied; and that the denial of such relief by said board of equalization is final upon the right of said plaintiffs to such relief; and that the determination of said board of equalization thereon is not the proper subject of review by the courts. Conceding the correctness of the principle thus invoked as fully supported by a long and uniform line of decisions, we are again met with the difficulty of giving it application to the facts of the present case, since the trial court has found upon what we deem ample and sufficient evidence that said board of equalization, in its action in upholding the assessor's concept with regard to the assessment complained of, was actuated and controlled by its adherence to the same arbitrary system and plan of evaluation as that systematically pursued by the assessor, and that the rulings of said board in the ratification of the assessor's aforesaid plan and method of assessment had the effect of upholding and perpetuating the same discrimination and want of uniformity in said assessment of which the plaintiffs herein complain. It will suffice to say that there is no other or different immunity available to boards of equalization than those which are available to assessors when the acts of the former are found to be arbitrary and when the proven discrimina-

tions and inequalities of the latter in making his assessment are perpetuated thereby; and that the courts will grant relief in the one case as readily as in the other when the record before them justifies the granting of such relief.

In conclusion, it may be stated that we are satisfied that the trial court was justified by the evidence before it in awarding to these particular plaintiffs in these several cases the relief to which they had shown themselves to be entitled by pursuing the remedies against the assessment assailed herein which the statute has provided; and hence that its judgment in each of said cases will be, and the same is hereby, affirmed.

We concur: WASTE, C. J.; LENNON, J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; LAWLOR, J.

198 Cal. 405

LUCE v. CITY OF SAN DIEGO (two cases).

LUCE et al. v. SAME.

(L. A. 8411-8413.)

(Supreme Court of California. April 1, 1926.)

Municipal corporations  977—**Property owners held not entitled to recover taxes paid under protest, in absence of showing of application to board of equalization for relief from arbitrary valuations.** (Pol. Code, § 3819 et seq.)

Property owners *held* not entitled to recover taxes paid under protest under Pol. Code, § 3819 et seq., in absence of showing that they made due application to city board of equalization for relief from arbitrary and unequal valuations of assessor.

In Bank.

Appeals from Superior Court, San Diego County; W. P. Cary, Judge.

Separate actions by M. A. Luce, Adelaide M. Luce, and another, and M. A. Luce, against the City of San Diego. Judgments for defendant, and plaintiffs separately appeal. Appeals consolidated. Affirmed.

Sloane & Sloane and E. A. Luce, all of San Diego, for appellants.

S. J. Higgins and A. F. H. Wright, both of San Diego, for respondent.

RICHARDS, J. These three appeals, though taken separately, were consolidated for the purposes of their hearing and determination in this court. They involve, with the exception to be hereinafter noted, the identical facts which were presented to this court in the appeals in the cases of B. Franklin Mahoney and certain other plaintiffs against the city of San Diego, which cases were also consolidated for the purposes of hearing and determination in this court and

the decision wherein has been this day filed. The exception as to the facts which brought about a decision in the plaintiffs' favor in the last above-named cases and in the defendant's favor in the present cases was this: That the plaintiffs in said former cases duly applied to the board of equalization of the city of San Diego for relief from the alleged unequal assessment involved in both sets of cases, while in the consolidated cases presented upon the present appeals no such application for relief was made. In the absence of such application and of action thereon by the said board of equalization, the trial court in these latter cases held, and we think held correctly, that the plaintiffs were not entitled to the relief demanded in their several complaints, namely, to the repayment of their taxes imposed by said assessment. The plaintiffs, who are the appellants herein, contend that no such application was required to be made; but in this contention we think they are in error. In the early case of *Fall v. Marysville*, 19 Cal. 391, it was held by this court that an objection to a tax assessment which did not go to the validity of the tax itself, but simply as to its amount, must be made to the proper tribunal for reduction before an action would lie to restrain the collection of such a tax. In the case of *Henne v. Los Angeles County*, 61 P. 1081, 129 Cal. 297, the foregoing doctrine was extended so as to be given application to an assessment of property which was not assessable, as in that case to the imposition of a tax upon a mortgage held by the University of California and taxed against the owner of the property in question. In the later case, however, of *Brenner v. Los Angeles*, 116 P. 397, 160 Cal. 72, this court drew the distinction between the wrongful assessment of property not subject to taxation and the wrongful valuation of taxable property, and to the extent only of an attempted assessment of nontaxable property overruled its former decision in the case of *Henne v. Los Angeles County*, supra; but otherwise indicated that the rule laid down in the earlier cases above referred to was to be upheld in its application to an unequal assessment of taxable properties. We are entirely satisfied that the rule as thus limited has full application to such cases as are presented upon the present appeals, and that, in the absence of a showing that the complaining property owners have made due application to the city board of equalization for relief from the arbitrary and unequal valuations of the assessor, the plaintiffs herein were not entitled to a recovery of the taxes paid, even though they had in each case made such payment under protest as provided in section 3819 et seq. of the Political Code.

It follows that the judgment in each of these cases must be, and is hereby, affirmed.

We concur: WASTE, C. J.; LENNON, J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; LAWLOR, J.

198 Cal. 407

In re WITT'S ESTATE.

CARLSON v. LANTZ.

(L. A. 8672.)

(Supreme Court of California. April 1, 1926.
Rehearing Denied April 29, 1926.)

1. Wills ⚡310—Court held not required, before submitting will contest to jury, to determine whether or not contestant had any interest entitling him to contest will (Code Civ. Proc. § 1312).

In contest by heir of probate of will devising all testatrix's property to a third party, it was not duty of trial court, before submitting contest to jury, to determine whether contestant had any interest in estate entitling him to contest will because of agreement of testatrix whereby she agreed to will all of her property to sole beneficiary named in will, since court's decision on validity of such agreement would be a determination of question which contestant, under Code Civ. Proc. § 1312, is entitled to have jury determine.

2. Wills ⚡324(1)—General motion of proponent for instructed verdict was properly denied, if evidence was sufficient to sustain one or more grounds of contest.

Where proponent's motion in will contest for instructed verdict was a general motion, and ruling was not asked on motion directed to each separate ground of contest, motion was properly denied, if evidence was sufficient to sustain one or more of causes of action.

3. Wills ⚡163(4)—Where attorney was made sole beneficiary in client's will, in will contest burden was on him to overcome presumption of fraud and unfair dealing and not on contestant.

Where attorney was made sole beneficiary under client's will, in suit by heir contesting such will on ground of fraud and undue influence, burden was on attorney to overcome presumption of fraud and unfair dealing and not on contestant, as is usual situation in will contest.

4. Attorney and client ⚡123(1)—Dealings between attorney and client for attorney's benefit are presumptively invalid, which presumption can only be overcome by the clearest and most satisfactory evidence.

All dealings between an attorney and client for benefit of former are presumptively invalid on ground of constructive fraud, which presumption can be overcome only by the clearest and most satisfactory evidence.

5. Wills ⚡163(4)—Proof of existence of confidential relationship between testatrix and beneficiary and activity on latter's part in preparation of will raises presumption of undue influence.

A presumption of undue influence arises from proof of existence of confidential rela-

tionship between testatrix and beneficiary, coupled with activity on part of latter in preparation of will.

6. Wills ⚡166(4).

Evidence held to sustain finding of undue influence in execution of will whereby testatrix's attorney was made sole beneficiary.

7. Wills ⚡166(4)—Evidence held to sustain finding that will making testatrix's attorney sole beneficiary was procured through fraud of such attorney.

Evidence held to sustain finding that will whereby testatrix's attorney was made sole beneficiary was procured through fraud of such attorney and sole beneficiary.

8. New trial ⚡57—Failure of clerk of trial court to enter verdict is not ground for new trial (Code Civ. Proc. § 628).

That clerk failed to enter verdict, as required by Code Civ. Proc. § 628, does not warrant granting new trial, as failure of clerk to enter in minutes a court order does not prevent action taken being order of court.

9. Trial ⚡350(1).

Omission of special issues is discretionary on part of trial court.

10. Appeal and error ⚡1170(1)—Specifications of errors not sufficient to warrant reversal of judgment will be disregarded by Supreme Court (Const. art. 6, § 4½).

Under Const. art. 6, § 4½, Supreme Court will disregard specifications of errors which would not suffice to warrant reversal of judgment.

In Bank.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

In the matter of the estate of Bertha Schubert Witt, deceased. Proceeding by Charles Lantz to probate decedent's will, in which Harold Carlson filed a contest. Judgment for contestant, and proponent appeals. Affirmed.

Charles Lantz, W. P. Hyatt, and F. C. Huber, all of Los Angeles, for appellant.

Marshall Stimson and Noel C. Edwards, both of Los Angeles, for respondent.

LENNON, J. This is an appeal by the sole beneficiary named in the will of Mrs. Bertha Schubert Witt, also known as Mrs. Bertha Carlson, from the judgment rendered by the court below in favor of the contestant, and from the order denying a new trial.

Bertha Schubert Witt, also known as Bertha Carlson, died on the 6th day of February, 1923, in the county of Los Angeles. She was at the time of her death about 62 years of age, and had been a resident of Los Angeles for some 28 years. During that time she had dealt in real estate, and had bought property, subdivided it, and built bungalows thereon. Her affairs, however, got into a very tangled condition, with the result that

most, if not all, of her property was covered by mortgages. The record shows that she owned equities in the following property which will prove pertinent to a discussion of the case, and which for convenience in discussion will be grouped in three parcels: Parcel I—Lot 15, block 13, Elysian Heights tract; a five-room cottage, known as No. 2049 Echo Park avenue; a lot known as the westerly 33 feet of lots 8, 9 and 10, Carlson Terrace tract. Parcel II—Agreement of purchase of lot 11 of the Carlson Terrace tract. Parcel III—Lots 8, 9, and 10, except the westerly 33 feet thereof, with three cottages known as 2029, 2033, and 2037 Echo Park avenue, and lots 17 and 19, block 28, Angeleno Heights, fronting on Sunset boulevard.

In August, 1914, Mrs. Witt entered into a contract with one A. J. Borden whereby he agreed to take over all of her equities in the various properties which she owned; give her a promissory note for the purchase price of \$6000; and give her as security a blanket second mortgage on all of the property deeded to him. Pursuant to said agreement a note for \$5,000 was given by Borden to her. Another note for \$1,000 was given to her by Borden, and she in return deeded to him a lot No. 10, Angeleno Heights, not included in the agreement, which lot he turned over to one Spicer, who held an attachment against Mrs. Witt's property, and thereby obtained a release. The arrangement with Mr. Borden did not prove satisfactory to Mrs. Witt, and some difficulty arose over the fact that Mrs. Witt, contrary to Mr. Borden's wishes, recorded her mortgage from him. In February, 1916, an accounting was had between Mr. Borden and Mrs. Witt, whereby Borden deeded back to Mrs. Witt a portion of the property deeded by her to him. This property consisted of the properties heretofore designated as parcel I. Legal title to the property re-deeded to Mrs. Witt by Borden subsequently came into the possession of Mrs. Anna Colkins by deed from Mrs. Witt. Lot 15, block 13, of Elysian Heights tract, had been sold for delinquent taxes and the unrecorded tax deed held by one T. A. Davis, a resident of Goshen, Ind. And on No. 2049 Echo Park avenue a first mortgage was held by one Tucker, and a second mortgage in the sum of \$800 was held by another person. Legal title to the remainder of Mrs. Witt's property remained in Borden. In April, 1920, Mrs. Witt called upon Mr. Charles Lantz, an attorney at law, at his office in Los Angeles relative to the unrecorded tax deed held by Mr. T. A. Davis. Mr. Lantz was a cousin of Mr. Davis, and transacted business either for him or in his name in Los Angeles. According to the testimony of Mr. Lantz, Mrs. Witt explained to him the nature of her business difficulties, and he undertook to straighten them out for her. On April 8, 1920, he secured a deed from Mrs. Anna Colkins to all of the property of Mrs. Witt to which she held legal title.

Said deed was made and executed, not to Mrs. Witt, but to Mr. T. A. Davis. Several business conferences were held according to Mr. Lantz, and on April 20, 1920, Mrs. Witt mailed to Mr. Lantz a letter in which she suggested that in return for \$20 or \$22.50 a month during her lifetime she would turn over to him any and everything she had coming from Borden. The letter was dated "Hamburger's Ladies Rest Room, Los Angeles, Calif.," and on the reverse side thereof, in Mrs. Witt's handwriting, was the following sentence, "I would also be at your side when & where needed." Thereafter several conferences were held, and Mr. Lantz drew up a draft of a plan which he submitted to her. The substance of the plan was that Mrs. Witt was to deed all of her property to Lantz; he would undertake to clear up the title thereto; he would be repaid for the money which he advanced; each party was to be entitled to one-half of the net income; and upon her death all of the property was to belong to him. Several drafts were made, but the final agreement of the parties is evidenced by three separate instruments dated May 17, 1920. The first instrument provided that Lantz was to purchase lot 11 of the Carlson Terrace tract, to which Mrs. Witt held an agreement of purchase, and was to turn it over to any one Mrs. Witt should designate upon the payment to him within two years of the cost of the lot and the expenses incurred thereon, together with interest at 10 per cent. The second instrument provided that one-half of the net profit realized from the handling of the lot, known as the westerly 33 feet of lots 8, 9 and 10 of Carlson Terrace tract, should belong to Charles Lantz, and the one-half to any person Mrs. Witt should designate. The third instrument provided that, in consideration of Lantz taking necessary steps to foreclose the Borden mortgage, Mrs. Witt granted to him a one-half interest in all of the property held by Borden and in the net proceeds of any sale thereof, and that Mr. Lantz should first be repaid for any money which he might have expended upon the recovery of said property. It will be noted that these instruments provided generally for a 50-50 split of the property and net income or proceeds, and made no provision for the taking of the ownership of the property by Mr. Lantz upon the death of Mrs. Witt.

In August, 1920, Mr. Lantz commenced suit in the name of Mr. T. A. Davis, to whom Mrs. Witt had assigned the mortgage against Borden, for the foreclosure of the mortgage. It seems that some time prior thereto Mr. Borden had permitted the first mortgage on a couple of the pieces of property to be foreclosed, and had not redeemed them, and Mrs. Witt was in danger of losing all of her security. Borden, according to his testimony, offered to deed the property back to Mrs. Witt without the prosecution of the suit, but Mr.

Lantz insisted on going on with the foreclosure. During the course of this suit a deposition of Mrs. Witt was taken on December 30, 1920, by Mr. Lantz.

On January 3, 1921, Mrs. Witt wrote to Mr. Lantz a letter wherein she stated that she wished him to prepare a paper whereby she would leave all of her real estate and property to "my beloved, kind friend and protector, Charles Lantz." The letter continued:

"He will during my lifetime never see me in want, take care of me while I live, and my body when I have passed away I like to be buried in Rosedale Cem. I will in case I sell anything, come to him and give an account and the amount of such sale I will hand over to him, or if in need hold or ask part of it, just as I or he sees best for me. I also wish Mr. Lantz to give my two boys, which have me entirely forgotten—give them each the trinkets which are really theirs. Should he see fit to add anything to it he may do so—just as he wills it. Should I live a little longer I will gladly do anything for my friend Mr. Lantz that I am competent to do. All of property which comes through Borden can be transferred at once, and in which I will do my utmost to see that he gets it. Mr. Lantz can also make a statement to the effect he or his successors will see to it—that I will not be in want of necessities of life. Mr. Lantz will know best, how and whatever to write—as I have complete trust and confidence in him. God Bless Him.
"Bertha Schubert Witt."

On January 5, 1921, a will drafted and prepared in the office of Mr. Lantz was executed by Mrs. Witt, wherein she stated that she had been neglected by her two sons, and willed all of her property to Mr. Charles Lantz. The will was witnessed by two employees of Mr. Lantz.

On March 7, 1921, a settlement was arrived at with Borden, and he, according to a written agreement with Mrs. Witt, deeded all of Mrs. Witt's property which had remained in his hands to Mr. Lantz. On March 9, 1921, Mr. T. A. Davis, who held the deed to the property from Mrs. Anna Colkins, deeded the property over to Mr. Lantz. Mr. Lantz also purchased the title to lot 11 as agreed upon in the first instrument of May 17, 1920. The legal title to all of Mrs. Witt's property came, therefore, into the hands of Mr. Lantz.

Mrs. Witt's health during this period was not good. She was very emaciated, weighing scarcely 100 pounds, and on different occasions she had had hemorrhages. She was taken seriously ill in September, 1922, and passed away on February 6, 1923. A doctor and nurse who attended her were paid by Mr. Lantz, and arrangements were made by him to have her buried in Rosedale Cemetery. Mrs. Gage, a friend of the decedent, notified Harold Carlson, a son of the decedent residing in Clarksdale, Ariz., who had not been theretofore informed of his mother's illness, and he came to Los Angeles, and insisted upon taking charge of the funeral arrangements.

A petition for the probate of Mrs. Witt's will was filed by Mr. Lantz wherein he alleged that Mrs. Witt's estate consisted solely of personal property. Harold Carlson, decedent's son, entered a contest of the will executed in Mr. Lantz's office which went to trial upon the issues of whether or not Mrs. Witt was of sound and disposing mind at the time of the execution of the will, and whether said will was procured by the fraud and undue influence of the sole beneficiary, Charles Lantz. Another ground of contest, that a subsequent holographic will had been executed by Mrs. Witt whereby she left all of her property to Mrs. Gage, was abandoned during the trial.

Special interrogatories were given to the jury as follows:

"Was Bertha Carlson of sound or unsound mind on the 5th day of January, 1921? Was the execution of the will dated January 5, 1921, obtained through undue influence of Charles Lantz? and, Was the execution of the will dated January 5, 1921, obtained through fraud of Charles Lantz?"

The jury brought in a verdict in favor of the contestant, and answered the interrogatories to the effect that Bertha Witt, also known as Bertha Carlson, at the date of the execution of the will was of unsound mind, and that the will was procured through the undue influence and fraud of Charles Lantz. Judgment was rendered accordingly, from which judgment defendant appeals.

[1] Preliminarily the point was made by defendant that it was the duty of the trial court, before submitting the contest of the will to the jury, to determine whether or not the contestant had any interest in the estate of the deceased which would entitle him to contest the will. It is defendant's theory that, the testatrix having entered into a valid agreement during her lifetime whereby she agreed to will all of her property to the sole beneficiary named in her will, the estate of the testatrix was entirely absorbed in her lifetime, and nothing remained in which the contestant had any interest, and he had, therefore, no right of appeal. It was not the duty of the trial court to determine in advance of the trial upon the contest of the will whether or not the testatrix had entered into a valid agreement prior to her death whereby she agreed to will all of her property to a person other than contestant. The cases cited by the defendant in support of his contention that an heir at law may have no interest in an estate entitling him to a contest of a will contain the element of estoppel, for they are cases wherein the contestant had an agreement with the testatrix whereby he agreed for a consideration not to contest the will of the testatrix. The court held that by reason of said agreement the contestant was estopped to contest the will. In the instant case the agreement which it is claimed deprived the contestant of any right to contest

was an alleged agreement between the testatrix and another person, which agreement, it is alleged by the contestant, was a part of a fraudulent scheme on the part of the beneficiary whereby he sought to secure all of Mrs. Witt's property. No element of estoppel here exists. And a decision by the court that the agreement was or was not valid by reason of the fact that it was or was not procured by fraud or undue influence would be a determination by the court of the question which the contestant, by code provision, is entitled to have determined by a jury. Code Civ. Proc. § 1312.

[2] Appellant's main contention is that the trial court erred in: (1) Denying the defendant's motion for an instructed verdict at the close of the contestant's case; (2) in denying the motion for an instructed verdict at the close of the entire case; and (3) in denying the motion for judgment notwithstanding the verdict.

The motion made by appellant for an instructed verdict was a general motion setting forth the reasons or grounds for making the motion. A ruling was not asked upon a motion directed to each separate ground of contest, and if, therefore, the evidence was sufficient to sustain one or more of the causes of action, the motion was properly denied by the trial court. *Pacific Vinegar, etc., Works v. Smith*, 93 P. 85, 152 Cal. 507, 513; *Estate of Relph*, 221 P. 361, 192 Cal. 451, 455.

The essential question presented by the above specification of errors is whether or not there was substantial evidence to support the verdict upon either of the three grounds of contest.

After a careful examination of the record, we are satisfied that, although the jury from the evidence adduced upon the entire case may well have arrived at a contrary conclusion, nevertheless there is sufficient evidence to sustain a verdict as to two of the grounds of contest. Inasmuch as weakness of mind may constitute a very important circumstance in the determination of whether or not fraud or undue influence was exercised, we deem it well to first discuss and dispose of the question of the mental capacity of the testatrix to make a valid and effective will.

Contestant contends that evidence in support of the finding of the jury upon this phase of the contest is to be found in the following facts: (1) The will was an unnatural will; (2) the will contained statements which were not true in fact; (3) letters and writings of the decedent contain incoherent and contradictory statements; (4) the decedent failed to understand the nature of her own act and her properties; (5) decedent's physical condition was extremely precarious at the time of the execution of the will; (6) acts and declarations of the decedent were not those of a woman of sound mind; and (7) the opinion of intimate acquaintances was that she was not of sound mind.

Briefly summarized, the proof offered to establish the foregoing facts is as follows: (1) The will was an unnatural will, in that it disinherited the two sons of the decedent, and there is in the record no testimony of any estrangement or ill feeling between the testatrix and her two sons. (2) The statement in the will that her two sons had failed to show any interest in her welfare or communicate with her for a long period of time, although she lived in Los Angeles for 26 years, and her place of residence was known to her two sons, and had by their neglect compelled her to become dependent upon the aid of others, was not true, if considered in conjunction with the testimony of Harold Carlson to the effect that he had previous to his marriage in 1918 sent her sums of money ranging from \$25 to \$40 per month, and had visited her at least once a year, and had written to her every two or three weeks. (3) The statement in the letter of January 3, 1921, to the effect that "I will in case I sell anything come to him and give him an account of the amount of such sale. I will hand over to him or if in need hold or ask for part of it just as I or he sees best for me," indicates the vague and indefinite grasp of the subject about which she was writing; the peculiar statement on the reverse of the letter dated "Hamburger's Rest Room," "I would also be at your side when & where needed," indicates at the least eccentricity of mind; the deposition taken at the time of the foreclosure of the Borden mortgage shows by its content that Mrs. Witt's mind was not normal. Mrs. Witt, when asked in her deposition to whom she had given a copy of the Borden contract, replied, "The man in the moon," repeating this several times. When asked if she had delayed filing the mortgage until February, 1916, she answered, " * * * Because I am a damn fool a good thing I did too—My God, it was an angel dwelling above me." When asked if she owned the note which was being sued on, she responded, "I live on air and the smell of beef steaks and being sick to death—understand me—now ask again." And another time she interposed, after the question had been asked her whether she had guaranteed certain notes, "It was a thin one." Her answers to many questions were irrelevant and very often vague and indefinite. Mr. Person, attorney for Borden, testified that he determined there was no chance of getting a rational deposition out of her, so he quit. (4) Although the letter of January 3, 1921, purported to call for the disposal by will of all her property and the immediate transfer of the property held by Borden, nevertheless in June, 1921, Mrs. Witt spoke about her property on Echo Park avenue and Baxter street, and stated that she had other property. Another witness testified that in the fall of the same year Mrs. Witt stated that she owned three houses on Echo Park avenue and the

Sunset boulevard lot. This occurred after she had signed the written agreement for Borden to transfer the property directly to Mr. Lantz, and indicates that she did not understand the nature of her act when writing the letter of January 3, 1921, claimed by Lantz to have been written just 2 days before the execution of the will. (5) During the years immediately preceding her death and at the time of the transactions here involved the decedent was in a very bad condition physically. She was so emaciated that she seemed to be but skin and bones, and weighed but 100 pounds. She was subject to hemorrhages, and was at times bedridden. (6) There is testimony of witnesses relative to the acts and declarations of the decedent tending to show she was not of sound mind to the effect that Mrs. Witt was afraid to take the medicine prescribed by the doctor for fear it was doped and would kill her; that she ate scarcely anything at all, and neighbors at different times had had to bring in food to her; that she ate grass and flowers; that at the time of the taking of her deposition in the foreclosure of the Borden mortgage she would stop and cry and rest quite a bit before answering, and her answers to questions propounded were at times irrelevant and nonsensical, and many times vague and indefinite; that Mr. Person, attorney for Borden, met her on the street, and she asked him to show her the way to a lecture, as she didn't know which way to go, although she had been there many times; that one afternoon about 2 o'clock she had answered the door with her hair all down and straggly, and with a "half crazy" look in her eyes, and asked the old friend who had called what she meant by coming at that time of the day, and refused to permit her to enter, although a shower had come up and the friend needed shelter. There is testimony that Mrs. Witt was an exceedingly slovenly housekeeper, and lived in a state of fearful disorder and confusion. Photographs were introduced in evidence to more graphically portray to the jury the indescribable disorder of the premises and the condition of the house in which Mrs. Witt had lived for some time. No words could describe the confusion and almost unbelievable disorder of the house, and it was the testimony of an intimate friend that this was the usual condition of the house in which Mrs. Witt lived. It was the testimony of Harold Carlson that subsequent to his mother's death he had found in the house occupied by her an instrument to punch one's body with about a foot long, with about 50 needles in it. (7) It was the opinion of Mr. Roughton, who had offices with Mr. Lantz during all the time that Mrs. Witt called to consult with Lantz, that she was not of sound mind. He based this opinion upon the fact that her conversations with him were of a rambling character. He stated that she would come into his office several

times in one afternoon and would talk to him about astrology and fortune telling. She repeatedly asked him for the date of his birth so that she might give him a horoscope. She put her hand on his head, and told him what fine silky hair he had, and told him that he would make a great lover. She kept this up for a period of a year and a half to 2 years. According to this witness, Mrs. Witt did not seem to be capable of carrying on a very intelligent conversation on any particular subject. He testified that "the woman's conversation, the woman's dress, the offensive odor that prevailed when she was around, not being according to the accepted ideas of hygiene, would lead me to believe the woman was of unsound mind; plus her continued wrangling and heckling me as to the kind of a great lover I would make, and putting her hand on the back of my head, and feeling the growth of my hair on the back of my head, and going away 5 or 10 minutes, and coming back and doing it all over again; doing that for about two years. Her conversations at those times was all in pieces, rambling, nothing." Mr. Moll, who qualified as an intimate acquaintance, having lived next door to Mrs. Witt for many years as her neighbor, testified that in his opinion she was not of sound mind. He based his opinion upon the way she would walk around "making funny actions; she would come around like she was in a trance, and acted as if she was really off somewhat." She would come out of the house about 11 or 12 o'clock in the morning with a cup of coffee and a roll and walk around the house and back again. On one occasion she set her cup of coffee down on the front steps and left it there for a week. Things were scattered all around her house, and, when he asked her if she could not keep house a little better, she replied that she was a blue blood, and was not born to housework. On another occasion she pulled weeds out of her garden and threw them on the steps and sidewalks and left them lay there for weeks. She would come out of her house into the yard at times barefooted and dressed in her wrapper, and when she went down town she would dress up with three or four or five strings of beads. Mrs. Ruth Hastings, who became a tenant of Mrs. Witt in May, 1921, testified that she did not seem to be a woman of sound mind; that she was "kind of unbalanced on horoscopes and fortune tellings." Several times a day Mrs. Witt would ask her what day of the month she was born on, and, upon being told, would say, "Well, Mercury is mind, and mind is God, and you are Mercury." In half an hour she would come back and ask her the same thing. This witness testified that at no time that she knew Mrs. Witt was Mrs. Witt perfectly rational. As impeachment of Mr. Lantz' testimony that he believed her to be of sound mind, there was introduced the testimony of Mr. Roughton to the effect that, in reply to a question by him, after Mrs. Witt

had been in the office, whether or not Mr. Lantz did not think the old lady was a little peculiar, Mr. Lantz replied, "Well, I don't know as I would pay much attention to what she said. She is kind of flighty."

Conceding, without deciding, that the foregoing narrative of facts and circumstances relied upon to show the mental incompetency of the testatrix at the time the will was executed to be not sufficient as a matter of law for that purpose, nevertheless we deem their narration to be needful and illuminating in the discussion of the points presented upon the other grounds of contest; namely, the issues of fraud and undue influence.

[3, 4] The burden of proof to establish all of the elements of fraud or undue influence was not, in the instant case, upon the contestant, as is the usual situation upon the contest of a will. The burden was upon the defendant, by reason of his relationship of attorney to Mrs. Witt, to overcome the presumption of fraud and unfair dealing which is automatically raised by the law as a protection to a client against the strong influence to which the confidential relation naturally gives rise. All dealings between an attorney and his client for the benefit of the former are not only closely scrutinized, but are presumptively invalid, on the ground of constructive fraud, and such presumption can be overcome only by the clearest and most satisfactory evidence. Not only must the attorney offer clear and satisfactory evidence that the transaction between himself and his client was fair and equitable, and no advantage was taken by him, but he must also offer proof that the client was fully informed of all matters relative to the transaction, and was so placed as to be able to act understandingly and to deal with the attorney at arm's length. *Kisling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644; *Cooley v. Miller & Lux*, 105 P. 981, 156 Cal. 510; *Clark v. Millsap* (Cal. Sup.) 242 P. 918.

Clearly, Mr. Lantz was acting as attorney for Mrs. Witt from the time she first negotiated with him concerning the clearing up of the titles to her various properties until some time after her will was drawn. The direct admission of Mr. Lantz himself upon the witness stand that he acted as attorney for Mrs. Witt is sufficient to establish the relationship. And an examination of the transactions between Mr. Lantz and Mrs. Witt leaves no doubt. It cannot be said that the fact that part of the negotiations included the terms of Mr. Lantz' payment is proof that Mr. Lantz and Mrs. Witt were dealing at arm's length, and negatives the confidential relationship. There is abundant evidence that Mrs. Witt was not dealing at arm's length with Mr. Lantz, but relied upon him and trusted him implicitly.

The fact that an advantage was obtained by the attorney is evidenced by the terms of the will itself wherein he was bequeathed

all of the property of the testatrix. Defendant insists that there is no proof of any advantage obtained by him by reason of the fact that the will was the result of a fair and equitable contract between himself and the decedent whereby she agreed to will him all of her property in return for an agreement by him to see that she should not during her lifetime be in want. Conceding this, merely for the purpose of argument, it will suffice to say that the evidence adduced by the contestant shows that, having in mind the condition of Mrs. Witt's health, Mr. Lantz stood to gain more by the contract than Mrs. Witt. The prima facie showing of contestant in this particular was, therefore, sufficient to show an advantage obtained by the attorney by virtue of his confidential relationship.

[5] Moreover, the will was drafted and drawn in the office of Mr. Lantz, and was signed by two of his employees as witnesses. Mr. Lantz testified that it was prepared in his office principally by himself. Also one of the subscribing witnesses testified that Mr. Lantz was in the room and talked to Mrs. Witt about the will before she signed it. A presumption of undue influence arises from proof of the existence of a confidential relation between the testatrix and the beneficiary, "coupled with activity on the part of the latter in the preparation of the will." *Estate of Higgins*, 104 P. 6, 8, 156 Cal. 257, 262; *Estate of Baird*, 168 P. 561, 176 Cal. 381; *Estate of Nutt*, 185 P. 393, 181 Cal. 522.

Defendant sought to overcome the presumption of undue influence by establishing the fact that the will was executed pursuant to an agreement, evidenced by the letter of Mrs. Witt of January 3, 1921, and his acceptance thereof, whereby Mrs. Witt agreed to will him all of her property in return for his promise to see that during her lifetime she would not be in want. Defendant insists that this contract was fair and equitable and no advantage was taken of Mrs. Witt. According to defendant, he not only gave his time and services, but he expended from \$6,000 to \$7,000 in purchasing and redeeming the property from prior liens and the expenses of litigation. He points out that he paid to Mrs. Witt \$60 a month, \$175 for doctor's bills, \$250 for nurse's bills, as well as the taxes upon the property during the 2 years preceding her death. However, if the precarious condition of Mrs. Witt's health be considered, it is evident that, although it was possible for a few years that Lantz would not make a profit from the contract, nevertheless the chances were that within a comparatively short time he would, by the original expenditure of \$6,000 or \$7,000, obtain as sole owner legal title to property which brought in an income of approximately \$1,200 per year. It is true that Mr. Lantz did furnish Mrs. Witt \$60 per month, and did permit her the use of one of the houses rent free, but this is not proof that under

the agreement he was obligated to furnish this amount and that he might not at his discretion give her considerably less. There was testimony of Mr. Roughton to the effect that Mr. Lantz told him he had an agreement with Mrs. Witt, but that whether or not he gave her anything was a matter of his discretion. In short, the possibilities at the time of the making of the agreement were that the contract would prove decidedly advantageous to Mr. Lantz.

If it be conceded that the first agreement, evidenced by the three instruments of May 17, 1920, was perfectly fair and legitimate, and was not the first step in the consummation of a scheme whereby Mr. Lantz was to gain all of Mrs. Witt's property, nevertheless the contract whereby Mr. Lantz was to secure all of the property in return for his promise to see that Mrs. Witt did not want for necessities was advantageous to him. According to that agreement, he was entitled to one-half of the property and one-half of the proceeds, and Mrs. Witt was entitled to the other half. This half would bring her in an income closely approximating \$60 per month, and would entitle her to have one-half of her house rent free. The agreement between Mr. Lantz and Mrs. Witt practically amounted to this: Mr. Lantz obligated himself to provide Mrs. Witt with the necessities of life, which, considering the fact that she was entitled to an income from the property of almost \$60 a month, would not obligate him to pay more than \$10 per month at the most, and to pay the doctor's and nurse's bills if she became ill. Mrs. Witt, in return for this, obligated herself to will him the one-half interest in the property. Bearing in mind the condition of Mrs. Witt's health, the inference is warrantable that the terms of the contract were apt to prove very advantageous to Mr. Lantz.

To strengthen the presumption of undue influence, the contestant introduced evidence to the effect that Mrs. Witt was advised by Mr. Garroway, an employee of Mr. Lantz, to accept the agreement. And contestant points out that the promise of Mr. Lantz, contained in his letter of acceptance of Mrs. Witt's offer of January 3, 1921, to the effect that he will "see to it that she will not be in want, that she will have substantial, of the necessities of life," and closing with the statement, "in case I die before Mrs. Witt, I desire my son to fulfill this agreement," is a hazy, indefinite proposition, and left a great deal to the discretion in his hands, and imposed no obligation upon his successors. Particularly is this true when considered in conjunction with Mr. Lantz' statement to Mr. Roughton that whether he paid her or not was a matter of his discretion. As further circumstances to strengthen the presumption, there was offered evidence of the active participation of Mr. Lantz in the actual preparation of the will, to be considered in conjunction with

the testimony of Mr. Lantz that the will was the product of several conferences, and his admission that the will might have been drafted prior to the letter of instruction of January 3, 1921; evidence that Mr. Lantz took advantage of Mrs. Witt's weakness for horoscopes by writing to her that he was inclosing her a pamphlet on luck and astrology; evidence that, although Mrs. Witt had for years wished upon her death to be cremated, she included in her will the statement that she wished to be buried in Rose-dale Cemetery.

[6] Bearing in mind that the burden was upon the defendant to remove any doubt of the unfairness in his dealings with the decedent whereby she may have been induced to will him her property, and to establish by clear and satisfactory proof that he had acted in the utmost good faith and taken no unfair advantage, it may be safely said we think that the jury, having in mind the testimony adduced as to the mental and physical condition of the decedent, was warranted in arriving at the conclusion that the defendant had not sustained the burden of proof upon him, and, therefore, found that the will was procured by the undue influence of the sole beneficiary.

Upon the issue of fraud in the procurement of the will, much of the evidence which has been set forth in connection with undue influence bears also upon this phase of the case. Thus, to overcome the presumption of fraud, defendant points to the testimony relative to the fairness and equitableness of the contract entered into between himself and the decedent. The testimony pro and con relative to the active participation of the beneficiary in the preparation of the will is also pertinent to the issue of fraud. There is, in addition, however, evidence peculiarly pertinent to the issue of fraud. This consists in evidence of the peculiar manner in which Mr. Lantz dealt with the property of Mrs. Witt. It is contestant's contention that evidence of Mr. Lantz' dealing with Mrs. Witt's property tends to establish the fact that Mr. Lantz concealed from Mrs. Witt the fact that he (Lantz), through Davis, had acquired title to her property, and that, at the time he was making a contract with her based upon the clearing up of the titles, he had in effect title to the property himself, and that she was, by reason of her ignorance of the true state of facts, induced to enter into the contract and to make her will naming him as sole beneficiary.

It will be remembered that on April 8, 1920, almost immediately after Mrs. Witt called at Lantz' office relative to her property, he procured Mrs. Colkins to execute a deed of the property, designated as parcel I, to Mr. T. A. Davis. The first mortgage upon No. 2049 Echo Park avenue—which was included in this parcel—had been foreclosed previously, and Mr. Lantz, by securing the

second mortgage, effected a redemption of this property in the name of Mr. T. A. Davis. Davis thereafter assigned to Mr. Lantz the sheriff's certificate of sale, and the sheriff's deed was made to Lantz as grantee. Mr. Lantz had previously purchased in his own name lot 11 of Carlson Terrace tract, designated as parcel II, to which Mrs. Witt held an agreement of purchase. In August, 1920, Mr. Lantz commenced suit for the foreclosure of the Borden mortgage in the name of Mr. Davis; Mr. Lantz, testifying that Mrs. Witt had assigned the Borden note and mortgage to Mr. Davis. And, despite the fact that Borden offered to redeed the property back to Mrs. Witt, Lantz insisted on going on with the foreclosure. On March 7, 1921, Borden deeded all of the property designated as parcel III to Mr. Lantz, and on March 9, 1921, T. A. Davis deeded to Lantz the property previously deeded to him by Mrs. Colkins.

Mr. Lantz testified that Mr. Davis held title to all the property involved in this controversy which stood in his name as trustee for himself (Lantz) and Mrs. Witt. It is insisted by contestant that Mrs. Witt was never informed of the fact that Mr. Davis was acting as trustee for herself and Mr. Lantz, and must therefore have believed that title to the property was held by a stranger; that Mr. Davis was merely a "dummy" for Mr. Lantz, and did not know that he was a trustee of the property. A letter sent by Mr. Davis to Mr. Lantz justified the inference that Mr. Davis was used as a "dummy" of Mr. Lantz and his name used by Mr. Lantz in his own business transactions. There is in the record the testimony of Mr. Person, attorney for Mr. Borden, to the effect that some time in November, 1920, after the deed from Mrs. Colkins to Mr. Davis, he asked Mrs. Witt who Mr. Davis was, and where he lived, and she said she did not know anything about him. There is also testimony to the effect that Mrs. Witt stated that her attorney was getting all her property, and she did not see how he could do that, as she had never deeded any of her property. This testimony indicates that Mrs. Witt did not understand the facts of the trusteeship. Mr. Lantz testified that he took the deed from Mrs. Colkins in the name of T. A. Davis in order that a deficiency judgment outstanding against Mrs. Witt should not be satisfied out of that property. He did not explain, however, why the deed was not taken directly in his name, since the same result could have been reached thereby. There is also some doubt from his testimony whether he actually learned of the deficiency judgment prior to the procurement of the deed from Mrs. Colkins to Davis or not.

Ignorance on the part of Mrs. Witt of the fact of the trusteeship of Mr. Davis for herself and Mr. Lantz—conceding that the testimony that Davis was holding the property

as trustee for them is true—and a belief by her that title to part of her property was in the hands of strangers, could not but have prevented Mrs. Witt from dealing understandingly with her property. It was the duty of Mr. Lantz as her attorney to make full disclosure of all facts in order that his client might act understandingly and at arm's length from himself.

The testimony by Mr. Lantz that the property was held by Mr. Davis as trustee is somewhat weakened by the fact that in the petition for the probate of the will of Mrs. Witt Mr. Lantz stated that no real property was left by Mrs. Witt; her entire estate consisting of personal property of the value of about \$250. If Davis had acted as trustee, Mrs. Witt's equitable interest in the property included in parcel I had never been divested, and should have been included in the statement of her estate. Some support to the inference that the facts were not fully and freely disclosed is to be found in evidence that instruments involved in the transactions were not recorded for a considerable time after they had been executed.

Contestant also points out that in several instances direct testimony on the part of Mr. Lantz which, if true, would have strengthened his case materially was upon cross-examination changed or considerably weakened. For example, Mr. Lantz testified that the will was executed subsequent to the letter of instructions of January 3, 1921, but upon cross-examination admitted that it might have been drafted previously, and that several conferences were held relative to it. Relative to the fact that Mrs. Witt was informed of who Mr. Davis was, Mr. Lantz testified at one time that he informed her at the time of the negotiations about the Colkins deed of April 8, 1920, and at another time he testified that he told her when the suit was filed by Davis for the foreclosure of the Borden mortgage in August, 1920. Also Mr. Lantz testified that the last two pages of Mrs. Witt's deposition which were clear and lucid were given at the time of the taking of her deposition, whereas Mr. Hyatt testified that she came in later and brought them. Contestant points out that the testimony upon these various points dealt, not with inconsequential matters, but matters of vital interest in the case.

Testimony was introduced by the defendant tending to show a plausible explanation for the manner in which the property had been handled and seeking to negative the circumstances tending to support the presumption of fraud. The jury were, however, the judges of the credibility of the witnesses, and were not bound to accept as true the testimony so offered. They may have, in their discretion, eliminated it entirely from their consideration. At the most, it merely created a conflict.

[7] We are of the opinion that, bearing in

mind that the burden of proof was upon the defendant, there is sufficient evidence to warrant the conclusion of the jury that the procurement of the will was the result of fraud on the part of the sole beneficiary.

[8] We find no merit in the contention that a new trial should have been granted, for the reason that the verdict was not entered by the clerk, as required by section 628, Code of Civil Procedure. Section 628 is directed to the duties of the clerk, and the failure of the clerk to enter in the minutes a court order does not prevent the action taken being the order of the court. *Von Schmidt v. Widber*, 34 P. 109, 99 Cal. 511.

[9] The special verdicts were not inconsistent with the general verdict, and there was no error by the court in refusing to submit to the jury the special interrogatories prepared by the defendant. Submission of special issues is discretionary on the part of the trial court. *Oberholzer v. Hubbell*, 171 P. 436, 36 Cal. App. 16, 19.

[10] With regard to the other specifications of errors, we are satisfied that they would not suffice to warrant a reversal of the judgment. Const. art. 6, § 4½.

The judgment and the order denying a new trial are, and each is, affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LAWLOR, J.

76 Cal. App. 486

WENTZ v. LINTHICUM. (Civ. 5376.)

(District Court of Appeal, First District, Division 1, California. Feb. 9, 1926.)

1. Replevin ⇨57—Complaint to recover stock deposited with defendant for sale or its value held to state a cause of action.

Complaint alleging that plaintiff deposited with defendant, at his request, for purpose of sale, stock covered by certificate which also covered stock owned by defendant, and that defendant refused, after a reasonable time, upon demand, to return it or its equivalent in cash, stated a cause of action for return of stock or its value.

2. Pleading ⇨49—Plaintiff need only state his cause of action, in suit to recover property or its value, in ordinary and concise language.

As the Code abolishes distinction between common-law actions and provides for a single action, it is only necessary for plaintiff, in suit to recover property or its value, to state his cause of action in ordinary and concise language, without stating character of action.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by John T. Wentz against Ex. E. Linthicum. From an order sustaining a de-

murrer to his complaint, plaintiff appeals. Reversed.

John T. Wentz, of San Leandro, in pro. per.

J. E. Hood, of Oakland, for respondent.

TYLER, P. J. This is an appeal from an order sustaining a demurrer to a second amended complaint. The action was one brought to recover possession of certain shares of stock in a corporation. The complaint alleges in substance that on or about the 10th day of October, 1923, plaintiff was the owner of five shares of the common capital stock of the Firestone Rubber Company, a corporation, such stock being of the par value of \$100 per share included in a certain certificate representing ten shares of said common stock; that defendant herein was the owner of the other five shares represented by such certificate. It is then alleged that on the date last mentioned plaintiff was in the possession of such certificate, and at the request of said defendant he deposited it with him for the purpose of having it sold and turned into cash. Further allegations are to the effect that on or about the 7th day of January, and at various other times, plaintiff demanded his five shares of stock from defendant, or the value thereof, but that defendant refused and still refuses to return to plaintiff the stock or its equivalent. The value is then alleged to be of the sum of \$500. The prayer is for the return of the five shares or their value and for general relief.

To this complaint a demurrer was interposed upon the grounds that it did not state a cause of action, and that it was uncertain, in that it could not be ascertained therefrom whether plaintiff is suing in replevin, or claim and delivery, or trover. The demurrer was sustained, and plaintiff refused to further amend. Judgment was entered in defendant's favor.

In support of the judgment respondent claims that the allegations of the complaint show conclusively that plaintiff and defendant are either joint tenants or tenants in common of the one certificate representing the ten shares of stock, and, this being so, plaintiff is not entitled to sue for the recovery of the same, as both parties are equally entitled to the possession thereof.

[1] Assuming that an action of replevin or claim and delivery is not maintainable by one tenant in common against another where the property is indivisible, there is no attempt here by the pleader to assert a right to the possession of the entire certificate, but only to one-half of the shares represented thereby. The property is divisible, and could be surrendered to the company that issued it, and two certificates of five shares each

could be issued in lieu thereof to the rightful owners. To the objection that the complaint is uncertain, in that it fails to state the character of the action, it is sufficient to say that in this state there is but one form of action. The cause of action here declared upon is based upon a contract of bailment, and is an ordinary one to recover personal property or its value. The auxiliary remedy of possession of the entire certificate is not sought. Plaintiff having deposited his shares of stock with defendant to sell and account for, he is entitled to the proceeds of such sale or the return of his property, which he alleges consists of five shares of stock. He asks for nothing else.

[2] Whatever the form of this action at common law might have been designated, whether debt, detinue, trover or conversion, is a question of no moment here. Our Code abolishes the distinction between the different common-law forms and provides for a single action. The provisions thereof do away with all the merely formal and technical distinctions between the different common-law actions, making every civil action in form substantially a special action on the case, thus avoiding the effects under the old practice of mistakes as to the proper form in particular cases. Under our reformed procedure it is only necessary for a plaintiff to state his cause of action in ordinary and concise language.

Here, as above indicated, plaintiff alleged that he deposited his stock, describing it, with defendant, at his request, for the purpose of sale. He charged that defendant refused, after a reasonable time, upon demand, to return it or its equivalent in cash. These allegations entitle plaintiff to the relief sought for, and they state a cause of action. *Faulkner v. First Nat. Bank*, 62 P. 463, 130 Cal. 258; *Corey v. Struve*, 149 P. 48, 170 Cal. 172.

The judgment is reversed.

We concur: KNIGHT, J.; CASHIN, J.

76 Cal. App. 460

FARREN et al. v. WILLARD. (Civ. 2721.)

(District Court of Appeal, Third District, California. Feb. 5, 1926. Hearing Denied by Supreme Court April 5, 1926.)

1. Landlord and tenant ⇨158—Contract by landlord to drive wells and install pumps to irrigate land held to require performance early enough to enable tenant to use water when required.

Contract by which landlord agreed to drive wells and install pumps with which to irrigate land leased *held* to require performance early enough to enable tenant to use water when required, notwithstanding lack of covenant pro-

viding for rebate of rent on account of any failure of landlord to comply with his covenant.

2. Sales ⇨81(4)—Contract for sale of water pumps, excusing seller for certain delays, held not to relieve it from its own negligence and unexplained delay in executing order promptly.

Contract for sale of water pumps, excusing seller for delays occasioned by strikes, civil or military, or other hindrances or calamities beyond its control, *held* not to relieve seller from its own negligence and unexplained delay in executing order for pumps promptly.

3. Sales ⇨81(3)—Contract providing by written clause that shipment should be made at once held to manifest intention for immediate delivery, notwithstanding contrary printed portion of contract (Civ. Code, §§ 1649, 1651, 1652).

Contract for sale of water pumps providing by written clause that shipment of pumps would be made at once, *held* to manifest intention, for delivery at once, in view of Civ. Code §§ 1649, 1651, 1652, notwithstanding printed portion of contract excusing seller from delays occasioned by strikes or other hindrances, or calamities beyond its control.

4. Sales ⇨418(18)—Giving of credit by landlord to tenant on rent on failure to irrigate land in accordance with contract, without awaiting suit, held not a "voluntary payment," precluding landlord from recovering against seller for breach of contract to furnish water pumps.

Under contract requiring landlord to furnish tenant with water to irrigate his land, giving of credit by landlord to tenant of a sum equal to rent covenanted to be paid, without awaiting suit, on failure to furnish water to portion of lands, due to seller's failure to ship water pumps in accordance with contract, *held* not a "voluntary payment," precluding landlord from recovering therefor in suit against seller for breach of contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Voluntary Payment.]

Appeal from Superior Court, Glenn County; H. C. Bell, Judge.

Action by R. C. Farren and another against E. E. Willard, wherein defendant filed cross-complaint. From a judgment granting a nonsuit as to defendant's cross-complaint and directing judgment for plaintiff, defendant appeals. Judgment reversed, and order granting nonsuit set aside.

Claude F. Purkitt, of Willows, and Arthur C. Huston, of Woodland, for appellant.

George R. Freeman, of Willows, for respondent.

PER CURIAM. On the 30th day of January, 1920, the defendant entered into a contract with the plaintiff Western Well Works, Incorporated, whereby the plaintiff agreed to furnish certain pumps, motors, and equip-

ment and the defendant agreed to pay therefor the sum specified in said contract. This action is for a balance alleged to be due on account of the unpaid portion of the purchase price of said equipment. The defendant, by cross-complaint, alleged damages for failure on the part of the plaintiff Western Well Works, Incorporated, to furnish the pumps, motors, and equipments according to the terms of said contract; the damages sought to be recovered being damages alleged to have been suffered by reason of such delay on the part of said plaintiff in fulfilling its contract. Upon the conclusion of the testimony, the court granted a nonsuit as to defendant's cross-complaint, and directed judgment for the plaintiff for the unpaid portion of the amount agreed to be paid by the defendant for the pumps, motors, etc. From this judgment the defendant appeals.

It appears from the testimony in this case that, preceding the execution of the contract between the said Western Well Works, Incorporated, and the defendant Willard, certain agents of said plaintiff called upon said Willard, and negotiations were had leading up to the execution of the contract for the purchase of the machinery and equipment mentioned therein; that the defendant refused to sign the printed form of the contract submitted to him by the agents of the plaintiff, unless provision were made therein for the immediate delivery of the articles about to be ordered. It further appears that the agent, not being authorized to make any change in the written form of the contract tendered to the defendant, communicated with the plaintiff at its home office, and was instructed and authorized to arrange for delivery as required by the defendant, and thereupon there was inserted in said contract the following written clause: "Delivery: Shipment to be made of all three pumps at once." It appears that the reason for desiring immediate delivery was that certain lands rented by the defendant were to be seeded to rice, and that the pumps and equipment should be installed and in working order by the 1st day of May of the year 1920. The contract referred to contained, among other things, that the plaintiff Western Well Works, Incorporated, would install the pumping machinery, and other conditions which we need not mention, and also had therein the following printed clause:

"Responsibility: The time of delivery named above is contingent upon delays occasioned by strikes, civil or military authority, or other hindrance or calamities beyond our control, nor do we assume any liability for damage on account of delays, or for defective material furnished other than to make good such defects as may be proved to have existed when said material was furnished."

The transcript further shows that the Western Well Works, Inc., did not have on hand

and was not a manufacturer of electrical motors, but these facts were not disclosed to the defendant. It also appears that, notwithstanding the written portion of the contract to make delivery at once, the plaintiff Western Well Works, Incorporated, did not order or make any effort to secure the electrical motors contracted to be delivered until on or about the 14th day of April, 1920, 73 days after the date of the contract first herein referred to. The answer of the plaintiff Western Well Works, Inc., admits that 60 days was a reasonable time within which to furnish the machinery contracted to be delivered. It also appears that the motors ordered by the plaintiff Western Well Works, Incorporated, on the 14th day of April, 1920, were delivered within 60 days of the date of the order given therefor. No explanation appears of why 73 days were allowed to elapse between the date of receiving the order signed by the defendant and the date when the plaintiff Western Well Works, Incorporated, ordered the motors in question contracted to be delivered by them.

[1] It appears from the transcript that the defendant Willard had leased some 2,500 acres of land to a tenant by the name of Marr, to be seeded to rice; that all but 200 acres of land were subject to irrigation by waters obtained from a canal company; that 200 acres of the land in question were of such elevation that irrigation could not be had by water furnished through the canals of the irrigation district, and therefore in the lease executed by the defendant to his tenant, Marr, there was inserted the following covenant:

"It is further understood and agreed between the parties hereto that the party of the first part (the defendant herein) will at his own proper charge and expense drive down wells and install pumping plants or units in sufficient numbers with which to irrigate all that portion of land which lies above or is too high to be irrigated from the main or central canal, etc."

The lease in question also contained the following subdivision:

"It being understood and agreed, however, between the parties hereto, that the party of the first part does not become the guarantor or the insurer that the whole or any amount of said water shall be furnished at any time during the term of this lease, or any year thereof, or that water will be furnished to said land that can be irrigated from said main canal, etc."

Provision was further made in the lease for a rebate of rent upon failure of water furnished by the irrigation district through its canals. There does not appear in the lease any provision for rebate of rent on account of any failure of the lessor, Willard, to comply with his covenant. The lack of such a

covenant, however, does not relieve him from the legal liability to perform his covenants as contained in the lease, and the argument to the contrary does not seem to us to require any consideration further than to state that performance within a reasonable time and at a time early enough to enable his tenant to use the water when required is necessarily inferred from the covenant to sink the wells, install the pumps and machinery necessary to operate the same. It may be true that he did not guarantee that the wells would furnish sufficient water, but that does not in any wise relieve the lessor from the performance of his part of the covenants contained in the lease. It further appears from the transcript that the rental agreed to be paid for the leased land was the sum of \$40 per acre, and that promissory notes were executed therefor; that upon failure to furnish water for the 200 acres in question, and which were not seeded by the tenant on account of the water not being furnished, the defendant Willard, as lessor, gave his tenant credit for the sum of \$8,000, the rent covenanted to be paid for the 200 acres in question. The testimony further shows that in order to properly cultivate the rice the water should have been furnished by the 1st day of May; that the water was not furnished by reason of the failure of the plaintiff Western Water Well Works, Incorporated, to furnish the equipment contracted for promptly, as specified in the agreement.

[2] As a defense to this action on appeal, the respondent calls our attention to the responsibility clause printed in the contract, and argues that the Western Well Works, Incorporated, incurred no responsibility by reason of its failure when ordering the machinery until 73 days had elapsed after receiving its contract and order from the defendant Willard. While other reasons which will be stated hereafter are sufficient to show that the so-called responsibility clause has no bearing whatever upon this case, it may be well to call attention to the fact that a reasonable interpretation of that clause leads to the conclusion that the plaintiff Western Well Works, Incorporated, is not excused for any negligence on its part in performing its contract according to the terms and time therein specified, but is only excused by delays occasioned by strikes, civil or military, or other hindrances or calamities beyond its control. The whole clause, we think, must be read together, and two or three words contained therein cannot be extracted therefrom and given a meaning different from the predicate or basis upon which the release from liability is founded. We do not think that there can be incorporated into this provision of the contract, as we have set it forth, the idea that the Western Well Works, Incorporated, is contracting to be relieved from its own negligence and unexplained delay in exe-

cuting the order for the machinery promptly, as covenanted by it in the agreement.

There is another principle of law, as we have said, which is applicable and controlling here (section 1651, Civ. Code):

"Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form. And if the two are absolutely repugnant, the latter must be so far disregarded."

This gives precedence to the written clause to which we have hereinbefore referred, and, if there is any repugnancy between it and the printed responsibility clause contained in the contract, the written provision is controlling. Thus, if by any possible construction the responsibility clause being printed can be held to excuse the Western Well Works, Incorporated, from its own inexcused delay, the written provision to which we have referred would be repugnant thereto, and would be the one by which this contract is governed. Again, section 1652 of the Civil Code provides for an interpretation which will give effect to all of the clauses of the contract. By the interpretation which we have adopted, effect is given to all of the clauses of the contract, when the responsibility clause is limited to the basis or predicate upon which it is founded, to wit, strikes, civil or military authority, hindrances or calamities beyond the control of the contracting party. If the contract is ambiguous in any respect, it must be interpreted in the sense in which the promisor believed at the time of making it that the promisee understood it. Section 1649, Civ. Code.

[3] The transcript shows beyond question that the parties to the contract were contracting for delivery at once. While it does not seem necessary to cite any authorities to support the application of the sections of the Civil Code in the present case, yet we will refer to the following: *Henne v. Summers*, 116 P. 86, 16 Cal. App. 67, on pages 70 and 71, refers to the sections which we are considering, and sets forth the law governing contracts where there is a written and a printed portion, just as we have above stated. In the case of *Bonslett v. Butte, etc., Canal Co.*, 122 P. 821, 18 Cal. App. 149, this court, speaking through Presiding Justice Chipman, referring to the sections which we are considering, says:

"Where a contract is partly written and partly printed, or is written or printed under special directions of the parties to meet their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties or contract in

question, the written controls the printed portions. If the two are absolutely repugnant, the printed part must be disregarded."

Other cases might be cited supporting the rule above quoted, but so doing would only unnecessarily extend the length of this opinion.

[4] It is finally argued by the respondent that the defendant Willard has suffered no damage by reason of the failure of the plaintiff to promptly perform its part of the contract according to the agreement therein contained. It is argued that the giving of credit on the promissory note executed by the defendant Marr of the sum of \$8,000, being equivalent to the rental covenanted to be paid for the lands that were not seeded to rice, or upon which rice was not grown, was purely voluntary; that if the defendant Willard was liable to Marr for any item of damages, it is not alone for the rent covenanted to be paid, but also for the profits that might have been realized from the rice that could have been grown upon the premises had water been furnished. This is only an argument as to the amount of the defendant Willard's liability to his tenant by reason of the failure of the lessor Willard to comply with the terms of his lease, and does not go to the question of liability. Nor do we think the credit on the promissory note can be construed in the light of a voluntary action on the part of the defendant Willard. Willard was under the legal liability of recompensing his tenant for all damages suffered by the latter by reason of Willard's failure to install pumps, etc., as agreed to by him, and the fact that Willard acknowledged his liability and sought to make amends before awaiting suit upon his contract does not alter the situation as to the damages suffered by the defendant Willard by reason of the plaintiff's negligence to comply with the terms of its contract. The amount of damages is entirely outside the question of liability. The giving of credit by Willard to his tenant of a sum equal to the rent covenanted to be paid without awaiting suit, in law, is no more a voluntary payment than would be the discharge of a lien upon one's premises without waiting for foreclosure proceedings.

It is next argued that if the lands had been seeded to rice it is probable that no crop would have been harvested therefrom by reason of the fact that certain portions constituting the lower lands of the 2,500-acre tract included in the lease were not harvested by reason of being flooded during the harvest time. We find no merit in this contention.

It follows from what has been said that the judgment appealed from must be reversed and the order granting a nonsuit as to the defendant's cross-complaint set aside, and it is so ordered.

76 Cal. App. 519

NEVADA-CALIFORNIA POWER CO. et al. v. BORLAND. (Civ. 3058.)

(District Court of Appeal, Third District, California. Feb. 15, 1926. Hearing Denied by Supreme Court April 15, 1926.)

1. Taxation ⇨156—Gross receipts tax held inapplicable to corporation engaged in generation of electric power to be devoted to a public use exclusively in state of Nevada (Const. art. 13, § 14, subd. [a]; St. 1911, p. 536, § 8, subd. 3); "public utility."

Const. art. 13, § 14, subd. (a), providing for gross receipts tax on corporations engaged in transmission or sale of gas or electricity, which tax shall be in lieu of all other taxes, held inapplicable to corporation generating electric power to be devoted to a public use exclusively in state of Nevada; such corporation not being a "public utility" within meaning of Constitution, and hence was taxable under St. 1911, p. 536, § 8, subd. 3, it being immaterial that corporation is public utility in state of Nevada.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Utility.]

2. Taxation ⇨156—Whether statute imposing gross receipts tax on corporation is applicable depends on character of service performed by corporation in this state (Const. art. 13, § 14, subd. [a]).

Whether Const. art. 13, § 14, subd. (a), imposing gross receipts tax on companies engaged in transmission or sale of electricity, in lieu of all other taxes, is applicable, is to be determined by character of service which corporation, seeking its benefits, performs in this state.

Appeal from Superior Court, Mono County; Wm. D. Dehy, Judge.

Action by the Nevada-California Power Company and another against James Borland, individually, and as Tax Collector in and for the County of Mono, State of California, to enjoin the execution of a tax deed. Judgment for defendant, and plaintiffs appeal. Affirmed.

I. B. Potter and Henry W. Coil, both of Riverside, for appellants.

Charles L. Hayes, of Bridgeport, and Platt & Sanford, of Carson City, Nev., for respondent.

FINCH, P. J. Plaintiffs brought this action to enjoin the execution of a deed after the sale of their property for nonpayment of county taxes thereon. Defendants were given judgment, and the plaintiffs have appealed therefrom. "The plaintiffs herein were and are of the same character, and have at all times during their respective ownerships operated the properties in the same manner and for the same purposes and in the same business." No distinction, therefore, need be made between them and they, or either of them, will be referred to as plaintiffs or appellants.

"The property involved herein embraces a complete hydroelectric generating plant consisting of power house, pipe line, penstock, dam, reservoir, and appurtenant machinery and structures, and the land on which the same are situated, together with water and water rights for the operation of said plant; also an electrical transmission line 22 miles in length, extending from said power house to the Nevada state line, and a second transmission line 55 miles in length, extending from said power house to the south boundary of Mono county." It was stipulated at the trial that the plaintiffs have at all times generated electricity at their plant in Mono county and transmitted it thence "through the state of California into the state of Nevada"; that they did not "generate, transmit, or sell * * * electric power for use in the state of California," but "sold and distributed" the same "exclusively in the state of Nevada"; that each of the plaintiffs "operated as a public service corporation in Nevada, and as such was under the jurisdiction of the Public Service Commission of Nevada"; and that neither of them was at any time "a public service company nor a public utility in the state of California." The articles of incorporation of the plaintiffs, after describing their powers and purposes, provide "that the foregoing objects shall be limited so that the corporation shall not do a public utility business in the state of California or serve the public in any way within the territorial limits of said state," and that the business of the corporation shall be carried on in the state of Nevada and also in the state of California, subject, however, to the limitation that they shall not do a "public utility business in California."

"Complying or attempting to comply with the provisions of section 14 of article 13 of the Constitution and the acts of the Legislature passed pursuant thereto, * * * plaintiff companies did, * * * on the 15th day of March, 1916, file with the state board of equalization duly verified reports * * * showing in detail all of the information required by said constitutional and statutory provisions. * * * These reports contained the express statement that 'no business in the sale of electricity was transacted in California during the year 1915.' * * * The companies, however, did not file any duplicate of these reports with the tax assessor of Mono county, at the time of filing the reports with the state board, * * * and the copies were not received by the tax assessor until about the 29th or 30th day of June, 1916. * * * The state board of equalization * * * assessed taxes for said year 1916 upon the basis of said report. * * * The plaintiffs in due time paid the state treasurer the amount of the taxes so levied and assessed for state purposes. * * * The county assessor of Mono coun-

ty also assessed the above-described property on the county assessment rolls and listed the same in the tax assessment book of said county. * * * No part of this tax has been paid." The properties "were advertised in the delinquent tax list for the year 1917, and at the June sale of that year declared 'sold to the state' for the taxes for the year 1916. At the expiration of 5 years—that is, at the June, 1922, sale—it would become the duty of the tax collector to issue a deed therefor to the state or to such other person as might bid in the property. This action was commenced prior to the date for the issue of such deed." The foregoing quotations are taken from appellants' opening brief, which contains a fair statement of the facts involved in the case.

Respondents contend that the failure of appellants to file with the county assessor a copy of their report to the state board estops them from attacking the county assessment, citing *Great Western P. Co. v. City of Oakland*, 209 P. 553, 189 Cal. 649, and *Pacific Electric Ry. Co. v. Rolkin*, 128 P. 20, 164 Cal. 154. The contention need not be considered, however, because the grounds urged by appellants for a reversal of the judgment are untenable.

Article 13, § 14, subd. (a), of the Constitution, provides:

"All companies engaged in the transmission or sale of gas or electricity shall annually pay to the state a tax upon their franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and other property, or any part thereof used exclusively in the operation of their business in this state, computed as follows: Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from operation of such companies, and each thereof within this state. When such companies are operating partly within and partly without this state, the gross receipts within this state shall be deemed to be all receipts on business beginning and ending within the state, and a proportion, based upon the proportion of the mileage within this state to the entire mileage over which such business is done, of receipts on all business passing through, into, or out of this state. * * * Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies except as otherwise in this section provided."

Chapter 335, § 8, subd. 3, of the Statutes of 1911, in force at the time of the assessments involved herein, provided:

"When any property in this state belonging to a company of the classes named in this section is rendering no service to the public in this state, even though it may be rendering service to the public in some other state or states, such property shall not be considered as operative property, and shall be subject to assessment and taxation for county, municipal, and district purposes." Stats. 1911, p. 536.

Appellants contend that the foregoing statutory definition of "operative property" is in conflict with the provisions of the Constitution herein quoted, citing *Lake Tahoe Ry., etc., Co. v. Roberts*, 143 P. 786, 168 Cal. 551, 556, Ann. Cas. 1916E, 1196, and *San Diego, etc., Ry. Co. v. State Board*, 132 P. 1044, 1047, 165 Cal. 560, 565. In the latter case it is said:

"It may be doubted whether any statutory definition of operative property would be valid if it was in conflict with the Constitution."

And in the former:

"If the definition is in harmony with the language of the Constitution, it does not affect the discussion hereinbefore had. If the definition does violence to the language of the Constitution to that extent it cannot be upheld for the definition of the Constitution itself must prevail."

The statute under discussion was enacted immediately after the adoption of the constitutional amendment relating to the taxation of corporations, and is therefore to be given consideration as a contemporaneous legislative construction of the amendment, although not binding upon the courts. The decisions of the courts, however, are in harmony with such legislative construction.

In *Story v. Richardson*, 198 P. 1057, 1059, 186 Cal. 162, 166 (18 A. L. R. 750), it is said:

"It is clear, both from the report of the commission proposing the amendment and the arguments advanced to those voting upon the adoption of the amendment, as well as from the nature of the amendment, that the provision for taxation in proportion to gross receipts is applicable only to public utilities. * * * 'Even a constitutional declaration cannot transform a private enterprise or a part thereof into a public utility and thus take property for public use without condemnation and payment.' *Del Mar Water, etc., Co. v. Eshleman* [140 P. 591, 948], 167 Cal. 666, 680. Consequently, it has been held that the definitions of public utilities contained in the Public Utilities Act must be construed as applying only to such properties as have in fact been devoted to a public use, and not as an effort to impress with a public use properties which have not been devoted thereto."

In *Transcontinental Tel. Co. v. Neylan*, 167 P. 541, 542, 34 Cal. App. 379, 382, it is said:

"It is only when such a corporation is operating within this state and rendering public service within this state, because of which operation and business it earns gross proceeds upon which the percentage tax can be based, that such a tax so paid is in lieu of all other taxes and licenses, state, county, and municipal."

[1,2] The plaintiffs rendered no public service wholly within the state or "partly within and partly without this state," and hence the constitutional amendment is not applicable to the taxation of their property. It is clear that they are not public utilities within the meaning of that amendment. They have devoted no property to a public use in this state. Even the constitutional definition of a public utility "must be construed as applying only to such properties as have in fact been devoted to a public use." *Allen v. Railroad Commission*, 175 P. 466, 474, 179 Cal. 68, 89 (8 A. L. R. 249). The fact that the plaintiffs are public utilities in the state of Nevada is immaterial as affecting the character of the service they perform in this state. *Thayer v. California Development Co.*, 128 P. 21, 164 Cal. 117, 133. The applicability of the constitutional amendment must be determined by the character of service performed in this state. Their business in this state is of a private character, the generation of electric power to be devoted to a public use exclusively in the state of Nevada. The case of *Grover Irrigation, etc., Co. v. Lovella Ditch, etc., Co.*, 131 P. 43, 21 Wyo. 204, Ann. Cas. 1915D, 1207, L. R. A. 1916C, 1275, involved the question of a corporation's right to condemn land in Wyoming for the location and maintenance of a headgate and part of an irrigating canal for the irrigation of lands situated wholly within the state of Colorado. The court said:

"It is a familiar elementary principle that the laws of a state have no extraterritorial effect. And it is not necessary for a state statute to contain words expressly confining its operation within the state. That it is so confined is generally understood. It is therefore not a strained construction of the statute conferring authority to appropriate and condemn land for a right of way for a ditch for agricultural purposes, that it is intended to be confined not only to a right of way within the state, but as well to agricultural purposes within the state."

The subject is so fully considered in the opinion and in the notes following it that no further discussion thereof is deemed necessary. Of course, if the corporation had sought to condemn a right of way for the purpose of performing a public service in both states, an essentially different question would have been presented. Since the constitutional amendment is applicable only to public utilities, and the plaintiffs are not public utilities in this state, the provisions of the amendment have no application to the taxation of their property.

The judgment is affirmed.

We concur: PULLEN, Justice pro tem.; PLUMMER, J.

76 Cal. App. 419

LINDSLEY v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR HUMBOLDT COUNTY et al. (Civ. 3046.)

(District Court of Appeal, Third District, California. Feb. 3, 1926.)

1. Contempt $\S$ 54(4)—Affidavit, setting forth circulation of newspaper in county, after drawing of names for trial of criminal libel case, wherein motives in respect to prosecution were impugned, held sufficient to show contemptuous acts charged and to give court jurisdiction (Code Civ. Proc. $\S$ 1209, subd. 9).

Affidavit in proceeding for contempt, alleging circulating newspaper in county, after drawing names of jury for trial of criminal libel case, wherein motives in respect to said prosecution were impugned, held sufficient to show contemptuous acts charged of publishing and circulating certain articles in newspaper in violation of Code Civ. Proc. $\S$ 1209, subd. 9, and to give court jurisdiction thereof.

2. Contempt $\S$ 63(1)—Judgment of contempt held proper, where contemner made no answer, notwithstanding no evidence was introduced with exception of affidavit in proceedings (Code Civ. Proc. $\S$ 1211, 1212, 1217, 1218; Pen. Code, $\S$ 1011).

Judgment for contempt in proceeding under Code Civ. Proc. $\S$ 1211, 1212, held proper, under sections 1217, 1218, and Pen. Code, $\S$ 1011, where contemner made no answer, notwithstanding no evidence was introduced with exception of affidavit in the proceedings.

3. Contempt $\S$ 54(4)—Affidavit on which order to show cause in contempt proceeding is based must set forth facts constituting contempt to give court jurisdiction.

Affidavit in contempt proceedings on which order to show cause is based must set forth facts constituting contempt to give court jurisdiction, as differing from information or indictment, and is evidentiary in character.

4. Contempt $\S$ 61(1)—On filing answer in case of constructive contempt denying allegations of affidavit, issue is presented and witnesses are called, and trial had as in other cases.

In case of constructive contempt, where an answer has been filed denying allegations of affidavit, issue is presented and witnesses are called and examined, and trial had as in other cases.

5. Contempt $\S$ 61(1)—Court need not look outside record evidence presented to it in contempt proceedings to determine truthfulness of matters alleged, but may investigate charge by examining affidavit submitted without further evidence (Code Civ. Proc. $\S$ 1217).

Code Civ. Proc. $\S$ 1217, providing court may examine witnesses for or against person alleged in contempt, and requiring court to investigate charge, does not mean that court must necessarily look outside of record evidence presented to it to determine accuracy or truthfulness of matters alleged which are uncon-

tradicted, but court may investigate charge by examining affidavit submitted without further evidence.

6. Contempt $\S$ 9—Prospective jurors need not have read article published in county after drawing jury, reflecting on criminal prosecution, to constitute contempt thereof.

To establish contempt for publication in county of articles reflecting on criminal prosecution, after drawing jury, it is not necessary to show that prospective jurors actually read article so published.

7. Contempt $\S$ 67—Evidence, as applied to merits of case, cannot be reviewed on certiorari to review judgment for contempt, but can be considered only to ascertain if there was proof of jurisdictional facts alleged in affidavit.

On proceedings in certiorari to review judgment for contempt, evidence, as applied to merits of case, cannot be reviewed, but can be considered only for purpose of ascertaining if there was proof of jurisdictional facts alleged in affidavit.

8. Contempt $\S$ 66(7)—Defendant in contempt proceedings, who, after motion to quash and demurrer were overruled, rested case without putting anything before court, cannot complain on appeal because no evidence was introduced.

Where defendant in contempt proceeding, in response to an order to show cause, filed motion to quash and demurrer, and, after adverse ruling thereto, rested case without putting anything before court, every constitutional right guaranteed to him was preserved, and he cannot complain on appeal because of judgment of contempt without introduction of evidence.

9. Contempt $\S$ 9—Publishing different articles in newspaper on different days relative to criminal prosecution pending within county constitutes separate contempts (Code Civ. Proc. $\S$ 1209, subd. 9).

Publication of different articles in newspaper on different dates relative to criminal prosecution pending within county, in violation of Code Civ. Proc. $\S$ 1209, subd. 9, constitutes separate acts of contempt.

10. Contempt $\S$ 63(1)—Court is authorized to pronounce judgment on each contempt charged separately and in different counts of affidavit constituting different and distinct offenses (Code Civ. Proc. $\S$ 1209, subd. 9).

Where publication of certain articles in violation of Code Civ. Proc. $\S$ 1209, subd. 9, on different dates, was charged separately and in different counts of affidavit constituting separate and distinct offenses, court was authorized to pronounce judgment on each offense.

11. Contempt $\S$ 66(7)—Court of Appeals is not authorized to hold aggregate amount of fines for separate contempts excessive, where fines imposed were not in excess of amount authorized by statute (Code Civ. Proc. $\S$ 1218).

Court of Appeals is not authorized to hold aggregate amount of fines for contempts excessive, where fines were not in excess of

amount authorized under Code Civ. Proc. § 1218.

Application by Alfred Lindsley for certiorari against the Superior Court of Humboldt County, and Denver Sevier, Judge, to review an order adjudging petitioner guilty of contempt. Writ denied.

See, also, 241 P. 934.

Metzler & Mitchell, of Eureka, for petitioner.

Arthur W. Hill, Dist. Atty., of Eureka, and Paul B. Gibson, Deputy Dist. Atty., of San Francisco, for respondent.

PLUMMER, J. [1] This is an application for a writ of certiorari to review the judgment of the superior court of Humboldt county adjudging the defendant guilty of four separate and distinct contempts of court and imposing sentence therefor. The petitioner was adjudged guilty of four distinct contempts of court, and sentenced to pay a fine for each separate contempt, or, in default thereof, to be imprisoned in the county jail. The petitioner is charged in the affidavit with having on four different occasions committed contempt of court by reason of printing, publishing, and circulating certain articles in a newspaper known as the Humboldt News, in the county of Humboldt, violative of subdivision 9 of section 1209 of the Code of Civil Procedure. The charge is in four separate and distinct counts, and judgment was pronounced upon each count. The petitioner alleges that the affidavit upon which the proceeding is based is insufficient, and that no proof of the facts stated in the affidavit was produced at the hearing; that no hearing, in fact, was had. It appears from the affidavit that an action against the petitioner for criminal libel was pending in the superior court of Humboldt county; that the cause had been set for trial on the 26th day of October, 1925; that the names of 60 persons had been drawn from the trial jury box from which to impanel the jury; that the petitioner is editor of the newspaper above mentioned, printed, published, and circulated in the city of Eureka and county of Humboldt; that said newspaper has a large number of subscribers in said county; that, after the drawing of said names from the said jury box, in four separate issues of said newspaper the petitioner published therein certain statements, which are set forth at length in this proceeding, attacking the district attorney of the county, impugning his motives in respect to the prosecution of said criminal action, and reflecting upon the character and veracity of the prosecuting witnesses therein; that said articles were respectively published and circulated for the purpose and with the intent of creating public sympathy for the defendant, the petitioner herein, and for the purpose and with the intent of influencing the

judgment and opinion of witnesses who may have been or might be summoned to act as jurors in the trial of said action, and also to intimidate witnesses against testifying for the prosecution therein and to embarrass the judge of said court in the trial thereof, and to interfere with the administration of justice. The statements so published referred to the prosecuting witness as a former admitted stool pigeon, a man who had presented a perjured expense bill against the county, and later stolen the same from the supervisors' files. As shown by the return herein, the articles published are too numerous and lengthy to be set out in this opinion, but were all calculated to hold up to ridicule and opprobrium the proceedings then pending against petitioner in the superior court of Humboldt county, to cast reflection upon, and question the honesty of purpose of the prosecuting officers and of the witnesses that would appear at the trial of said action. These matters are all specifically set forth in the affidavit which was filed in the contempt proceedings, and the affidavit further set forth that the petitioner knew of the pendency of said action, of the prosecuting witness therein, whom the petitioner had named in the articles referred to, and that the articles so printed and published and circulated in the county of Humboldt were for the purpose of embarrassing the court and unduly influencing jurors and witnesses. Without further review of the evidence, we may conclude our review to this part of the cause by stating that the facts set forth in the affidavit are sufficient to show the contemptuous acts charged against the petitioner in each count therein, and it contains all of the necessary allegations and recital of the things constituting the alleged contempt necessary to give the court jurisdiction to proceed.

After the making and filing of the affidavit just herein referred to and the presentation of the same to the court, the court made and entered its order reciting that, upon reading and filing of the affidavit, and good cause appearing therefor, it was ordered that the said Alfred Lindsley be and appear before said court at 10 o'clock on the 30th day of October, 1925, then and there to show cause, if any he had, why an order and judgment of the court should not be made adjudging him guilty of contempt. This order and affidavit were served upon the petitioner. At the time set in the order to show cause the petitioner appeared with his counsel, and, upon the calling of the case, first filed a motion to quash each of the four counts set forth in the affidavit, specifying a number of grounds therefor: (1) That the court had no jurisdiction to issue the order to show cause, etc.; (2) that the acts, facts, and things specified did not constitute a contempt of court. Upon the denial of this motion the defendant and petitioner herein then filed a demurrer raising the question of jurisdiction and setting forth

in the demurrer specifically the same grounds as contained in the motion to quash; that none of the counts set forth facts sufficient to constitute a contempt, want of facts and lack of jurisdiction being urged in the demurrer against each one of the several counts. The record further shows that after argument the motion to quash was denied and the demurrer overruled; whereupon, according to the reporter's notes, set forth in the transcript, the petitioner's counsel then said: "We rest without putting anything before the court." The recital in the judgment as to this particular is as follows:

"After argument, said motion to quash was denied, and said demurrer was overruled. Thereupon said Metzler & Mitchell, as counsel for said Lindsley, announced in open court that they had nothing further to offer."

Following this statement the court pronounced its judgment finding that the acts and matter set forth in each of the four counts contained in the affidavit constituted separate and distinct contempts, and adjudging the petitioner herein guilty on each of said four counts, imposing separate and distinct fines for each count, with imprisonment in jail in lieu of payment at the rate of \$2 per day.

It is now contended that the judgment of the court is void, by reason of the fact that no further evidence was offered in the case; that there was nothing before the court except the affidavit and the order to show cause, to which we have herein referred; that testimony should have been taken; and, in substance, that the court was without jurisdiction to pronounce judgment without first proceeding to take testimony.

[2] This proceeding was instituted under the second paragraph of section 1211, Code of Civil Procedure, which specifies that—

"When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall be presented to the court, or judge, of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officer."

Section 1212, Code of Civil Procedure, then directs that a warrant of attachment or an order to show cause shall be issued. In this case the affidavit was filed, and then an order to show cause was issued. Coming to section 1217 of the same Code, we find:

"When the person arrested has been brought up or appeared, the court or judge must proceed to investigate the charge, and must hear any answer which the person arrested may make to the same, and may examine witnesses for or against him. * * *

After these proceedings have been had, section 1218 of the same Code reads:

"Upon the answer and evidence taken, the court or judge must determine whether the per-

son proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars, or he may be imprisoned not exceeding five days, or both."

The wording of section 1217, Code of Civil Procedure, does not require, in absolute terms, the taking of testimony. It does require that the court must investigate the charge, must hear any answer which the person arrested may make; and may examine witnesses for or against him, not that the court must or shall summon witnesses for or against the person ordered to show cause, when there is no necessity therefor, or when the defendant expressly rests his case upon the statement, in substance, that he has nothing to place before the court.

[3] It must be borne in mind, also, that the affidavit upon which such an order to show cause is based must set forth the facts constituting the contempt in order to give the court jurisdiction to proceed; not merely the ultimate facts, but the facts themselves, showing acts specifically constituting the contempt. In this particular the affidavit differs from the formal language ordinarily found in an information or indictment. The affidavit, in itself, in a contempt proceeding must be evidentiary in character in order to show the contempt alleged and lay a basis for the proceeding. As stated in *Frowley v. Superior Court*, 110 P. 817, 158 Cal. 220:

"In proceedings for constructive contempts of court, that is, contempts committed without the presence of the court, * * * the affidavit which is made the basis for the proceeding should show upon its face the acts which constitute a contempt. The affidavit constitutes the complaint and unless it contains a statement of facts which show that a contempt has been committed, the court is without jurisdiction to proceed in the matter."

See *Strain v. Superior Court*, 142 P. 62, 168 Cal. 216, Ann. Cas. 1915D, 702; *Mitchell v. Superior Court*, 125 P. 1061, 163 Cal. 423.

[4] In the case of a constructive contempt, where an answer has been filed denying the allegations of the affidavit, an issue is presented and witnesses are called and examined and a trial had, as in other cases. In *re Buckley*, 10 P. 69, 69 Cal. 1. In 5 Cal. Jur. 945, § 41, we find the further statement:

"Inasmuch as the affidavit serves as a complaint in a charge of constructive contempt, allegations in the affidavit that are not denied in the answer are deemed to be admitted."

See, also, *Mitchell v. Superior Court*, 125 P. 1061, 163 Cal. 423, 425.

Hoteling v. Superior Court, 217 P. 73, 191 Cal. 501, 29 A. L. R. 127, states the rule:

"The affidavits on which the citation is issued constitutes the complaint. * * * The affidavits of the defendant constitute the answer or plea * * * and the issues of fact are

framed by the respective affidavits serving as pleadings."

It is also further held that such proceedings are of such a criminal nature that the defendant cannot be compelled to be a witness against himself. It is further held in that case that, while a writ of certiorari is not a writ of review, it nevertheless extends to the whole of the record, and even to the evidence itself, where necessary to determine jurisdiction. While not expressly so stating (the second paragraph on page 506 of the opinion in the *Hotaling Case*), the necessary inference to be drawn from the language there used is that competent evidence must be adduced to support the allegations which are traversed, leading to the logical determination that, where allegations are not traversed, no additional testimony need be presented to the court.

"A party charged with contempt has the same inalienable right to be heard in his defense, especially in instances of mere constructive contempt, as he would have against the charge of any other crime. And, in the proceeding for such a contempt, an issue is made up by the affidavit and answer, witnesses are called and examined, and a trial is had as in other cases. While affirmative allegations contained in an affidavit of the defendant in contempt proceedings for the disobedience of an injunction cannot be deemed established without a trial to determine the issues so joined, yet the production of witnesses may be waived in such proceedings, and the party may consent to try the case on the evidence." 5 Cal. Jur. 943, § 40.

As to what the record should show we find the following in 13 C. J. p. 82:

"The judgment should show on its face that the court had jurisdiction to inflict the penalty, and that the judgment was warranted by the pleadings. In cases of constructive contempt it should show that the accused had been given an opportunity to be heard in his defense. The punishment inflicted should be clearly and specifically stated."

[5] Outside of providing that the court may examine witnesses for or against the person alleged to be in contempt, section 1217, Code of Civil Procedure, requires the court to investigate the charge. This does not mean that the court must necessarily look outside of the record evidence presented to it to determine the accuracy or truthfulness of matters alleged, which are undenied or uncontradicted when submitted to the court for decision. The court may investigate the charge by examining the affidavit to determine what is set forth and which is submitted to it without further evidence relating to the same matters. We do not see that the case of *Roe v. Superior Court*, 60 Cal. 93, contravenes these propositions. The opinion in the *Roe Case* is brief, but it appears that affidavits charging contempt were filed, and that *Roe* had filed an answer thereto. The court said:

"It is contended that according to the statute witnesses must be examined (C. C. P. § 1217), and the judgment must be on the answer and evidence (Id. § 1218). That is so, but it does not appear that this course was not pursued."

The opinion further says:

"Moreover, the production of witnesses might have been waived and *Roe* might have consented to trying the case on affidavits."

That is practically what the petitioner in this case did when his counsel announced: "We rest without putting anything before the court." Two cases have expressly been called to our attention having to do with procedure in contempt proceedings: *Herald-Republican Pub. Co. v. Lewis*, 129 P. 624, 42 Utah, 188, and *Zobel v. People*, 111 P. 846, 49 Colo. 142. We quote from the *Herald-Republican Pub. Co. Case*, supra, which is relied upon by the petitioner herein as showing ample reasons why the judgment of the trial court should be annulled, as follows:

"The other alleged grounds may be considered together. And in this connection we think the last ground—rendering a judgment on pleadings adjudging the accused guilty of the charged contempt without evidence or proof or a hearing—presents the most serious question. Our statute (Comp. Laws 1907, § 3360) provides that, when a contempt is not committed in the immediate view and presence of the court or judge, an affidavit shall be presented to the court or judge 'of the facts constituting the contempt.' Upon that a warrant of attachment is issued 'to bring the person charged to answer.' By section 3366, it is provided that, 'when the person arrested has been brought up or has appeared, the court or judge must proceed to investigate the charge, and must hear any answer which the person arrested may make to the same, and may examine witnesses for or against him.' By section 3367, 'upon the answer and evidence taken, the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding \$200, or he may be imprisoned not exceeding thirty days, or both.'

"The petitioners allege, and the allegations are not denied, but are supported by the record, that the court adjudged the accused guilty upon the affidavits and answers 'without proof or evidence,' without an investigation of the charge, and without a trial or a hearing. Though sufficient facts are alleged to constitute a constructive and criminal contempt, and though the person charged therewith stands mute still the court under the statute may not treat such allegations as confessed, and upon them pronounce a judgment of conviction. The court nevertheless is required 'to investigate the charge.' It no doubt may, without proof or evidence, pronounce such a judgment if a plea of guilt or an answer equivalent thereto is entered."

While citing from this case, in considering the point relied upon by the petitioner, we may also quote therefrom the following state-

ment sustained by a long list of authorities there set forth, to wit:

"The authorities are almost, if not quite, unanimous that if any act or conduct of any publication is 'calculated to intimidate, influence, impede, embarrass, or obstruct the courts in the due administration of justice in matters pending before them,' it constitutes a contempt of court. Moreover, it is also frequently stated in the cases that if any willful act or conduct, or any publication, has a tendency to prevent a fair trial, or tends to prejudice the public or jurors against an accused person on trial for an offense, or the tendency of which publication is to prejudice the rights of either party to a civil action, such act, conduct, or publication may be punished as for a contempt of court."

As stated, the citation of authority supporting this rule is legion.

It will be observed that the opinion of the court in the *Herald-Republican Case* was based upon the predicate that an answer had been filed to the affidavits presented to the court charging contempt; that every allegation contained in the affidavits was denied save and except the mere fact of publication. The trial court held that the fact of publication, being admitted, carried with it all the other acts, including the intent necessary to constitute contempt, and admitted of no other proof in the case. It is also stated, after quoting the language, that the court is required to investigate the charge:

"And nothing short of a plea of guilt, or its equivalent, will justify a judgment of conviction without evidence, and without an investigation of the charge."

In *Zobel v. People*, 111 P. 846, 49 Colo. 142, the proceedings were identical with those in the case at bar. Upon the return day or order to show cause, the defendant first presented a motion to quash, which, being denied, he filed a demurrer, which, being overruled, from the language of the opinion, "no desire was manifested by the defendant in the contempt proceedings to plead, and no request was made for leave to make any answer or further return than the motion to quash or demurrer already referred to." The court thereupon adjudged the defendant guilty of contempt. The court then proceeds to consider the provisions of the Colorado Code relating to contempts, which provisions are almost identical with those contained in our Code of Civil Procedure, and then says:

"When defendant presented himself in court in response thereto, instead of making an answer denying the facts set up in the affidavit on which the entire proceeding for contempt was based, and without asking to have witnesses examined or evidence heard, and without making any showing at all in opposition to the affidavit, he filed a motion to quash the proceedings, which, in more than one particular, is a general demurrer. It was overruled. The court was ready to proceed with the investigation. No request was made by defendant to plead over, or to answer the affidavit further. There

was no denial of defendant's alleged right to plead over, or to produce evidence. The court was ready to grant it if demanded. Section 328 of the Code says: 'The court shall proceed to investigate the charge, and hear any answer which defendant may make to the same, and may examine witnesses.' The court heard the only answer, which was a demurrer or motion to quash, that defendant made, and, so far as the record shows, would have heard evidence, had defendant offered to produce any. The court, then, on due application, adjudged defendant guilty of contempt, under the contradicted affidavit. * * * We fail to see wherein there has been a departure from the statutory proceeding in this case. * * * Section 328 provides that the court may hear witnesses; but certainly, in the absence of any request by defendant therefor, when he himself rests his defense upon a motion to quash or a demurrer, thereby confessing the affidavit, there is no necessity for the court to conduct a hearing or take evidence."

[6, 7] This court has already held that the facts alleged in the affidavits upon which the proceeding for contempt was based are clearly sufficient to show willful contempt within the foregoing rule (discussing the rule relating to publications tending to embarrass the proceedings pending in court, etc.). It is also there held by this court that it is not necessary to show that the jurors, or prospective jurors, actually read the article so published. In the *Matter of Application of Lindsley for a Writ of Habeas Corpus* (Cal. App.) 241 P. 934, where the petitioner's application for discharge on a writ of habeas corpus was denied, the rule is also well settled that, upon proceedings in certiorari, the evidence cannot be reviewed in so far as it affects or applies to the merits of the case. It can be considered only for the purpose of ascertaining whether there was proof of the jurisdictional facts alleged in the affidavit. *Strain v. Superior Court*, 142 P. 62, 168 Cal. 216, Ann. Cas. 1915D, 702; *Hotaling v. Superior Court*, 217 P. 73, 191 Cal. 501, 29 A. L. R. 127; *Livingston v. Superior Court*, 49 P. 836, 117 Cal. 633, 38 L. R. A. 175.

As analogous to the proceedings had in this case, we may refer to the provisions of the Penal Code and also to the common law applying to ordinary criminal cases where a like situation is presented. Section 1011 of the Penal Code reads:

"If the demurrer is disallowed, the court must permit the defendant, at his election, to plead, which he must do forthwith, or at such time as the court may direct. If he does not plead judgment may be pronounced against him."

This section of the Penal Code has been held constitutional by the Supreme Court in the case of *People v. King*, 28 Cal. 265. While the holding appears to have been unnecessary in the *King Case*, the section certainly applies to misdemeanors and offenses such as the one at bar, which is not even classified in the Codes as a crime. In 31 C. J. 821, the

text-writer, referring to pleas upon felonies, uses the following language:

"Upon demurrer the court will examine the entire record in order to determine whether a judgment thereon would be warranted. A demurrer admits the truth of all the facts which are sufficiently pleaded, but not facts which are insufficiently pleaded, or the mere conclusions of the pleader,"

and then when it comes to treating of misdemeanors, where the demurrer has been overruled, the text-writer, in section 409 thus sets forth the common-law rule:

"In the case of misdemeanors, it is generally held that a judgment overruling a demurrer operates as a conviction, and that while it is within the discretion of the court to allow defendant to plead over, he cannot do so as a matter of right, except in some jurisdictions or unless the right is given by statute. While there is some authority to the contrary, it seems likewise that the right to plead over as a matter of right does not exist even in the case of felony; but it is discretionary with the court to allow defendant to plead over, and such plea is ordinarily allowed. Upon a failure and refusal to plead, the court may enter final judgment."

In 16 C. J. p. 394, § 724, the rule is again announced that, in prosecutions for misdemeanors, in the absence of a statute, "if defendant plead in abatement, or specially in bar, or if he demur, he cannot plead not guilty, either at the same time or after the issue on the plea or the demurrer has been decided against him; but he may be sentenced as upon a conviction, unless the court in its discretion allows him so to do."

In section 722, *supra*, in setting forth the different pleas which a defendant may make and enter, it is said:

"Defendant also may plead guilty or interpose the plea of *nolo contendere*, which is an implied confession" and in section 739 of the same volume, page 404, "that plea which is still allowed in some jurisdictions, is not a plea in the strict sense of that term in the criminal law, but a formal declaration by accused that he will not contend with the prosecuting authority under the charge. When accepted by the court, it becomes an implied confession of guilt, and, for the purposes of the case only, equivalent to a plea of guilty; and when judgment has been entered on the plea, the record is competent evidence of the fact of conviction."

In 7 Cal. Jur. p. 993, § 130, the procedure followed in this case is set forth as proper. In the case of *Mitchell v. Superior Court*, *supra*, the Supreme Court, in considering whether further proof was necessary to support a certain allegation in the affidavit setting forth contempt, in the absence of a denial of the allegation, ruled as follows:

It is not necessary, "however, to determine these matters, because the undenied allegation of defendant's presence at the time of the making of the order rendered a showing of

service of notice upon him entirely unnecessary."

As said in the case of *Herald-Republican Co. v. Lewis*, *supra*, if what was done by the defendant amounted to a plea of guilty or admission of everything charged in the affidavit, then, and in that case, the trial court was authorized to proceed and render judgment. If the procedure provided by the Penal Code that may be followed in cases which are criminal cases in every sense of the term, and where the punishment may be more severe than that allowed in the present case is applicable, then the procedure of the trial court in the case at bar must be approved.

[8] We are of the opinion that, when the defendant came into court in response to an order to show cause why he should not be adjudged guilty of contempt for having done and performed the acts charged in the affidavit, filed his motion to quash, and then his demurrer thereto, and, after an adverse ruling on both his motion and his demurrer, announced that "he rested his case without putting anything before the court," he did those acts which amounted to an admission of guilt, or plea of guilty of whatever was charged against him in the affidavit, and, if the affidavit set forth facts showing contempt, then, and in that case, upon an investigation of the affidavit and consideration of the facts therein alleged, which were alleged under oath, the court, if satisfied beyond a reasonable doubt that the defendant was guilty of each of the several contempts charged, it had jurisdiction to pronounce judgment. The petitioner had his day in court; he had his opportunity to make answer and present any defense, excuse, or explanation that he saw fit. Thus every constitutional right guaranteed to him was preserved, and, if he chose to submit his case upon the testimony, to wit, the affidavit already presented to the court, we do not readily see how, in the face of his own expressed willingness to so submit the case, that he can now be heard to complain.

[9-11] It has been argued that only one contempt was committed; that the several acts committed upon different days in the different articles published upon different days do not constitute different contempts, but, if contempt at all, only one contempt was committed. This, however, is not the law. In *Oates v. U. S.*, 223 F. 1013, 139 C. C. A. 389, it is said:

Where it consists of "separate acts of disobedience to an injunction, the sentence should not be imposed generally for all offenses; but the punishment for each offense should be specified, so that it could be reviewed on appeal."

In *Gompers v. Buck Stove & Range Company*, 31 S. Ct. 492, 221 U. S. 418, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, it is further said:

"A decree adjudging each defendant guilty of the independent acts set out in the separate paragraphs of a petition charging them with

contempt of an injunction order, and consolidating sentence without indicating how much of the punishment was imposed for the disobedience in any particular instance should be reversed if it appears that the defendants have been sentenced on any charge which, in law or in fact, does not constitute a disobedience of the injunction."

This rule is approved in 13 C. J. p. 82, as follows:

"Thus, where a defendant is found guilty of separate acts constituting contempt, judgment must be pronounced separately for the separate contempts."

In the case at bar each publication is charged separately and in different counts of the affidavit, constituting a separate and distinct offense, for which the court was authorized to pronounce judgment, the contempt sufficiently appearing, as we have heretofore considered. The petitioner not having had imposed upon him a fine for any of the contempts of which he has been adjudged guilty in excess of the amount authorized to be imposed by the provisions of the Code of Civil Procedure, under which this action was taken and had, this court is not authorized to hold the aggregate amount thereof excessive, whatever our views might be upon this matter.

It follows from what has been said that the petition for a writ of review herein must be, and the same is hereby, denied.

We concur: FINCH, P. J.; HART, J.

76 Cal. App. 517
MULTER v. KEPPEL, County Superintendent of Schools. (Civ. 5110.)

(District Court of Appeal, Second District, Division 1, California, Feb. 15, 1926.)

1. Schools and school districts $\S$ 42(2)—Statutory proceeding is limited to exclusion of an elementary school district from a high school district combined with annexation of elementary school district to a contiguous high school district (Pol. Code, $\S$ 1734c).

Proceeding provided by Pol. Code, $\S$ 1734c, relating to exclusion of a school district from a high school district, is limited to exclusion of an elementary school district from a high school district combined with annexation of the elementary school district to a contiguous high school district.

2. Schools and school districts $\S$ 42(2)—Statute held not to authorize withdrawal of portion of high school district from district itself and formation of a new high school district (Pol. Code, $\S$ 1725, 1734).

Pol. Code, $\S$ 1725, being limited solely to formation of new high school districts, held not to authorize withdrawal of a portion of high school district from the district itself and the

formation of a new high school district; section 1734, being inapplicable.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Application for writ of mandate by A. N. Multer against Mark Keppel, as County Superintendent of Schools of Los Angeles County. From a judgment denying the writ, petitioner appeals. Affirmed.

Joseph Scott and A. G. Ritter, both of Los Angeles, for appellant.

Edward T. Bishop, County Counsel, and Albert W. Leeds, Deputy County Counsel, both of Los Angeles, for respondent.

YORK, J. The sole question presented to this court is whether or not, by reason of a certain petition for the formation of a proposed "Arcadia city high school district," it has become the duty of the county superintendent of schools to proceed to call an election as provided by section 1725 of the Political Code. It is conceded by respondent that the whole question presented is whether or not section 1725 of the Political Code is applicable to the situation shown by the stipulation on file herein. It is contended by respondent that section 1734c provides the only method by which an elementary school district may withdraw from a high school district and form a new district—unless, perhaps, the provisions of section 1734 would apply to the case.

The contention that section 1734 of the Political Code might be applicable is disposed of by the fact that the record shows that the Monrovia city high school district is composed of two elementary school districts only, and therefore is not a union high school district. Pol. Code, $\S$ 1721. The provisions of section 1734, relating to exclusion of a school district from a high school district, are by their terms restricted to union high school districts.

[1] The proceeding described in section 1734c is limited to the exclusion of an elementary school district from a high school district, combined with annexation of the elementary school district to a contiguous high school district; but this, also, is not the situation presented by the case at bar.

[2] It seems, therefore, that there is no method provided for withdrawal of a portion of the high school district from the district itself and the formation of a new high school district. As we view it, section 1725 cannot be construed to permit such withdrawal and is limited by the Legislature solely to the formation of new high school districts, and not to the withdrawal of any part or portion of an existing high school district. There is no presumption that of necessity there must be some method provided for such withdrawal. Moreover, the conclusion

that the result sought by petitioners can be obtained under section 1725 would permit the Arcadia school district to withdraw from the Monrovia high school district without the consent of that high school district. There are manifest reasons why the Legislature might not be willing to allow such an unconditional privilege. So, in section 1734a, which provides a method for exclusion from a union or joint union high school district, of a school district which is a part thereof, the proceeding is conditioned upon the existence of an agreement of consent, signed by a majority of the high school board. It is reasonable to assume that a similar requirement of consent by the high school district would have been written into section 1725, if that section had been intended to authorize withdrawal from an existing high school district.

Therefore the judgment of the lower court is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

76 Cal. App. 473

HITCHCOCK MILITARY ACADEMY v. MYERS. (Civ. 3008.)

(District Court of Appeal, Third District, California. Feb. 5, 1926. Hearing Denied by Supreme Court April 5, 1926.)

1. Schools and school districts $\Leftrightarrow$ Statutes relative to liquidated damages and damages for breach of contract held inapplicable, in action by Military Academy to recover tuition according to terms of contract (Civ. Code, §§ 1670, 1671).

In action by Military Academy to recover unpaid tuition for last half of school year according to terms of contract with defendant, where latter's children were taken out of school at end of first half of year, Civ. Code, § 1670, relative to liquidated damages, and section 1671, relative to damages for breach of contract, held inapplicable.

2. Schools and school districts $\Leftrightarrow$ Military Academy held entitled to recover tuition for full year as stipulated in application for admission, signed by parent, though children were voluntarily withdrawn when year was half over.

Military Academy held entitled to recover tuition for full year as stipulated on application for admission, signed by parent, though children were voluntarily withdrawn from school when year was half over.

Appeal from Superior Court of Sacramento County; Malcolm C. Glenn, Judge.

Action by the Hitchcock Military Academy against Henrietta de Back Myers. Judgment for plaintiff, and defendant appeals. Affirmed.

H. W. Zagoren and George L. Popert, both of Sacramento, for appellant.

Frederick L. Berry, of San Francisco, and Ralph H. Lewis, of Sacramento, for respondent.

PER CURIAM. Action by plaintiff to recover of the defendant \$900, alleged to be due on account of certain contracts for tuition, entered into between the plaintiff and the defendant. Respondent had judgment for \$896.91, and from this judgment the defendant appeals. It appears from the transcript that the defendant is the mother of two minor sons, Paul de Back Myers and Theodore E. Myers; that on or about the 1st day of June, 1924, at San Rafael, the plaintiff and the defendant entered into a contract in writing for the admission of the two minor sons of the defendant into the school conducted by the plaintiff for a school year, beginning September 3, 1924, and ending June 3, 1925. The applications for admission of the two minor sons of the defendant to the Hitchcock Military Academy were made subject to the current printed register and regulations of the academy for the period above mentioned. These terms and conditions are as follows:

"Terms.

"Cadets are accepted only for the entire school year, or for the remainder of a school year if received after the opening date. Pro rata allowance will be made if a boy is accepted after the first four weeks of the school year, but no reduction or credit will be granted if a cadet is expelled, suspended, or withdrawn.

"Charges for Resident Cadets.

"The charge for board, tuition, room, minor medical attention, athletics and use of the Academy swimming pool and government arms for the school year of approximately thirty-seven weeks, is \$950, payable as follows: \$50 registration fee, to accompany the application for admission of new boys or the application for readmission of old boys; \$450 payable on entrance in September; \$450 payable at the close of the Christmas vacation. * * *

Cancellations.

"Registration fees will be returned if applicants are not accepted. Early registration is desirable, and to encourage such action we will return the fees if a written request for cancellation of reservation is received by the Academy not later than thirty days before the opening date in September.

"Charges are made for a place in the Academy, and not for a period of attendance. The absence of a cadet does not materially decrease the expenses of the Academy; hence parents and guardians are held responsible for full payment for the school year, or such part of the school year as remains after a late entrance."

The testimony in the transcript further shows that the two boys attended school one-half year each; that the defendant paid the \$450 for each boy payable on entrance, but refused and neglected to pay the \$450 cove-

nanted and agreed to be paid at the close of the Christmas vacation; that neither one of the boys attended the half-year of school subsequent to the Christmas vacation, beginning in 1924 and ending in 1925. It is for this unpaid portion that this action is prosecuted. It will be observed that the rules and regulations of the academy, subject to which application for admission of the two boys was made, provide that admission can be had only for an entire school year and that deductions are not made on account of the failure of pupils to attend for the entire year, as charges are made for a place in the academy and not merely for the period of attendance.

The appellants in this case contend that sections 1670 and 1671 of the Civil Code are controlling here. The first section referred to provides that:

"Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section."

The next section provides:

"The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

[1, 2] A number of cases are cited having to do with controversies arising under these sections where liquidated damages or damages for breaches of contract are set forth in the agreement itself. The inapplicability of the sections involved and of the authorities cited having to do with cases where liquidated damages and penalties are set forth in the contract is so apparent that we do not need to extend this opinion by a review thereof. The case at bar is not one involving liquidated damages, or any damages arising from a breach of the contract. It is simply one to enforce payment according to the terms of a contract whereby the defendant purchased for her two boys admission to the Hitchcock Military Academy for one school year. There is no provision in the contract whereby either party seeks to compensate the other in liquidated damages for a contemplated breach thereof. In considering cases of this kind, the text-writer in 35 Cyc. p. 816, says:

"School rules and provisions contained in a school catalogue, advertisement, or application blank become part of the contract for tuition and other school charges, where notice thereof has been given to parents or guardians, or their attention called thereto. A contract for a com-

plete course of instruction or for a specified period of time is entire, and the school proprietor is entitled to recover the whole sum agreed upon or nothing."

Likewise to the same effect is the case of *Teeter v. Horner Military School*, 81 S. E. 767, 165 N. C. 564, 51 L. R. A. (N. S.) 975, Ann. Cas. 1915D, 309. It is there said:

"A contract for schooling for any specified period of time being entire, * * * it seems to be well settled that, if, during the term of the contract, a pupil is properly expelled for misconduct, or unnecessarily withdraws from the school, without any fault on the part of the proprietor or master, or anyone connected with the school, the school is entitled to the whole consideration for the entire period, and may recover any portion thereof remaining unpaid, and the other party to the contract may not recover back any part of the consideration paid in advance for such period. Thus, a parent whose son was properly expelled from a military school for hazing, about 30 days after the beginning of a term, cannot recover any portion of a sum which he paid in advance, at the beginning of the term, upon the tuition fee."

To the same effect is the case of *Vidor v. Peacock* (Tex. Civ. App.) 145 S. W. 672, in which case it is held that, where a pupil is withdrawn during the year, the father is responsible for the whole sum agreed to be paid in the contract. A case involving a somewhat similar principle is that of *Bartlett v. O. F. Savings Bank*, 21 P. 743, 79 Cal. 218, 12 Am. St. Rep. 139, where an attorney had agreed to perform certain services of an entire contract for a specified compensation. The unwarranted acts of the defendant prevented full performance by the plaintiff. It was held that the contract was entire and the plaintiff was entitled to recover. A long list of authorities appears in the note to *Teeter v. Horner Military School*, as reported in 51 L. R. A. (N. S.) 975, supporting the principal case that such contracts are entire and that schools are entitled to recover the full compensation agreed to be paid. As stated in some of the cases, this rule rests upon the fact that the place for a pupil in the school is contracted for at the beginning of the year and cannot reasonably be filled by the school authorities during the course of the year, when a pupil contracting for a place, improperly withdraws therefrom, or is withdrawn therefrom. In the case at bar, it appears that the two boys were simply voluntarily withdrawn by the defendant.

Under such circumstances, we think the cases which we have cited are controlling, and, as the contract signed by the defendant is an entire contract, the judgment of the trial court should be affirmed, and it is so ordered.

76 Cal. App. 511

GRAY v. PERLIS et al. (Civ. 5125.)

(District Court of Appeal, First District, Division 1, California. Feb. 15, 1926. Hearing Denied by Supreme Court April 15, 1926.)

1. Appeal and error §1010(1)—Finding of trial court on substantial evidence on issue of ownership of business is conclusive.

Where question of whether tailoring business belonged to a married woman and was carried on by her in good faith as her own enterprise was one of fact for trial court, its finding on substantial evidence that the business belonged to her is conclusive.

2. Husband and wife §257.

Where ownership of a tailoring business was established to be in a married woman, proceeds thereof became her separate, as distinguished from community, estate (Civ. Code, § 162).

3. Husband and wife §257—Fact that husband contributed time and skill to wife's tailoring business held to give him no interest therein.

Where ownership of a tailoring business was established to be in wife, fact that husband contributed time and skill in conduct thereof gave him no interest in the business nor proceeds therefrom, nor did it have effect of transmuting status of ownership of the business from wife's separate estate to community property.

4. Husband and wife §257—Husband may legally give time and industry to wife in aiding to carry on business owned by her.

Since creditors have no lien on debtor's labor, nor any way to compel him to work, he may legally give his entire time, skill, and industry to his wife in aiding to carry on business owned by her, and community creditors cannot complain.

5. Husband and wife §257—Fact that married woman, in conducting business owned by her, used some equipment owned by husband held immaterial on question whether profits were community property.

Where tailoring business was conducted by a married woman as her separate property, fact that husband allowed her to use a sewing machine and motor belonging to him was immaterial.

6. Husband and wife §266.

Husband may relinquish to wife right to her earnings during marriage, and thereupon they become her separate estate (Civ. Code, § 158).

7. Husband and wife §270(8)—Agreement of husband to relinquish to wife right to her earnings during marriage may be proved by evidence as to his conduct with relation thereto.

Agreement of husband to relinquish to wife right to her earnings during marriage may be proved by evidence as to husband's acts and conduct with relation to her earnings, indicating

that he did not regard them as community property.

8. Bankruptcy §303(3)—Evidence held to sustain finding that wife's earnings from her tailoring business became in fact her separate property.

In suit by trustee in bankruptcy of husband's estate to recover personal property as belonging to bankrupt, evidence held to justify finding of relinquishment by husband to wife of right to earnings from tailoring business owned by her, and that earnings therefrom became in fact her separate property.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by F. P. Gray, as trustee in bankruptcy of the estate of B. Perlis, bankrupt, against B. Perlis and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Goldman, Nye & Surr and Ernest J. Torregano, all of San Francisco, for appellant.

Laurenz J. Krueger, John A. Sinclair, and Oscar T. Barber, all of San Francisco, for respondents.

KNIGHT, J. Plaintiff, as trustee in bankruptcy, brought this action to recover certain personal property, claiming that it belonged to the bankrupt's estate, also to require an accounting, and for damages for alleged conversion. Judgment was given for defendants. Plaintiff appealed.

For several years prior to 1916 respondent B. Perlis was engaged in business on Sutter street in San Francisco as a ladies' tailor, employing some ten persons. In September of that year said business failed, and Perlis made an assignment for the benefit of creditors to the board of trade, but was not released by said creditors from payment of his debts. On account of worry caused by the collapse of his business, Perlis became sick and unable to earn a livelihood for himself or his family, and the burden of supporting the family then fell upon Mrs. Perlis. In order to meet this situation, Mrs. Perlis, in October, 1916, applied for and obtained from the superior court a decree of sole tradership, and thereupon opened and afterwards conducted under her name and management a ladies' tailoring business in premises on Geary street leased by her for that purpose. The negotiations for the opening of said business were concluded by her. Said business was started with a cash capital of \$250, which Mrs. Perlis raised by pawning jewelry which was her separate property. She also used in operating said business, along with the other equipment, a few articles of personal property belonging to her husband. They were of small value, and included a sewing machine and motor. The four members of the Perlis family, consisting of Mrs. Perlis, her husband, and two minor sons (the

latter being joined herein as defendants), together with a few other persons, were employed in conducting said business. B. Perlis helped with the cutting and fitting and some of the selecting and buying of materials. He received no wages, merely his living expenses. The other members of the family were also supported out of the proceeds of the business. On April 5, 1920, B. Perlis was adjudged a voluntary bankrupt. On that date Mrs. Perlis, besides having on hand a stock in trade of the value of about \$300, had on deposit in the bank, in her name, the sum of \$2,329.72, which represented the net proceeds of said business at the end of 3½ years' operation thereof. She also had on deposit, as trustee, the sum of \$970 belonging to her two minor sons.

The amended complaint, which contains four counts, charged in substance that said business was owned and operated by B. Perlis; that "said sole tradership was merely a fraudulent device and blind" carried on by Perlis and his wife in furtherance of a conspiracy entered into between them to defraud the creditors of Perlis; that as a result of said fraudulent acts on their part assets belonging to Perlis amounting to \$15,000 have been sequestered and illegally converted by Mrs. Perlis, for which amount judgment was prayed. The trial court found against appellant on all charges of fraud and conspiracy, and further found that "all the capital and assets of said ladies' tailor business * * * are, and have, since the establishment of said business * * * been the separate property of Sophia Perlis." Appellant contends "that the facts do not support the finding that *all* the business and assets were separate property," but show that the same were community property, and that therefore, as such trustee he is entitled to recover the same as part of the bankrupt's estate.

[1, 2] The question of whether said business belonged to Mrs. Perlis and was carried on by her in good faith as her own enterprise, and at her expense and for her benefit, or whether, as charged in the complaint, it was operated by her husband in her name as a "cloak and screen" for the fraudulent purpose of sequestering the proceeds thereof, was one of fact for the trial court to determine, and, said court having found upon substantial evidence in favor of Mrs. Perlis on that issue, the matter of the ownership of said business is settled so far as this appeal is concerned (*Oldershaw v. Matteson & Williamson Co.*, 125 P. 263, 19 Cal. App. 179; *Estate of Pepper*, 112 P. 62, 158 Cal. 619, 31 L. R. A. [N. S.] 1092; *Hossfeldt v. Dill*, 10 N. W. 781, 23 Minn. 469; *Knapp v. Smith*, 27 N. Y. 227), and, the ownership of said business having been thus established in Mrs. Perlis, the proceeds of that business became her separate estate (*Diefendorff v. Hopkins*, 28 P. 265, 30 P. 549, 95 Cal. 343; *Estate of*

Pepper, supra; *Smith v. Smith*, 191 P. 60, 47 Cal. App. 650; Civ. Code, § 162).

[3-5] The fact that the husband contributed his time and skill in the conduct of the business gave him no interest in the business nor in the proceeds derived therefrom, nor did it have the effect of transmuting the status of ownership of the business from separate to community property. (*Oldershaw v. Matteson & Williamson*, supra; *Walsh v. Walsh*, 23 P. 1099, 84 Cal. 101; *Lewis v. Johns*, 24 Cal. 98, 85 Am. Dec. 49. Creditors have no lien on a debtor's labor nor any way to compel him to work, and consequently he may legally give his entire time, skill, and industry to his wife in aiding to carry on a business owned by her, and his creditors cannot complain of his doing so, since such a donation of services is not inconsistent with his obligation toward them. See cases cited in note, 28 A. L. R. p. 1048. Nor was it of any legal consequence that Perlis allowed his wife to use as part of the equipment of said business a few articles of personal property of insignificant value, belonging to him. *Walsh v. Walsh*, supra; *Estate of Pepper*, supra; *Hossfeldt v. Dill*, supra. The profits derived from the business cannot be said to be, as appellant contends, the product of the sewing machine and motor belonging to the husband, but were the results of the operation of the entire business, which belonged to the wife. Even if the subject of the loan had been money to use in the business instead of the personal property mentioned, it would not have affected the title to the business. *Estate of Pepper*, supra.

[6, 7] The conclusion of the trial court that the earnings of said business were not community property may also be sustained upon the principle of law that the husband may relinquish to the wife the right to her earnings during marriage without any consideration other than their mutual consent, and that thereupon said earnings become her separate estate. *Smith v. Smith*, supra; *Wren v. Wren*, 34 P. 775, 100 Cal. 276, 38 Am. St. Rep. 287; *Larson v. Larson*, 115 P. 340, 15 Cal. App. 531; *Diefendorff v. Hopkins*, supra; Civ. Code, § 158. As stated in *Smith v. Smith*, supra:

"Such an agreement may be proved by evidence as to the acts and conduct of the husband with relation to the earnings of the wife or business conducted by her as community property indicating that he did not regard them as community property. *Larson v. Larson* [115 P. 340, 15 Cal. App. 531] supra; *Kaltschmidt v. Weber* [79 P. 272], 145 Cal. 596, 599."

[8] The facts already narrated show in this connection that, following her husband's business failure, Mrs. Perlis, through a former attorney, applied for and obtained in good faith a decree of sole tradership in order that she might operate a business of her own and thereby support her family. Proceeding under said decree she procured the

necessary money by pawning her separate property to open said business, and she thereafter conducted the same under her name and management. Said decree was offered in evidence at the trial of this action by appellant in support of his case, and, although said decree was afterwards held to be invalid by the trial court because of an error committed in failing to specify in the tradership proceedings the true given name of Mrs. Perlis' husband, said business was nevertheless started and was carried on for a period of 3½ years under the belief that said decree was valid, during which time Perlis, the husband, made no claim to said business or to any part of its profits; nor did he ever indicate that he regarded said business or the earnings of his wife therefrom as community property. We therefore believe that from the acts and conduct of the parties it was not unreasonable for the trial court to infer that there had been a relinquishment by the husband to his wife of the right to such earnings, and that consequently such earnings became in fact her separate property. *Kaltschmidt v. Weber*, supra; *Smith v. Smith*, supra; *Diefendorff v. Hopkins*, supra.

After reviewing the entire record, we conclude that the evidence is sufficient to support said contested finding to the effect that the assets of said business were the separate property of Mrs. Perlis.

The judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

76 Cal. App. 468

HARBINSON et al. v. MALLON et al.
(Civ. 2980.)

(District Court of Appeal, Third District,
California. Feb. 5, 1926. Rehearing
Denied March 6, 1926.)

Appeal and error — 1011(1)—Where defendant agreed to build irrigation system and sell to district and evidence supported finding of performance, judgment would be affirmed notwithstanding contrary evidence.

Where defendant, for a consideration, agreed to build an irrigation system and sell it to an irrigation district embracing lands of plaintiffs, and, in action based on theory that system when so conveyed was incomplete, the evidence supported findings that it was complete, judgment would be affirmed notwithstanding evidence which would have supported contrary finding.

Appeal from Superior Court, Colusa County; Ernest M. Weyand, Judge.

Action by J. C. Harbinson and another against J. F. Mallon and another upon contracts. Judgment for defendants, and plaintiffs appeal. Affirmed.

Arthur C. Huston, of Woodland, and Seth Millington, of Colusa, for appellants.

U. W. Brown, of Colusa, for respondents.

PLUMMER, J. This is an action by plaintiffs to recover the sum of \$16,766 alleged to be due from the defendants for and on account of certain contracts hereinafter mentioned. The defendants had judgment, and the plaintiffs appeal.

On the 15th day of November, 1916, the plaintiffs and defendants entered into a contract in writing by the terms of which the plaintiffs leased to the defendants a certain tract of land for the period of two years for the purpose of growing rice, at a specified cash rental per acre. This contract provided that the defendants should construct and install an irrigation system conducting water to certain lands, including the lands belonging to the plaintiffs, specifying in general language the work to be performed, including drains, headgates, etc. The contract also provided that at the expiration thereof, the appellants were to convey an interest in the entire irrigation system constructed by the lessees, by which said lands were to be irrigated to such extent as their (the appellants') lands bore to the whole acreage then irrigated, or to be irrigated by said irrigation system; that the irrigation system should be free from all indebtedness. The contract further provided that it was understood and agreed that the parties thereto, their successors or assigns, together with other parties who had lands subject to irrigation from said system, and who desired to unite with the parties to said contract in the irrigation of their lands by said system, shall and will form a mutual water corporation for the irrigation of their said lands, to which mutual water corporation said irrigation system shall be conveyed free of incumbrances. It was further agreed that the respondents would thereupon convey to the appellants stock in said mutual water corporation to the extent of the acreage demised, fully paid up, without cost or expense to said appellants. In consideration of the construction of said irrigation system, the appellants agreed to convey to the respondents certain lands consisting of 800 acres, other than the lands leased in the contract. On the 14th day of January, 1917, the respondents, in pursuance of said lease, or contract, dated November 15, 1916, and in consideration of the conveyance by appellants to respondents of the 800 acres of land as provided in said contract, by an instrument in writing purported to grant, convey, assign, and set over to the appellants, free and clear of debts or charges, the right and title in and to the irrigation system, irrigation plant, and property therein described, in such proportion of interest therein to the same extent as the lands of appellants, which were described in

said lease of November 15, 1916, bore to the whole acreage irrigated by said system prior to December 31, 1918, the date of the expiration of said lease, and providing further that upon the organization of a mutual water corporation there should be issued to appellants stock in such corporation to the extent of one share for each acre of land described in said agreement, fully paid up, without cost or expense to appellants. On the 21st day of November, 1918, the appellants and respondents entered into another agreement in writing, modifying the lease and agreement of November 15, 1916, in that it was agreed that an irrigation district should be formed comprising the lands of appellants and other lands within the irrigation system in lieu of the mutual water corporation provided for in the agreement dated November 15, 1916, and providing further that said irrigation district should be formed within one year and should acquire by purchase the irrigation system constructed by the respondents, that the appellants should receive an amount of bonds of said district which should bear the same ratio to the entire amount of bonds received for the irrigation system as the number of acres of appellants' lands bore to the whole acreage included within the district.

On or about the 18th day of June, 1918, the irrigation system in question was offered to the Maxwell irrigation district, this district being formed and organized to purchase the property in question. Thereafter such proceedings were taken and had by the district that there was submitted to the electors of the district the proposal to issue bonds of the district in the sum of \$260,000 for the purpose of buying the irrigation system constructed as aforesaid. This proposal was approved by the property owners and qualified electors of the Maxwell irrigation district. Thereafter, and on or about the 16th day of September, 1918, the appellants, respondents, and all others owning an interest in the irrigation system, constructed as aforesaid, by proper conveyance, transferred to the Maxwell irrigation district said irrigation system, including all rights of way, ditches, drains, water, water rights, pumps, headgates, machinery, appliances, etc., connected therewith or used in the maintenance or operation of the same.

After these proceedings had been taken and had, it appears that the landowners of the district in an informal manner agreed to add certain improvements and betterments to the irrigation system, in which informal meeting it appears that the plaintiffs participated. The engineer of the district was directed to make an estimate of the amount of money required for the purposes mentioned. Thereafter, on April 1, 1919, the board of directors called a special election for the purpose of voting an assessment of \$52,355 to pay the costs of such improve-

ments and betterments. At the election held on the 29th of April, 1919, this proposed assessment was voted unanimously. In order to have the money available immediately for the installation of said improvements and betterments to the irrigation system, it appears that an agreement was entered into by which \$45,000 of the bond money should be retained and an authorization was signed by the landowners of the district, authorizing J. W. Forgeus, as trustee, to withhold from the bond money such landowners' pro rata part of said \$45,000, to be used for the installation of motors, pumping equipment, etc., at the site of the water wheels theretofore used by the irrigation system constructed by the respondents. This money proving insufficient to pay for the contemplated improvements, other proceedings were had so that the amount chargeable to the lands of the plaintiffs aggregated the sum sued for in this action. It appears that the respondents advanced the money necessary to pay the portion of said assessment chargeable to the lands of the plaintiffs, and, under the agreements just referred to, deducted that sum in the settlement of their indebtedness and delivery of bonds to the plaintiffs.

The contention of the appellants now is that the irrigation system constructed by the defendants was not completed when the interest therein agreed to be conveyed by the defendants to the plaintiffs was transferred and the plaintiffs conveyed in payment thereof, to the defendants the 800 acres mentioned and provided for in the contract dated November 15, 1916. On the part of the respondents, it is contended that the system was completed in accordance with the terms of said contract and had been in operation for a period of more than one year and had furnished to the appellants the water agreed to be furnished their lands for irrigation purposes in a quantity equal to that furnished after the improvements and betterments to the system made by the district. As to whether the work done by the Maxwell district was a completion of the work agreed to be performed by the respondents in their contract for building the irrigation system, or was, in truth and in fact, simply improvements and betterments, the trial court, upon conflicting evidence, found:

"That prior to the conveyance of said irrigation system to said Maxwell irrigation district, and at the time of said conveyance, said irrigation system was completed and was in a condition to properly function, and the same operated satisfactorily for two years before it was turned over to said district; that it irrigated all of the lands of the district prior to the time of the organization thereof; that it diverted as much water from the river prior to the organization as since its organization; that after the organization of said irrigation district, and after the conveyance to it of all the properties and rights which went to make up the irrigation plant or system, free and clear of incumbrances,

the landowners of the district, including plaintiffs, agreed that they would install certain improvements or betterments; that prior to the expiration of the lease and agreement of November 15, 1916, said irrigation system was conveyed to said Maxwell irrigation district free and clear of all incumbrances."

The testimony of Mr. Brown, engineer of the district, shows all the improvements and betterments installed in the system by the Maxwell irrigation district and also the installation of storage pumps and motors for the purpose of giving assurance of a sufficient water supply to the landowners within the district. This testimony, as well as the testimony of some other witnesses, if believed by the trial court, is sufficient to support the finding that the system was completed as contemplated when the same was conveyed to the Maxwell irrigation district, and that whatever was thereafter done was done in the way of improvements, betterments, and maintenance. There is some testimony in the transcript and referred to by the appellants that might support a contrary finding, but such matters are exclusively for the trial court.

The findings to which we have referred being sufficiently supported, it follows that the judgment of the trial court must be and the same is hereby affirmed.

We concur: FINCH, P. J.; HART, J.

76 Cal. App. 455

LEMM et al. v. RUTHERFORD. (Civ. 2961.)

(District Court of Appeal, Third District, California. Feb. 5, 1926. Rehearing Denied March 6, 1926. Hearing Denied by Supreme Court April 5, 1926.)

Waters and water courses ☞101—Landowner cannot sink well so near irrigation ditch of another that water supply would be taken from ditch.

Landowner held unauthorized to sink a well or sump so near an irrigation ditch across his land belonging to another that his water supply would be practically all taken from waters flowing in such ditch.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Suit by Charles L. Lemm and another against George Rutherford. From an order granting a temporary injunction, defendant appeals. Order affirmed.

Carter & Smith, of Redding, for appellant.

Carr & Kennedy, of Redding, for respondents.

PLUMMER, J. This is an appeal from an order of the superior court granting a tem-

porary injunction. The plaintiffs set forth in their complaint that they are the owners of certain lands situate in the county of Shasta, comprising about 553 acres, and that they and their predecessors in interest for more than 50 years have been the owners of a certain water ditch taking water out of a certain stream known as Cow creek; that the water belonging to the plaintiffs is taken at a point on said creek and carried thence in a ditch in a general westerly direction parallel to said stream over and to the lands of the plaintiffs hereinbefore referred to, and there used for irrigation purposes; that said water ditch in its course passes along and over a certain tract of land belonging to the defendant before reaching the lands belonging to the plaintiffs; that the plaintiffs have acquired and own the right to conduct said water in said ditch from said Cow creek to their lands in the ditch above mentioned; that a short time preceding the commencement of this action the defendant on the lands and premises belonging to him, and at a point about 33 feet from the water ditch belonging to the plaintiffs sunk a sump or well 8 feet in depth, three sides of said well or sump being 8 feet and the fourth side thereof about 9 feet in dimensions; that after said well was dug only a trifle of water appeared in the lowest places therein; that, within about 24 hours after water was turned into the ditch belonging to the plaintiffs, for the purposes of conducting water from Cow creek to their lands and premises to be used for irrigation purposes, the water in the well or sump dug by the defendant increased to a depth of about 4 feet; that the defendant installed a pump in said well, and was proceeding to pump water therefrom until a temporary restraining order was issued herein; that an order to show cause why a temporary injunction should not be issued pending the trial was made, and, upon the hearing upon such order to show cause, a temporary injunction was issued in this action, restraining the defendant from pumping water from said well until the final order of the court. It is from this temporary injunction that the defendant appeals.

There seems to be no controversy in the testimony that practically all water in the well withdrawn by the defendant's act came directly from the water flowing through the plaintiffs' ditch. The argument presented by the appellant in this case, admitting the taking of the water to be as above stated, is to the effect that the defendant, as the owner of the land in question, is the owner of all the percolating water therein, and that, as the water from plaintiffs' ditch comes to the well dug by the defendant underneath the surface, the defendant is entitled to withdraw therefrom all the water that may be found therein for the purpose of irrigating his own land. In support of this contention, a large number

of California cases having to do with percolating waters are presented for our consideration.

On the part of the respondent, it is first contended that the granting of a temporary injunction is largely discretionary with the trial court, and should not be interfered with; secondly, that the plaintiffs are the owners of an easement over the defendant's lands to the extent that plaintiffs are entitled to have the percolating and seepage waters remain undisturbed along the lines of its irrigation ditch for the purpose of supporting and maintaining the current of water flowing in said ditch, and also, further, that the different cases relating to percolating waters, in the ordinary sense, where it is held that the owner of the soil is also the owner of all the water beneath the soil, are inapplicable. Passing by the question that the discretion of the trial court, in issuing a temporary injunction, should not ordinarily be interfered with, we will consider what appears to us to be the main question presented by the facts of this case. Has a landowner a right to sink a well or sump so near an irrigation ditch belonging to another that it is reasonably apparent his water supply will be practically all taken from the waters flowing in said irrigation ditch? We think this question answers itself, and that under such circumstances cases having to do with ordinary percolating waters, in the true sense of the term, have no application. However, we will refer to a few of the leading cases in California, dealing with questions somewhat similar. In the case of *Katz v. Walkinshaw*, 74 P. 766, 769, 141 Cal. 116, pages 128 and 129 (64 L. R. A. 236, 99 Am. St. Rep. 35) of the main opinion written by Justice Shaw, it will be noted that the rule laid down in the case of *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299, relating to percolating waters, and the subsequent cases following the McCue Case are taken up, considered, and limited in their application. The Walkinshaw Case further holds that the law relating to percolating waters is very much limited and is governed largely by another rule, which is to the effect that one must so use his own property as not to injure that of another. In the Walkinshaw Case the owner of land was enjoined from sinking wells and pumping water therefrom which materially interfered with and diminished the water supply in wells owned by an adjoining landowner. It is true that the waters used and proposed to be used by the parties enjoined was conducted away from the lands from which it was pumped. The complaint in the Walkinshaw Case alleged:

"That the water was necessary for domestic use and irrigation on the lands on which they were situate; that the defendant, by means of other wells and excavations upon another tract of land in the vicinity prevented any water from flowing through the plaintiff's wells to their premises; and that this was done by

drawing off the water through the wells of the defendant, taking it to a distant tract, and there using it."

The contention was made in the Walkinshaw Case similar to the contention made here as to the rights of the defendant to percolating water. In speaking of this contention, Justice Shaw said:

"The idea that the doctrine contended for by the defendant is a part of the common law adopted by our statute, and beyond the power of the court to change or modify, is founded upon a misconception of the extent to which the common law is adopted by such statutory provisions, and a failure to observe some of the rules and principles of the common law itself."

Mention is then made of conditions under which the principles enunciated by the common law of England are inapplicable, among which are the physical conditions of our state and also the fact that the rule of the common law is not to be applied where the reason for it utterly fails, and, further:

"The true doctrine is that the common law, by its own principles, adapts itself to varying conditions, and modifies its own rules so as to serve the ends of justice under the different circumstances, a principal adopted into our Code by section 3510 of the Civil Code: 'When the reason of a rule ceases, so should the rule itself.'"

We do not need to follow the reasoning of the Walkinshaw Case further than as above stated to show that, where the circumstances are such that the reason for the rule utterly ceases, it cannot be applied. In the case of *Hudson v. Dailey*, 105 P. 748, 156 Cal. 617, opinion by Justice Shaw, the Supreme Court considered a case involving the withdrawal of water by wells and pumps and thereby depleting the quantity of water flowing into a nearby creek. The trial court found there was a substratum of impervious material under which water flowed and from which water was taken by the defendant in connection with the water that was drawn from the creek supplying the plaintiff. As to this matter, the opinion reads:

"But as the findings also, in substance, declare that the pumping of the defendant does, to a material extent, decrease the amount of water which the plaintiff is able to divert from the creek and which she needs for the irrigation of her land, the finding as to the lower strata is immaterial. If the pumping by the defendants constituted an unlawful diversion of water to which plaintiff was entitled, it would be no defense that they also took other water from another source."

In the further consideration of the facts presented in the Dailey Case, the court came to the conclusion that the defendant had an interest in the water flowing in the creek, and that the claims of the plaintiff were not paramount to the rights of the defendant, and it was upon this phase of the case that judg-

ment was rendered. Again, in the case of Verdugo Cañon Water Co. v. Verdugo, 93 P. 1021, 152 Cal. 655, a case involving the taking of subterranean waters by means of wells, opinion by Justice Shaw, it is said:

"The continued presence in the soil, sand, and gravel composing the bed of the stream of a sufficient quantity of water to supply and support the surface streams in their natural state, is essential to their existence and preservation, and the parties have as clear a right to have this quantity remain underground for that purpose as they have to the stream upon the surface; and neither party should be permitted to decrease this necessary quantity of underground water to the depletion of the surface streams and the injury of those to whom it has been assigned."

The facts of that case are not the same exactly as presented in this, but the principle announced is similar—the right to the support to the water flowing in the ditch afforded by the seepage water escaping therefrom into the soil reasonably adjacent to the ditch. Here the defendant by his action, as determined by the trial court, dug his well so near the water ditch belonging to the plaintiffs as to draw therefrom practically all of the water finding its way to his lands through the agency of an 8-foot well and a pumping plant. For all practical purposes, considering the juxtaposition of the well to the ditch, the suction pipe of the pump might just as well have been inserted directly in the ditch belonging to the plaintiffs. We think the common law relating to percolating waters, as stated, where the circumstances show that real percolating waters are involved, have no bearing upon the issues in this case, and that the principle set forth in the Walkinshaw Case and the two California cases, which we have cited following the Walkinshaw Case, are the ones governing the conditions such as are here presented.

The order appealed from is affirmed.

We concur: FINCH, P. J.; HART, J.

76 Cal. App. 492

NEWBERRY v. EVANS et al. (Civ. 2950.)

(District Court of Appeal, Third District, California. Feb. 10, 1926.)

1. Eminent domain $\hookrightarrow$ 167(4)—Drainage district, in taking property, must do so in exercise of right of eminent domain according to statutes, unless owner consents to such taking (St. 1903, p. 291; St. 1915, p. 1321; Code Civ. Proc. § 1238, subd. 3; Const. art. 1, § 14).

Unless owner of property, required for purpose of drainage district, organized under St. 1903, p. 291, St. 1915, p. 1321, and Code

Civ. Proc. § 1238, subd. 3, consented to taking or damaging of his property by such district, district was required to pursue course outlined by Const. art. 1, § 14, and to be invoked according to the procedure adopted by the Legislature for taking of property by eminent domain.

2. Drains $\hookrightarrow$ 19—Unauthorized act of drainage directors in digging ditch across owner's land constituted a trespass for which they were severally and jointly liable, even though such acts were committed in their official capacity or as directors of district.

Acts of directors of drainage district in digging a ditch across owner's property without his consent, and without first making just compensation therefor, constituted trespass for which they were severally and jointly liable, authorizing owner to proceed against them as for a tort, even though such acts were committed by them in their official capacity or as directors of drainage district.

3. Drains $\hookrightarrow$ 19—Drainage district held not immune from liability for unauthorized acts of officers in digging ditch across owner's property, where work was performed as district itself had outlined and expressly directed it to be done (St. 1903, p. 299, § 26).

Drainage district was not immune from liability for acts of its directors in digging a ditch across owner's property without his consent and without awarding him just compensation therefor, where such officers, in performing work, did it precisely as district itself had outlined and expressly directed such work to be done, and hence drainage district should have been retained as party defendant, in action against directors for such unauthorized acts, in view of St. 1903, p. 299, § 26.

4. Drains $\hookrightarrow$ 20—Drainage district may be sued as well as institute and maintain actions at law or suits in equity (St. 1903, p. 291; St. 1915, p. 1321).

Drainage district, organized under St. 1903, p. 291, St. 1915, p. 1321, being given express and specific authority to sue or to defend in any action, may be sued as well as institute and maintain actions at law or suits in equity.

5. Drains $\hookrightarrow$ 19—Drainage district held not required to satisfy judgment against directors for unauthorized taking of owner's property, in absence of showing that drainage district actually took property or used it for its purposes.

Drainage district held not required to satisfy judgment against directors in action by owner for damages for digging ditch across his land without his consent and without making just compensation, though work itself had been planned and authorized to be done by district, in absence of any showing that district actually took owner's property or was using it for its purposes.

6. Property $\hookrightarrow$ 4.

Injury to trees by unauthorized acts of drainage directors in digging ditch is injury to real property on which they were growing.

7. Drains ☞20—Personal judgment against directors of drainage district for unauthorized digging of ditch across owner's property creates presumption that directors alone were concerned in commission of such act.

Personal judgment against directors of drainage district for digging ditch across owner's land, without his consent and without making just compensation therefor, creates presumption that directors alone were concerned in commission of tort on which such judgment was founded, notwithstanding that directors, in digging ditch, did it precisely as district itself had outlined and expressly directed it to be done.

8. Drains ☞20—Judgment against drainage directors for using funds of district in satisfaction of personal judgment held not void as against director who was not member of board when funds were paid out or when tort on which judgment was based was committed.

Judgment, in action to recover of directors of drainage district funds of district expended by them in satisfying personal judgment against them for digging ditch across owner's land without his consent and without making just compensation therefor, held not void as to a director who was not a member of the board when damage to owner's land was committed or when judgment was ordered paid, where it was not denied that he had a hand in causing funds of district to be used in paying such judgment.

9. Drains ☞20—If director of drainage district was not member of board when personal judgment against directors was ordered paid out of district's funds, he would not be proper party to action to recover therefor.

If director of drainage district was not a member of board when personal judgment against directors was ordered by board to be paid from funds of the district, and he in no other way assisted or abetted act of board in thus misappropriating funds of district, he would not be a proper party to action to recover for such unauthorized diversion of funds.

10. Contribution ☞6—Contribution cannot be invoked by party voluntarily paying obligation against person for whom such payment was made.

Where an obligation arising out of contract has been paid and extinguished voluntarily, by a party not obliged to pay it, right of contribution ordinarily cannot be invoked as against person for whom such payment was made by party thus making such payment.

11. Contribution ☞3—Drainage director could not be held liable for proportionate part of moneys paid out of district's funds to extinguish personal judgment against directors under doctrine of contribution, where he was not member of board when such payment was made or when damage was committed.

Director of drainage district, who was not a member of board of directors when personal judgment against directors was satisfied out of funds of district or when tort on which judgment was based was committed, cannot be held liable to district for a proportionate part of moneys paid out of its funds to extinguish such

judgment under theory of contribution, assuming that district paid judgment upon theory that it with director committed damage complained of, or even if district had been made a party to such action.

12. Contribution ☞5.

Generally right of contribution does not apply as between joint tort-feasors.

13. Drains ☞19—Drainage district would be liable for fees of attorney contracting to defend action, though district was eliminated as party thereto, in absence of showing that payment of fees was to be contingent on quantum of services rendered.

Attorney, who appeared for drainage district in action against directors and district for unauthorized digging of ditch across owner's land and who continued so to act until district was eliminated as a party defendant thereto, might recover of district full sum which it agreed to pay him for his professional services in such action, in absence of any showing that payment of his fees was to be contingent on quantum of services rendered, and even though drainage directors, after district ceased to be a party to action, agreed themselves to pay him for his professional services to them.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by H. O. Newberry against W. E. Evans and others. Judgment for plaintiff, and defendants W. E. Evans, Louis Pedrotti, and George F. Morken appeal. Reversed with directions.

W. F. Cowan and A. W. Hollingsworth, both of Santa Rosa, for appellants.

R. M. Barrett and C. W. Anderson, both of Santa Rosa, for respondent.

HART, J. The Wilfred-Bellevue drainage district, which is situated in the county of Sonoma, is, as its name implies a drainage district, and was organized and is existing as such under and by authority of the laws of the state of California. See Stats. 1903, p. 291, and Stats. 1915, p. 1321. At all times mentioned in the pleadings and the evidence, the defendants, other than defendant Morken, were duly elected and acting members of the board of directors of said district. The times at and during which said Morken became and acted as a member of the said board will later be shown.

The plaintiff, prior to and at the time of the institution of this action, was the owner of real property situated within the boundaries of said drainage district, and which has been, at all the times mentioned in the complaint, assessed for the payment of taxes in and to said district, "and taxes thereon during said period have been and now are paid by this plaintiff into the treasury of said drainage district."

It appears that, at some time prior to the 1st day of January, 1921, the board of directors of the said Wilfred-Bellevue drain-

age district (hereinafter, for convenience and brevity to be referred to as "the district" or the "drainage district") by due proceedings, and in furtherance of the purposes and objects of the district, ordered the engineer thereof to survey and lay out a route for the construction of ditches as a part of its system of drainage. In compliance with the direction thus given, the said engineer (L. L. Mills by name) proceeded with the work of laying out and establishing the line or lines along which the ditches were to be constructed. Among the ditches so laid out was one designated in the field notes of the engineer as "ditch No. 2." The line of said ditch was started, and as later constructed starts at a point about a quarter of a mile north of what is known as Bellevue Station, a railroad station of the Northwestern Pacific Railroad, "and runs along the easterly side of the railroad right of way" through the property of one F. W. Wilson, "from the northerly property line of said land to the southerly line thereof and parallel to and at a distance of about 3 feet from the westerly line of said land." Said ditch, as above indicated, was constructed over and along the line or route as marked out by the survey made by said engineer.

On the 28th day of July, 1921, the said F. W. Wilson brought an action against the drainage district and the defendants in the present action, as the board of directors of said district, the purpose of which was to recover damages for damage alleged to have been produced by the defendants in the building of said ditch to that portion of his said land through and over which said ditch No. 2 was constructed and maintained and also for damage alleged to have been likewise caused to a certain number of pear trees then growing on said land. Subsequently to the bringing of said action—on March 13, 1922—Wilson filed a third amended complaint, but omitted therefrom the drainage district as a defendant, thus leaving therein as the only parties defendant to the action Evans, Pedrotti, and Morken, the defendants in the present action. The said third amended complaint in that case alleged, among other things, that the defendants therein (and herein), on the 1st day of January, 1921, while acting as trustees in the management, control, and operation of said drainage district, without the knowledge, consent, or approval of plaintiff, "did then and there wrongfully dig and construct a ditch over and through the land of plaintiff (said land being specifically described in said complaint) along the line of said land," as above indicated, said ditch as so constructed being 675 feet in length and of the width of four feet and of the depth of four feet. Several different items of damage to a certain number of trees on said land and to the land itself are specifically alleged and described, all amounting, in the aggregate, as stated in money, to the sum of \$1,000, for which judgment was prayed.

The answer to said complaint after certain denials, alleged that in the years 1920 and 1921, the drainage district was engaged in the construction of a system of drainage for said district, and to that end caused surveys to be made for its drainage ditches; that one of the ditches so surveyed and laid out was the one which was to be constructed for the purpose of carrying water from a large territory north of the lands of plaintiff and across said lands, "thence southerly for a long distance until the same was discharged into a large body of water called the Laguna; that defendants notified the plaintiff in said action (Wilson) of the necessity for the use of the portion of his lands over which said ditch was to pass as a part of the drainage system which had been outlined, and that the said plaintiff thereupon consented to the construction of said ditch along the line of the survey thereof and over and through his said lands, and directed defendants to proceed with the work of constructing said ditch; that he knew at all times "the identical place where the said ditch was to be constructed and of its proximity to the westerly row of pear trees on said lands." Upon the issues thus made by the pleadings, the cause came on for trial on the 12th day of September, 1922, before the court sitting without a jury, and on the 25th day of April, 1923, judgment was entered upon the findings and conclusions of law in favor of the plaintiff in said action (Wilson) for the total sum of \$325 and costs. The court found in that action that the defendants, "while acting as directors * * * of said drainage district, and without the consent or approval of plaintiff herein, entered upon the land of plaintiff as particularly described in the third amended complaint" and wrongfully dug and constructed the ditch in question. It was further found (finding 1) that the direct result of the construction of said ditch was the destruction of the westerly row of pear trees growing on Wilson's said land, and that the damage to said trees amounted, as stated in money, to the sum of \$325. The court further found in said action "that the lands of the plaintiff (Wilson), apart from the damage to the pear trees thereon, as above set forth in finding 1, have not been damaged by reason of the construction of said ditch by the said defendants." As a conclusion of law, the court found that "the defendants are liable personally for the damage to the trees of plaintiff," etc. No appeal was taken from the judgment therein entered.

It appears from the record in the instant case that the defendant Morken was not a director of the drainage district at the time the preparatory steps for building the ditch in question were taken, he having been appointed a member of the board of directors of the said district by the board of supervisors of Sonoma county on June 14, 1921, to fill a vacancy occurring in the board of directors. It further appears that, on Feb-

ruary 7, 1923, an election was held by the landholders of the district for the purpose of electing a director in the place and stead of said Morken; his term being then about to expire. At said election said Morken and one Chas. Bacon were rival candidates for said office of director, and, upon a canvass by the board of directors of the returns of the election so held, it was found that Bacon received the highest number of votes cast at said election for said office, and was by said board declared duly elected thereto. A certificate of election was thereupon duly issued to said Bacon, who, having duly qualified, assumed the duties of his office as director of the district on the 6th day of March, 1923, in the place and stead of said Morken, defendant herein. On June 5, 1923, at a regular meeting of the board of directors, all the members thereof (Pedrotti, Evans, defendants in the present, as also in the Wilson action, and Bacon, successor of Morken as director) being present, the matter of the Wilson judgment was called up for consideration. The minutes of said meeting read, in part:

"A judgment of \$325 having been awarded F. W. Wilson in his damage suit and costs of \$82, it was decided to pay same out of the construction fund in favor of W. F. Cowan (attorney for defendants in the Wilson as well as in the present action) and let him settle with Wilson's lawyers. Wilson agreed to discount \$25 from the amount awarded, so a warrant for \$382 was drawn out of the construction fund in the name of W. F. Cowan."

Wilson accepted the above-stated amount as in full payment and satisfaction of his judgment against the defendant directors, and the same was duly and regularly satisfied.

The present action was brought by plaintiff, who, as shown above, was a landowner and a taxpayer in and to said district, and on behalf of the district, for judgment in favor of the latter in the sum of \$791.30; being the sum alleged to have been taken and diverted from the funds of the district by said defendants to pay, and with which, it is alleged, they did pay and satisfy, the judgment rendered against them in the action of F. W. Wilson against said defendants and certain costs, attorney's fees, and other expenses incurred by them in said action, and for costs incurred herein by said plaintiff.

The complaint herein proceeds upon the theory that the judgment obtained against the defendants in the Wilson Case was wholly a personal judgment and in no manner or form bound the drainage district, which, as seen, was pretermitted as a party to said Wilson action by the third amended complaint, upon which, together with the answer thereto, said action was tried and judgment entered against the defendants herein alone, and that the appropriation of the moneys of the drainage district by the board of direc-

tors to the payment and satisfaction of the Wilson judgment and the costs, attorney's fees, and other expenses incurred therein by the defendants, constituted a misappropriation or wrongful diversion by the latter, as the directors thereof, of the funds of said district. The complaint briefly, but with sufficient fullness, relates the history of the Wilson litigation and the causes leading to the action by Wilson, and also contains a statement of the issues therein tried and decided, and the fact that the drainage district was dropped from said action as a party thereto before the issues of fact therein were tried. The complaint also sets forth in detail the items of costs, attorney's fees, and other expenses incurred in the Wilson suit which, it is alleged, were included within the amount of the judgment in the Wilson Case, as compromised and satisfied in the total sum alleged to have been wrongfully taken from the funds of the drainage district, and misappropriated by defendants.

The answer admits that Evans and Pedrotti were at all times mentioned in the complaint directors of said district, but declares that the defendant Morken, at the time of the commission of the alleged trespass upon which the Wilson action was founded, was not a director of the drainage district, "and is not now a director of said * * * district, although, at the time of the commencement of said action by said Wilson and at the time of the rendition of the judgment therein, the said Morken was a director of said drainage district." The judgment in the Wilson action against defendants is admitted, as is also the payment by defendants out of the funds of the drainage district of said judgment and the costs, attorney's fees, and other expenses incurred in the Wilson action, as specified in the complaint, but the answer alleges that the acts of said defendants, upon which the action by Wilson was based, were not oppressively committed or with the intent to, or purpose of, injuring the said Wilson or his property, but that said acts were within the scope of the authority of said directors, were caused to be done by defendants solely in their capacity as directors of said district and "for the use and benefit of said drainage district"; that the Wilson judgment was paid by said drainage district, "with full knowledge of all the facts upon which the said judgment was based, and with full knowledge that each and every act performed by said personal defendants was performed for the use and benefit of said drainage district; and that said district did fully ratify and approve said payment."

Among the court's findings are the following:

"That for the purpose of defending said action of Wilson, Plaintiff, v. Evans, Pedrotti and Morken, Defendants, * * * the defendants for their own benefit and not for the use of or on behalf of said drainage district, incurred obligations and expenses for court costs,

attorneys fees, witness fees, meals for witnesses, court reporter's fees, automobile hire, surveyor's services, and photographs, and for all of said expenses, said defendants caused demands to be filed against the said Wilfred Bellevue drainage district. That defendants Evans and Pedrotti, acting as a majority of the board of directors of said district, allowed, audited, and ordered warrants drawn for each and all of said demands, * * * and that warrants were drawn. * * * That each and every one of said demands (which are set forth in the finding) were allowed and ordered paid by defendants Evans and Pedrotti, acting as a majority of said board of directors. * * * That prior to the commencement of this action said warrants were paid out of the funds of the Wilfred Bellevue district, and that the treasury has been depleted in the aggregate amount of the judgment and of the costs. That it is not true that each and every act and thing done and performed by the said defendants, in and about the premises and upon which the said action of *Wilson v. Evans et al.* was based, was done for and on behalf of and for the use and benefit of said drainage district. * * * That it is not true that the said judgment and expenses were paid by the drainage district with full knowledge of the facts upon which the judgment was based. * * * That it is not true that the drainage district fully or otherwise ratified and approved said payment."

The court further found that defendants Evans and Pedrotti "were at all times herein mentioned directors of the * * * drainage district," but that defendant Morken, at the time of the commission of the trespass complained of in the *Wilson* action was not a director of the drainage district, "and is not now a director of said drainage district, although at the time of the commencement of said action by said *Wilson* and at the time of the rendition of judgment therein the said Morken was a director of said drainage district." The court also expressly found that Morken joined Evans and Pedrotti in causing a warrant to be issued and drawn upon the funds of the district and payable to W. F. Cowan for the purpose of using the money so obtained in payment of the *Wilson* judgment.

The conclusions of law are, in part, as follows:

"(1) That the judgment in the case of *Wilson v. Evans, Pedrotti, and Morken*, heretofore mentioned, was and is a personal judgment against said defendants individually, and that said judgment has never been appealed from, modified, or reversed in whole or in part. That the principal of said judgment, together with costs, expenses, and attorney's fees and all other charges and expenses in connection therewith and heretofore in the court's findings of facts specifically mentioned, were in truth and in fact charges and expenses against said defendants Evans, Pedrotti, and Morken individually, and that said defendants were individually liable for all thereof."

The court further concluded as a matter of law that, by reason of the payment by

defendants from the funds of the district of the judgment in the *Wilson* Case and the costs, attorney's fees, and other expenses accruing against defendants in said action, the treasury of the drainage district "has been unlawfully depleted in the sum of \$757.80," etc., and that the drainage district is entitled to judgment against the defendants and each of them for said amount. Judgment was entered accordingly. A motion by the defendants for a new trial was denied, and they appeal from said judgment, supporting said appeal by a record prepared in conformity with the requirements of the so-called alternative method.

[1-4] The Legislature has vested in all duly organized drainage districts the right to exercise the power of eminent domain whenever it is found necessary, for the accomplishment of the purposes for which they are organized, to invoke that power. Section 1238, subd. 3, Code Civ. Proc.; section 14, Stats. 1903, pp. 291, 295, under the provisions of which the district spoken of herein was organized. The Constitution provides that "private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner." Article 1, § 14, Const. Thus it is clear that, unless the owner of property required for the purposes of such districts consents to the taking or damaging of such property by such public agencies for their use as such, the one course which those organizations must pursue in order to secure the legal right to take or damage such property is that outlined by the Constitution and to be invoked according to the procedure adopted by the Legislature for the purpose of facilitating the exercise of the right of eminent domain. It therefore cannot be denied that the acts of the defendants in entering upon the property of *Wilson* and digging a ditch over and across said property, under the circumstances as indicated or disclosed by the findings in *Wilson's* action against them, constituted a trespass for which they were severally and jointly liable. And this is so, even if the acts complained of were committed by the defendants in their official capacity or as directors of the drainage district. "One, acting in his official capacity, is individually liable for the negligent discharge of his duties." *Proper v. Sutter Drainage District*, 200 P. 664, 666, 53 Cal. App. 576, 581; *Perkins v. Blauth*, 127 P. 50, 163 Cal. 787. Of course, that rule applies as well where the wrong has occurred as the result of an act involving no element of negligence as where the wrong committed is the direct result of the negligence of the person committing the wrong. "One may become liable in an action as for tort by actually doing to the prejudice of another something he has no legal right to do." 2 Cooley, *Elements of Torts*, p. 19; *Perkins v. Blauth*, supra. *Wilson*, therefore, was authorized to proceed, as according to the complaint in his action he

did proceed, against the defendants as for a tort. There is not, however, serious, if any, controversy between the parties as to those propositions.

The controversy here revolves around the general proposition, as advanced by the appellants, that, since it was made to appear by the answer to the complaint in the Wilson action and the answer to the complaint in the present action, as well as by evidence received in this action, the damage to Wilson's property was the direct result of acts by the directors of the drainage district which were expressly directed to be done by the district, in the exercise of its authority to establish a system of ditches necessary to carry out the purposes of its organization, and were for the sole benefit and use of the district, it was within the legal right or authority—indeed, a legal duty—of the district to pay and satisfy the judgment for damages awarded in favor of Wilson and against the directors for the damage resulting from the commission of those acts. With the predicate of that proposition established, there could be no legitimate controversy as to its soundness as a matter of right and justice. From the answer to the complaint in the Wilson Case and the answer to the complaint and the uncontradicted evidence in the present case, it is clear that the directors of the drainage district (defendants herein and in the Wilson case) were, when committing the acts of trespass complained of by Wilson, acting under the direct authority or instructions of the drainage district with respect to a matter falling within the general scope of the purposes and powers of the latter. The act of the district in causing a survey of the ditch was not *ultra vires*. But, in attempting to exercise a power lawfully conferred upon it, to wit, the taking (if it did take) or damaging of private property for a public use and its own benefit, the district itself, acting through its board of directors, without the consent of the owner, and without first making to him just compensation therefor, as prescribed by the Constitution, committed a wrong for which it was liable to the owner. Such, we say, was the case as it was presented by the pleadings of defendants in both cases and the evidence in this. Therefore, as thus disclosed, it was not a case where injury to the property of another was directly or at all produced by the negligent performance by the officers or agents of a public mandatory of their duties as such officers or agents. Assuming, though, that the case upon the facts was of the latter class, the district would not be immune from liability, since the officers and agents of the district, in performing the work, did it precisely as the district itself had outlined and expressly directed it to be done. In other words, the injury to the property of Wilson resulted from the work itself as it had been planned and authorized to be done

by the district, and not from any negligence of the officers or agents of the district in performing the work. The act or acts which thus the district commanded its officers or agents or employees to perform, being inherently wrong, the district and the officers or agents or employees who performed the act or acts are both liable. *Perkins v. Blauth*, 127 P. 50, 163 Cal. 782, and cases therein cited at page 789; *Weissband v. City of Petaluma*, 174 P. 955, 37 Cal. App. 296, 307; *Western Assur. Co., etc., v. Sac. & San Joaquin Drainage District* (Cal. App.) 237 P. 59, 63.

Hence, from any of the several viewpoints of the case as thus considered, the drainage district, having originally been made a party defendant in the action by Wilson, ought to have been retained in that action as a defendant. Indeed, if the district actually took the land of Wilson and has been or is using it for its purposes as a drainage district, the action of Wilson should be treated as having been in effect a condemnation proceeding instituted by the district for its own necessities, and, therefore required to pay or stand for the damages awarded against the defendants in said action. It is not in the present connection inappropriate to say, in reply to the contention of respondent to the contrary in that particular, that there was no legal impediment to the making of the district a party defendant to the Wilson action. Section 26 of the Statute of 1903, *supra*, provides that, "in all courts, actions, suits, or proceedings, the said board (of directors) may sue, appear, and defend in person or by attorneys, and in the name of such drainage district." Thus the district is given express and specific authority to sue or to defend in any action, which means, of course, that it may be sued as well as institute and maintain actions at law or suits in equity. The cases cited by respondent, as supporting the view that the drainage district could not legally have been made a defendant in the Wilson suit, are *Proper v. Sutter Drainage Dist. et al.*, 200 P. 664, 53 Cal. App. 576; *Perkins v. Blauth*, 127 P. 50, 163 Cal. 782; *Brunson v. Santa Monica*, 143 P. 950, 27 Cal. App. 89; *Brownell v. Fisher*, 57 Cal. 150; *Hopkins v. Clemson Agricultural College*, 31 S. Ct. 654, 221 U. S. 636, 55 L. Ed. 890, 35 L. R. A. (N. S.) 243. Those cases, however, had to do with state agencies or public mandatories, the right to sue which had not been authorized by the Legislature.

[5-7] But the situation as it is presented here is such as to preclude us from holding that the district should be compelled to assume and satisfy the Wilson judgment. While, as seen, there is testimony in the present record showing that the damage done to the property of Wilson, for which the judgment in his action against the defendants awarding him damages was given, was an incident of an attempt upon the part of

the drainage district to take the property for a public use and its benefit, still there is no evidence herein that the district actually took the property or is using or ever used it for its purposes. Turning to the judgment roll in the Wilson Case, we find nothing in the findings to the effect that the land was taken and was being used by the district as a part of its drainage system. To the contrary, it was therein expressly found that, while certain trees growing and standing on the land alleged in the complaint of Wilson were injured by the acts of the defendants, it is also found that "the lands of the plaintiff have not been damaged by reason of the construction of said ditch by the defendants." Of course, injury to the trees was, in law, injury to the real property upon which they were growing, but by the finding it was evidently intended to declare that the soil itself was not injured. Indeed, construing the finding by the light of the complaint in that case, it would be the reasonable inference that neither the soil nor the fee to the land was taken for the uses of the district. The complaint in that case, as has above been shown, segregated or divided the damage alleged and the damages claimed into two distinct items, to wit: Damage to the trees, \$500 damages; damage to the land, \$500 damages. The court, in its findings, it will be perceived, followed the segregation thus made by the complaint, and, as stated, it seems to us that the reasonable construction of, or the more rational inference from, the finding as to damage, is that there was no taking of the land. But, regardless of all those matters, the fact is that, notwithstanding that it is found that the defendants, while acting as directors of the district and in control of its affairs, committed the trespass, the judgment is exclusively against them as a personal judgment. The judgment is, of course, buttressed by all the presumptions and intendments which apply to all judgments which, upon their face, are not void, and, while it is true that a party suing only one or two of a greater number of tort-feasors is not for that reason barred from suing any against whom he has not proceeded, unless a judgment he has secured against those sued has been satisfied, or his right of action against those not sued is barred by the statute of limitations, it is equally true that it is to be presumed from the judgment in the Wilson action that the defendants alone were concerned in the commission of the tort upon which said judgment is founded. And there is no showing in the present action which would justify the conclusion that it was the legal duty of the district to pay the Wilson judgment, and the landowners of the district, so far as the present case is made to appear here, had the right to regard and treat the act by the district in satisfying said judgment out of its funds as involving a diversion by the directors of so much of said funds as were so

taken and used from its lawful purposes. As before suggested, if the defendants, under allegations in their answer to that effect, had shown that the district had taken and was using the land of Wilson for its purposes—that is to say, if it had been made to appear in the present action, under an issue appropriately made and tendered, that, by virtue of the Wilson judgment or under the compromise between Wilson and the district, whereby Wilson accepted, as in satisfaction thereof, less than the judgment called for, the district was to have and own and use for the purpose of its drainage system the land alleged in the Wilson action to have been damaged—then, in that case, the payment of the Wilson judgment by the district would not only be just, but, upon the theory that it amounted to the taking of property by the district for its use as a drainage district, would be legally proper.

[8-12] The contention that the judgment in the present case, in so far as it involves and affects the defendant Morken, is void, cannot be sustained. While said judgment as to Morken may be voidable or erroneous or not justified, it is not void. This point, however, is predicated upon the finding herein that Morken was not a member of the board of directors when the damage to Wilson's land was committed, or the work resulting in the damage was ordered to be done. There is also evidence tending to show that Morken had nothing to do with the act of taking and using money from the funds of the drainage district to pay the Wilson judgment. And, as pointed out above, the evidence without conflict shows that Morken, at the time the payment of the Wilson judgment was ordered and caused by the directors to be made out of the funds of the district, was not a member of the board of directors. The action by the plaintiff, as is manifest, is one for the recovery for the district from the defendants of the moneys which it is alleged in the complaint were illegally paid out of the funds of the district by the defendants to satisfy the Wilson judgment against the defendants, and the question is, not whether Morken committed or was connected with the commission of the damage to Wilson's property, but whether he caused or in any way assisted in causing a wrongful use of the district's funds in the manner as alleged in the complaint. The answer, however, sets up a special defense in the nature of a plea in confession and avoidance for all the defendants, including Morken, and amounts to a collateral attack upon the judgment in the Wilson Case. Therein the fact of the use of the money by the defendants to pay the Wilson judgment is admitted, but it is sought to justify the action of the defendants in so using the funds of the district by the plea that the damage to the property of Wilson was alone caused by the district, and that therefore, in paying the judgment of Wilson against the defendants,

the district did only what legally it ought to do.

As to defendant Morken, nowhere is there in the answer any denial by or for him of the charge in the complaint that he had a hand in causing the funds of the district to be used in paying the Wilson judgment, and thus he is deemed to have admitted that he, in conjunction with his codefendants, caused the payment of the Wilson judgment to be made from the funds of the district. The court found accordingly. While upon such admission the judgment can stand, and could still have stood, even if the court had failed to make a specific finding as to that matter, yet, if it be true, as the evidence received in the case seems to indicate is true, that Morken was not a member of the board of directors when the judgment in the Wilson Case was ordered and caused by said board to be paid from the funds of the district, and he in no other way assisted, advised, or abetted, the act of the board of directors in thus misappropriating the funds of the district, he was not a proper party to this action, and could not and should not be compelled to stand for any part of the loss sustained by the district by reason of the wrongful diversion of its funds by applying them to the payment of said judgment. Of course, it would not be argued, assuming that Morken took no part in causing the district to pay the Wilson judgment, that the payment of said judgment with the funds of the district would place Morken in the position of one whose obligation has been paid by another, and that, having accepted the benefit of the payment of said judgment with the district's money, he became a debtor of the district by reason of such payment, and should be required to pay the district the debt thus arising against him. Where an obligation arising out of contract has been paid and extinguished voluntarily by a party not obliged to pay it, the right of contribution cannot, as a rule, be invoked as against the person for whom such payment was made by the party thus making such payment. "No one can be made a debtor for money paid to his use, unless it was done at his request, or unless the party paying the money was bound as a surety, or otherwise, to pay it for him." 6 Cal. Jur. § 6, pp. 504, 505. Nor will it seriously be contended that Morken may be held liable to the district for a proportionate part of the moneys paid out of its funds to extinguish the obligations of the Wilson judgment under the right of contribution, assuming that the district paid said judgment upon the theory and admission that it, with the defendants, committed the damage complained of by Wilson, or even if the district was, had been, or were to be made, if it could now be made, a party to the action. The general rule is that the right of contribution does not apply as between joint tort-feasors. There are, however, some exceptions to the general

rule. 6 R. C. L. § 17, p. 1054. But there is not presented here a case falling within any of the exceptions which, it has been held, qualify the general rule.

But, as above declared, the judgment here as against Morken is well supported upon his implied admission that, jointly with his codefendants, he did cause the funds of the district to be drawn upon and used in the payment of the Wilson judgment against him and his codefendants, as alleged in general terms in the complaint. It is not impossible or improbable that, although not a member of the board of directors at the time the Wilson judgment was ordered paid and was paid from the funds of the district, he could in some way—advising and abetting the act—have taken part in causing the moneys of the district to be used in the payment of said judgment. In other words, he could, even though not a director, have wrongfully and knowingly conspired with or otherwise induced the directors to betray their trust by a wrongful use of the trust property, in order himself to escape payment of a judgment which imposed upon him a several liability. The judgment, however, must be reversed because of the inclusion therein, as moneys of the district illegally used, of certain expenditures by the district in connection with the Wilson litigation while the district was still a party thereto, and we therefore suggest that the case should be tried upon amendments to the answer, if defendants be so advised, which will justify inquiry into these propositions, to wit: (1) Whether the district, by the compromise of the Wilson judgment, secured the land or the right to use the land damaged, and has been or is now, as the effect of such compromise, in possession and control, either as owner or otherwise, and using the same for the purposes of its drainage system. (2) Whether defendant Morken was in any way connected with the alleged wrongful appropriation of the funds of the district to the payment of the Wilson judgment. Justice plainly demands that these matters should be fully gone into. If the district is now or has been, under the compromise of the Wilson judgment, in the enjoyment of the right to use the land of Wilson, alleged in his complaint to have been damaged by defendants, then the district should be held to have taken said land according to the principles underlying the doctrine of eminent domain and should be required to stand for the payment of the Wilson judgment, as compromised.

[13] Now, as to the ground upon which a reversal must be ordered. As seen, when the action was first filed in the superior court, the district was a party defendant to the Wilson suit, and the district, acting through its board of directors, entered into a contract with Cowan whereby he was to defend the district in said action for a fee of \$200. Of course, the board had the legal right to make that contract with Cowan, and, as he ap-

peared for the district as its attorney in said litigation and continued so to act until the district was eliminated as a party defendant thereto, and, furthermore, as there is no showing to the effect that, whether the payment to him of the full sum of \$200 or any less sum than that was to be contingent on the quantum of service he should render the district therein, it is clear that the district is under obligation to pay him the full sum which it agreed to pay him for his professional services in said action. And this would still be true, even if, after the district ceased to be a party to the action, the defendants agreed to pay him out of their own pockets a fee or fees for his professional services to them. In so far as it failed to recognize the validity of the contract between Cowan and the district for the payment by the latter of the sum of \$200 to the former for his services in the Wilson action and added to the judgment against defendants herein said sum of \$200, said judgment cannot, upon the present record, be upheld. Furthermore, there are certain items of costs and expenses which the record before us discloses were incurred prior to the time at which the district was dropped from the Wilson action as a party defendant thereto. All costs and expenses legitimately and necessarily incurred in the Wilson action while the district was a party would, manifestly, constitute a proper charge against the district, and should be so adjudicated in this action.

The judgment is reversed, with direction to the trial court to grant leave to the defendants, or any one of them, if they or he be so advised, to amend their answer in the particulars herein above specified or suggested, or to set up any proper special defense to the claims of the complaint herein which may, according to their judgment, be available to them under the facts of the several transactions leading to the present controversy.

We concur: FINCH, P. J.; PLUMMER, J.

76 Cal. App. 232

BRICHETTO et al. v. RANEY et al.
(Civ. 2969.)

(District Court of Appeal, Third District, California. Jan. 15, 1926. As Modified Jan. 26, 1926. Hearing Denied by Supreme Court March 15, 1926.)

1. Mortgages ⚡380.

Action to foreclose mortgage is equitable.

2. Mortgages ⚡490—Where mortgagee paid taxes on mortgagor's failure to do so, as authorized by mortgage, foreclosure decree should include such payments.

Where mortgagee, as authorized by mortgage, paid taxes on mortgagor's failure to do so, such payments became part of mortgage in-

debtedness, and foreclosure decree should include them.

3. Mortgages ⚡380—Court's jurisdiction to enter deficiency judgment in mortgage foreclosure suit does not destroy equitable character of proceeding.

That court in mortgage foreclosure suit has jurisdiction to enter personal money judgment if sum realized on foreclosure sale is insufficient to satisfy mortgage debt does not destroy equitable character of proceeding.

4. Jury ⚡13(5)—Trial ⚡374(2)—Allowance of jury trial in equity case is not matter of right, and jury's findings may be disregarded by chancellor and contrary findings made, or, if adopted, new findings must be made by chancellor (Code Civ. Proc. § 592).

Jury trial on issues of fact in equity case is not a matter of right, but allowance thereof is wholly *ex gratia*, and jury's findings are merely advisory, and may be disregarded and contrary findings made by chancellor, or, if verdict is adopted, chancellor must still make findings, in view of Code Civ. Proc. § 592.

5. Judgment ⚡200.

Whether judgment foreclosing mortgage is supported by evidence is referable to findings of court and not to verdict of jury.

6. Mortgages ⚡559(4) — Evidence held to show that bank took legal title to mortgaged realty in trust for benefit of purchasers.

Evidence held to show that bank took legal title to mortgaged realty in trust for benefit of purchasers, and deficiency judgment against it was not warranted.

7. Mortgages ⚡278, 283(1)—Grantee taking mortgaged property "subject to mortgage" is bound only to extent of property, but grantee "assuming mortgage" becomes principal debtor and mortgagor becomes surety.

Grantee, taking conveyance of mortgaged property "subject" to mortgage, in absence of express or implied agreement to assume debt, is bound only to extent of the property, but grantee "assuming" debt becomes principal debtor and mortgagor becomes surety.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assume; Subject to.]

8. Mortgages ⚡280(5) — Parol proof that grantee assumed mortgage debt must be clear and satisfactory to make grantee personally liable.

In absence of provision in deed or of other written agreement showing grantee's assumption of mortgage debt, parol proof that such agreement was made must be clear and satisfactory to make grantee personally liable.

9. Estoppel ⚡68(2)—Bank's affidavit supporting its claim to portion of crop on mortgaged land, as against receiver, alleging that it was owner, held not inconsistent with its subsequent claim that it was trustee for purchasers (Code Civ. Proc. § 369).

Bank's affidavit supporting its claim to one-third of crop produced on mortgaged land, as against receiver appointed in mortgage foreclo-

sure proceeding, alleging that it was owner of land, held not inconsistent with its subsequent claim that it was trustee for purchasers thereof, in view of Code Civ. Proc. § 369.

10. Trusts ⚡63½ — Oral agreement under which mortgaged property was conveyed to bank in trust, though void as against innocent purchasers and incumbrancers for value, was valid as between beneficiaries of trust and bank (Civ. Code, §§ 853, 869a, 2221, 2222).

Though oral agreement under which property was conveyed to bank in trust for purchasers was void under Civ. Code, § 869a, as against innocent purchasers and incumbrancers for value, it was valid as between beneficiaries of trust and bank, notwithstanding sections 2221, 2222, and, such beneficiaries having paid consideration, resulting trust in their favor is presumed under section 853.

11. Mortgages ⚡280(5) — That mortgaged property was conveyed to savings bank in trust for purchasers and that banks are prohibited from dealing in realty held convincing evidence that bank did not assume mortgage debt (State Bank Act, §§ 61, 62 [Gen. Laws 1923, Act 652]; Civ. Code, §§ 869a, 2221, 2222).

That mortgaged property was conveyed to savings bank as trustee for purchasers, and that under State Bank Act, §§ 61, 62, savings banks are prohibited from dealing in realty, is convincing evidence that bank did not assume mortgage debt, regardless of whether trust was void under Civ. Code, §§ 869a, 2221, 2222.

12. Appeal and error ⚡987(2).

Trial court's decision on conflicting evidence cannot be disturbed on appeal without violating constitutional limitation on appellate review.

13. Estoppel ⚡60—Estoppel by conduct involves implied representation of existence of apparent facts, and to justify prudent man in acting thereon it must be plain and not doubtful.

Estoppel by conduct, founded on silence of party whose duty it is to speak, involves an implied representation of the existence of apparent facts, and to justify a prudent man in acting thereon representation must be plain, not doubtful or of questionable inference.

14. Mortgages ⚡280(5) — Evidence held to show that mortgagor conveyed mortgaged property to bank knowing bank was mere trustee, as against contention that bank was liable for deficiency (Civ. Code, §§ 18, 19).

Evidence held to show that mortgagor conveyed mortgaged property to bank knowing bank was mere trustee for purchasers, or at least that mortgagor was put on inquiry under Civ. Code, §§ 18, 19, as against contention that bank was liable for deficiency of proceeds of sale on foreclosure and mortgage debt.

Appeal from Superior Court, Stanislaus County; L. W. Fulkirith, Judge.

Suit by L. F. Bricchetto and another against F. A. Raney and others. Judgment for plaintiffs, and defendant Fidelity Trust & Savings Bank appeals. Reversed.

Newton A. Johnson, of Fresno, for appellant.

F. W. Reeder, of Oakdale, and L. J. Mad-dux and T. C. Boone, both of Modesto, for respondents.

HART, J. This action was brought to foreclose a mortgage upon a certain tract of land of 963 acres, more or less, and executed by one F. A. Raney, to secure a promissory note made by him in favor of the plaintiffs for the sum of \$45,000. The note and the mortgage were made and executed on the 4th day of September, 1920, the note to become due and payable five years from the date thereof. It provided for the payment of interest at the rate of 6 per cent. per annum, said interest to be paid semiannually, and, if not paid as it became due, was to be added to the principal and become a part thereof and bear interest at the same rate. It was further provided in said note that if default be made in the payment of interest as provided therein, "then this note shall immediately become due and payable at the option of the holder thereof."

The mortgage provided, among other things, that it "is also intended to secure, and does hereby secure, the payment of all liens, incumbrances, charges, and the counsel fee herein mentioned, said counsel fee to become payable and be allowed if suit be commenced to foreclose this mortgage"; that the mortgagees, their heirs, successors, and assigns, may lawfully pay and discharge at maturity "all liens or other incumbrances now subsisting or hereafter to be laid or imposed upon said lot of land and premises, and which may be in effect a charge thereupon, and to insure and keep insured the buildings now or to be erected on said mortgaged premises for at least \$1,000, and to pay the premiums on such insurance; and such payments shall be allowed, with interest thereon at the rate of 8 per cent. per annum; and such payments and interest shall be considered as secured by these presents, and shall be a charge upon said premises, and shall be repayable on demand," etc. The mortgage also contained a release clause by virtue of which every acre of land embraced within the tract described in and subject to the mortgage upon which the sum of \$75 has been paid is to be released from the operative effect of the instrument.

The complaint is in the form usual to actions for the foreclosure of the liens of mortgages. In addition, it alleges that the defendants were in default in the payment of certain county and irrigation taxes assessed against the land, the same aggregating the sum of \$6,969.79; that, in accord with the terms of the mortgage, the plaintiffs paid said taxes. It is further alleged that there became due and payable on the 4th day of September, 1921, as for interest on the said note the sum of \$1,350, and a like sum as for in-

terest due on the 4th day of March, 1922; that defendants had defaulted in the payment of said interest, and continued to be so in default to the time of the commencement of this action, to wit, the 22d day of July, 1922.

It is further alleged that the defendant bank "is now the owner and holder of said property by bargain and sale deed from F. A. Raney, and assumed the mortgage at the time of receiving said deed and agreed to pay the same, said bank having paid the first installment of interest on said note." It is alleged that "there is now being harvested from said land a wheat crop," of which a one-third part will be delivered to the defendant bank as its share of said crop; that if defendant bank "receives said rental from said land they will apply it to their own use and will not apply it to the liquidation of said note; that it is absolutely necessary that the court appoint a receiver ex parte to take possession of the premises and receive the rents, incomes, and profits thereof pending the litigation, and to apply the proceeds thereof under an order of this court."

It is further alleged by plaintiffs that the defendants have breached the covenants and conditions of said note and mortgage, and that they (plaintiffs) "have elected and do now elect to exercise the option by said note provided and to declare and do declare all of said note, etc., due and payable."

The prayer is for judgment against Raney and the defendant bank for the sum of \$45,000, the principal sum of the note, together with interest falling due from time to time according to the terms of the note, for taxes paid by plaintiff by virtue of assessments levied by the county of Stanislaus and the Oakdale irrigation district upon said land, in the payment of which defendants are alleged to have defaulted, for any deficiency which may be found to exist in the amount necessary to satisfy the judgment, interest, and costs upon the sale of the property, and for an order appointing a receiver, pendente lite, to take possession of the property and to receive the rents and profits thereof, and to hold the same subject to the disposition thereof to be made by the court.

By a supplemental complaint, the plaintiff stated that, subsequent to the institution of this action, taxes assessed upon the land for county and irrigation purposes became due and payable, said taxes totaling the sum of \$4,186.47, and that plaintiffs, by reason of the default of the defendants in paying the same, and to prevent the sale of the property for the satisfaction of said taxes, paid all said taxes; that the same were and are a lien on the mortgaged premises, and prays judgment for the said sum of \$4,186.47 in addition to the sum asked in the original complaint.

The larger portions of the complaint are denied by the defendant bank on information and belief. Said defendant, however, directly denies that it breached the covenants and

conditions of the note and the mortgage, or those of either of them, and alleges that, while the defendant Raney, by deed dated September 4, 1920, conveyed to it the land described in the complaint, and that thus it acquired the legal title thereto, it took said title in trust for W. W. Stanforth and Hugh Blair, who were therefore the equitable owners of said land and beneficiaries of said trust. The said defendant, in its answer, explains its connection with the lease of said land to the plaintiffs herein, and of which more will be said later on in this opinion.

The defendant Raney filed a separate answer, in which he also denies, on information and belief, nearly all of the allegations of the complaint; directly denies that (as the complaint alleges) from the sale of the land under the decree of foreclosure there will not be realized a sufficient sum to satisfy the judgment, or that there will be such a deficiency in the amount for which the land is sold as to require or justify the entering of a deficiency judgment against the defendants and in favor of plaintiffs. Raney also filed a cross-complaint, and thereafter amended the same. Therein he sets forth in detail an account of all the transactions culminating in the conveyance by him to the bank of the land described in the complaint, and alleges that said bank, at the time the transfer of the land was made to it, agreed to assume and pay the debt to secure which the mortgage herein involved was given. He also sets up an estoppel as against the defendant bank, alleging in that behalf that, assuming that the bank took the conveyance solely as a trustee or in trust for the benefit of Stanforth & Blair, the said defendant did not at that time apprise or notify him of that fact, but its silence in that particular led him to infer and believe that it took the conveyance entirely for itself or as an absolute transfer of the whole title of the land to it.

The plaintiffs answered Raney's cross-complaint, and therein admit to be true the allegation therein that, "as a part of the consideration, to the amount of \$45,000, for said conveyance, the said * * * bank assumed the payment of said note and mortgage," etc., but affirmed that both Raney and the defendant bank are severally and jointly liable for the indebtedness evidenced by said note and mortgage, as also for all taxes assessed against the land, and which plaintiffs were compelled to pay by reason of the default of said defendants in that respect. The bank answered the amended cross-complaint, denying those allegations thereof which involve the claim by the cross-complainant that it assumed the payment of the mortgage indebtedness as a part of the consideration for the conveyance of the land to it. But further consideration herein of the pleadings may be dispensed with, it being sufficient to say that there was a joinder of issue upon all the vitally important questions of fact in the case,

and that they were therefore squarely and clearly submitted for decision.

The cause was tried by a jury, and a verdict returned in favor of plaintiffs by way of answers by the jury to the following special issues of fact submitted to them by the court:

(1) "At the time of the delivery of the deed of September 4, 1920, by F. A. Raney to the Fidelity Trust & Savings Bank, did F. A. Raney have any notice or knowledge that the bank was trustee for Stanforth & Blair? Answer: No." (2) "Was there an agreement, express or implied, by the Fidelity Trust & Savings Bank, a corporation, to pay the mortgage set forth in the complaint? Answer: Yes."

The court made findings in accord with the answers returned to the foregoing interrogatories, and found as a fact as well as a conclusion of law that the defendant bank and said Raney were jointly and severally liable, as principal and surety, respectively, for the deficiency found to exist in the amount required to satisfy the judgment, and entered a deficiency judgment accordingly.

The defendant bank appeals from said judgment upon a record prepared in accordance with the so-called alternative method.

The court specifically found that the bank took the conveyance of the land described in the complaint from Raney for itself or in its own behalf, and not as trustee for Stanforth & Blair; that Raney, at the time of the delivery of the deed of conveyance to said land to the bank, had no notice or knowledge that the bank took and accepted said conveyance as a trustee for Stanforth & Blair or for the benefit of the latter; that at the time of the delivery of the said deed to it the bank agreed to assume the payment of the note and mortgage and to perform all other covenants and conditions contained in said instruments. The legal integrity of these findings is assailed by the appellant upon the ground that they are not supported by any evidence in the case. Since the findings founded upon the answers returned by the jury to the above interrogatories are absolutely essential to the support of the judgment, it will follow, if the contention that those findings are without the requisite evidentiary support to uphold them, that all the other or what may be termed as subsidiary findings, in so far as they apply to the defendant bank, must necessarily fail to be of any effect, or, in other words, will be wholly devoid of materiality in the consideration of this appeal. In other terms, without the findings specially referred to above, the judgment as against the appellant cannot stand.

[1-3] Before taking up for consideration the question whether the findings which follow or approve the special findings of the jury upon the special issues submitted to them as above indicated are supported, we should first dispose of the contention of counsel for the plaintiffs that the court below was bound by the verdict, that the making of

findings by the court was wholly supererogatory, that the findings made are entirely without force or effect and that therefore the question whether the decision is insufficiently buttressed evidentially must be determined by reference to the verdict and not to the findings. The contention is obviously unsound. The action here is purely one of an equitable character and of equitable cognizance. It will not be maintained that, because a recovery for taxes is also sought in the action, that the suit was transformed into a mixed equitable and law action. The matter of the payment of taxes by the mortgagor was provided for in the mortgage and therefore upon the default by the mortgagor in the payment thereof and their payment by the mortgagee, they became as much a part of the mortgage indebtedness as was the principal or original obligation itself. The plaintiff was entitled to have embraced in the decree of foreclosure, not only a provision for the satisfaction of the loan evidenced by the promissory note, to secure which was the primary object of the mortgage, but one for all claims which arose by reason of the nonpayment by the mortgagor of any taxes or assessments imposed upon the property which the mortgage provided should become a lien on the land. But these propositions are so self-evident that the discussion thereof is wholly unnecessary. Nor does the fact that in a suit for the foreclosure of a mortgage lien the court is vested with the jurisdiction to enter a deficiency or personal money judgment against the mortgagor or the defendant liable for the debt, in case the sum for which the mortgaged property has been sold under the decree of foreclosure is insufficient to satisfy the debt secured by the mortgage, take from the proceeding its equitable character. As was said in *Carroll v. Deimel*, 95 N. Y. 254, approved by the case of *Downing v. Le Du*, 23 P. 193, 82 Cal. 473:

"Although a sale of the mortgaged premises might result in a deficiency for which a money judgment could be docketed against the defendant liable for such deficiency, such a judgment was not the sole object of the action, but was an incident of the equitable relief sought."

See, also, *Van Valkenburgh v. Oldham*, 108 P. 42, 12 Cal. App. 572, 579.

[4] No one will claim that the right to a trial by jury applies to equity cases, for it is too elementary to require argument to support the proposition that one of the inherent and most conspicuous attributes of chancery courts is that parties appealing thereto for the adjudication of rights appropriate to that forum are not entitled as a matter of right to a trial by a jury of the issues of fact arising therein. Conversely, the allowance of a jury in a suit calling entirely for equitable relief is wholly *ex gratia*. The finding of the jury in such case is merely of an advisory character upon the issues of fact, and the verdict may be disregarded and findings con-

trary thereto made by the chancellor, or, if the verdict be adopted, it is still incumbent upon the chancellor to make findings. Code Civ. Proc. § 592; *Stockman v. Riverside L. & Irr. Co.*, 28 P. 116, 64 Cal. 57, 58; *Downing v. Le Du*, supra; *Van Valkenburgh v. Olaham*, 108 P. 42, 12 Cal. App. 572; *J. I. Case T. M. Co. v. Copren*, 187 P. 772, 45 Cal. App. 159, 167, 168; *Vallejo & N. R. Co. v. Reed Orchard Co.*, 147 P. 238, 169 Cal. 544; *Carroll v. Deimel*, 95 N. Y. 254; *Rochester v. Bennett* (Mont.) 240 P. 384, 387.

[5, 6] It follows that the question whether the decision below is or is not supported by the evidence is referable to the findings and not to the verdict of the jury. And to that question consideration will now be given. W. W. Stanforth and Hugh Blair were, prior to and during the year 1920, engaged, as copartners, in the business of buying and selling real property, their offices being in the city of Fresno, where also they resided. They devoted their activities largely to the buying and subdividing of large tracts of land and selling the same by subdivisions to various persons. Among the lands so purchased and subdivided was a tract of land comprising about 880 acres situated in the county of Madera. Stanforth & Blair, by deed dated April 23, 1919, conveyed said land to the defendant bank, then designated and known as "Bank & Trust Company of Central California," with principal place of business at Fresno, but which subsequently was changed to that indicated in the title of this case. At the same time, said bank and Stanforth & Blair entered into and executed a written agreement, also dated April 23, 1919, wherein and whereby it was agreed that, although the said deed to said land was absolute in form, it was made to, and said property was to be held by, said bank in trust for the benefit of Stanforth & Blair, in accordance with the terms and provisions of said agreement and for the specific purposes therein set forth. The agreement, with much particularity of detail, set forth the terms, conditions, and provisions regulating the administration of the trust, and prescribed and declared the respective duties and obligations of the trustee and the trustors. As to these, though, it will be sufficient for our purposes to explain, in a general way, that the agreement provided for the surveying, the platting, and the subdividing of the land by the parties of the first part (Stanforth & Blair), and, upon the completion of such platting and subdividing, for the placing of the land upon the market for sale by subdivisions; that Stanforth & Blair should attend to the business of procuring contracts for the purchase of the subdivisions, and that the defendant bank should receive and disburse, according to the stipulations of said agreement, all moneys paid it by those entering into contracts with it for the purchase of such subdivisions; that all such contracts, or leases or other agreements in

writing concerning the sale, the handling, the management or the operation of "the said town property," shall be made in its (said bank's) name, etc.; that the payment of the costs and expenses "of these trusts, including payment to the second party (bank) for its services hereunder," should be out of the moneys received or collected by the bank on the sales made under "these trusts." It should be explained that, at the time of the making of the contract between Stanforth & Blair and Raney for the sale by the former and the purchase by the latter of the land under the mortgage concerned herein, and also at the time said land was conveyed to the defendant bank, a Berkeley (Alameda county) bank held a mortgage on the Madera county land (the subject of said agreement of trust) as security for the payment of a promissory note for the sum of \$20,000.

A large number of contracts of sale of the subdivisions of the Madera county lands were made between defendant bank and various other parties, and payments thereon were made by the purchasers to the defendant bank. At the time of the conveyance by Raney to the bank of the land upon which the plaintiffs' mortgage subsists, said bank had in its possession, holding the same as trustee for Stanforth & Blair, contracts calling for the payment to the bank, as such trustee, by the several purchasers of subdivisions of the Madera county land, of installments amounting in the aggregate to the sum of \$52,000, more or less. Thus Stanforth & Blair owned a net equity in the subdivisions covered by those contracts, totaling, in value, the sum of \$32,000, approximately.

The record appears to be silent as to the particular time at which were begun the negotiations eventuating in the purchase by Raney of the land upon which plaintiffs hold the mortgage which is the subject of this suit. That fact, however, bears no significance here. But it does appear that Raney purchased said land from the plaintiffs, and that the consideration passing from Raney to plaintiffs for the said land (Stanislaus county land, as hereinafter it may be referred to) was the sum of \$50,000; that upon the consummation of the agreement of sale between plaintiffs and Raney, the latter paid to the former, by virtue of said agreement, the sum of \$5,000 in cash, and gave and delivered to plaintiffs his promissory note for the balance of the purchase price (\$45,000) and a mortgage on said land to secure the payment of said note.

After the last above mentioned deal between Raney and plaintiffs had been completed, one Cecil Grigsby, a real estate dealer of Fresno, undertook, and succeeded in starting, negotiations between Stanforth & Blair, on the one hand, and Raney on the other, looking to the sale of the Stanislaus county land by the latter to the former. After inspecting the land, Stanforth & Blair submitted to

Raney a written offer for the purchase of the same. This written proposal to buy the land was dated at Fresno, August 4, 1920. Therein Stanforth & Blair offered \$77,616.71 for the entire tract of 960 acres, more or less, on the terms therein specified. Among those terms were the following: That said proposed purchasers would take the land, "subject to a mortgage in the sum of \$45,000," referring to the mortgage then existing on the land securing Raney's note to the plaintiffs for the sum so mentioned, same to bear interest at the rate of 6 per cent. per annum, payable semiannually; that the mortgage will not provide for any payments on the principal before "approximately five years"; that said mortgage should contain "a release clause releasing any portion of said land upon payment of \$75 per acre for each and every acre so released"; that, "as a further consideration," we will assign or cause to be assigned certain contracts issued by the Bank & Trust Company of Central California, covering property in sections 31 and 32, in township 12 south, range 17 east, M. D. B. & M., Madera county, Cal., and signed by the following people in the following amounts, following which language is an enumeration of seven different contracts of sale executed by as many different persons and the defendant bank upon the sale by the latter to the former of subdivisions of the Madera county land, with the amount owed by each purchaser under his contract set opposite his name. The total sum of these amounts was \$51,950. As before stated, Stanforth & Blair owned a net equity in said contracts amounting to the total sum approximately of \$32,616. In other words, that sum represented the total amount over and above the mortgage indebtedness against the property held by the Berkeley bank. The proposal further provided that "said contracts are to remain in trust at the Fidelity Trust & Savings Bank." The foregoing are all the provisions of the offer which need be referred to.

On August 9, 1920, and within the time during which said offer was, as specified therein, to remain open, Raney accepted the proposal in the following language:

"I hereby accept the above offer, together with all terms and conditions therein mentioned, and agree to pay Cecil Grigsby a brokerage commission as agreed upon."

Upon thus completing the agreement to sell and purchase said land, Raney, upon the suggestion of Stanforth & Blair, conveyed the land to the defendant bank, as heretofore stated. In turn, said bank assigned to Raney the equitable interests of Stanforth & Blair in the several contracts for the sale of the several subdivisions of the Madera county land described therein. On the 15th day of October, 1920, the defendant bank and the plaintiffs entered into an agreement of lease, whereby the Stanislaus county land was

leased by the former to the latter for the term of three years from the said 15th day of October, upon the consideration that the bank should receive, as rental, "one-third part of all grain or crops produced or raised on said land during the continuance of this lease"; the bank expressly reserving the right to sell said property at any time during the continuance of the lease. In this connection it may be stated that, within due time after the present suit was instituted (the court having appointed a receiver pendente lite to take possession and control of the property), the defendant bank through one of its officers executed and filed an affidavit in said action in support of its claim to the one-third part of the crops harvested on the Stanislaus county land in the year 1922 (the action was brought July 22, 1922), under the terms of the said lease of said land between said bank and the plaintiffs; that in said affidavit the said bank declared that it was the owner of said land, and entitled, as against the receiver appointed by the court, to the possession of the one-third part of the crops raised and harvested on said land during that year.

The above embraces a general statement of the facts. A review of such of the testimony as is conceived to be necessary will follow; but before proceeding to do so, it is proper at this juncture to say that the testimony of Ralph Vianello and W. H. Fielding, who, at the time of the transfer of the land directly concerned in and with this action by Raney to the bank, and the testimony of Stanforth, that the said defendant took said conveyance as a trustee, in trust for the benefit of Stanforth & Blair, stand in the record undisputed. The testimony of Stanforth and of said trust officers of the bank that the contracts relating to the Madera county land were owned by Stanforth & Blair and held by the defendant bank in trust for them also stand in the record uncontroverted. In fact, Raney himself, in substantially all the letters addressed by him to the bank concerning the transfer subsequent thereto, did so (as will later herein be the more fully shown) upon the assumption that said bank had taken the conveyance as a trustee for Stanforth & Blair. As to the contracts for the sale of the several subdivisions of the Madera county land, the fact that they were held in trust by said bank was so plainly indicated in the written offer submitted by Stanforth & Blair to Raney for the purchase of the Stanislaus county land that the latter could not have acquired any other thought or impression than that they were so held by defendant bank as trustee for Stanforth & Blair. The offer, as has been shown, provided that Stanforth & Blair, "as a further consideration will assign or cause to be assigned certain contracts (describing them) issued by the Bank & Trust Company of Central California," and further provided that "said contracts are to remain in trust at the Fidelity Trust & Savings

Bank." Mr. Raney, himself a banker, certainly, when accepting said offer, could not have misapprehended the real meaning or import of those provisions. Thus warrantably it may be, and, indeed, it is to be held, as a matter of law, that, upon the testimony, it stands in the record in this case as an established fact, that the defendant bank did take the legal title to the property solely in trust for the benefit of Stanforth & Blair, and that the latter were, at all times, from the date of the conveyance, not only the equitable but the beneficial or real legal owners thereof.

[7] Nor is there disclosed by this record any evidence, either direct or circumstantial, with the possible exception of the mere circumstance that the land was conveyed to the bank by Raney, that lends any support to the finding that the defendant bank, on taking the conveyance, or at any other time, agreed to assume the payment of the debt secured by the mortgage, and that circumstance alone possesses no probative force as in proof of such an agreement, for the reason, among others, that the deed to the bank does not so provide, but expressly and specifically provides that the conveyance thus effected is subject to the mortgage; and there is a broad and obvious distinction, in the effect thereof upon the rights of the parties, between the taking of mortgaged property subject to a mortgage subsisting thereon at the time of such taking and the assumption or agreement by the grantee to pay the debt secured by such mortgage, in that, where the purchaser or grantee of the mortgaged property takes it subject to the mortgage only, there being no express or implied agreement to assume the mortgage debt, he is bound only to the extent of the property, but if the debt be assumed by the grantee, he becomes the principal debtor, while the mortgagor, as is the theory of the findings in this case, becomes the surety. Jones on Mortgages (7th Ed.) § 751; Roberts v. Fitzallen, 52 P. 818, 120 Cal. 482.

[8] If there is nothing in the deed itself clearly indicating an assumption by the grantee of the debt secured by the mortgage, and there is no written agreement extrinsic to the deed to that effect, then proof by parol testimony that such an agreement was made must be clear or of the most satisfactory character. As stated, no express parol agreement was shown. Raney himself did not testify that any such agreement was made by the bank with him. As far as he went in that respect was to say that it was his "understanding" or that he assumed that the bank assumed the payment of the note secured by the mortgage. That "understanding" or assumption on his part, according to his own testimony, was not suggested or inspired by anything expressly said by the defendant bank's trust department officers, with whom he directly dealt in all the transactions per-

taining to the transfer of the land to said bank, nor did those officers or any officer of the bank use any language from which such an agreement could be implied. It will not, of course, be contended that the assumption of the debt secured by the mortgage by Stanforth & Blair, if, in truth, they really did assume it, would of itself bind the defendant bank in that particular, or, in other words, that such agreement by Stanforth & Blair, if any such was in fact entered into with Raney, was tantamount to an agreement on the part of the defendant bank to satisfy the obligation to secure which was the purpose of the mortgage, since, manifestly, such a position could only be maintained upon the theory or hypothesis that Stanforth & Blair, in the transaction ending in the purchase of the land from Raney, were acting and did act as agents of and for said bank, and were authorized as such by the bank to make such an agreement for it; but such a theory or hypothesis is wholly without any support or justification from any evidence brought into the case. Indeed, the uncontroverted fact in this case that a trust relation as to said land was created between the bank, as trustee, and Stanforth & Blair, as beneficiaries, completely negatives any such a theory.

[9] In stating that the fact that the bank took the deed to the property as a trustee only stands in this record uncontroverted, we have not lost sight of the fact that, in its affidavit filed in this case supporting its claim to a one-third portion of the crop produced on the land against any right of the receiver to maintain possession of the same, the bank asserted that it was the owner of the land and leased it to the plaintiffs. Even if it were true that he did not know before and at the time he conveyed to the bank that the latter took the land as a trustee, Raney certainly knew it at the time the affidavit was filed. He so admitted in his testimony, and his letters written to the bank and Stanforth & Blair after the deed conveying to the bank was delivered were all written upon the assumption that the bank's interest in the conveyance was only that of a trustee. But it was not inconsistent with its relation as trustee to said property for the bank to allege in said affidavit that it was the owner of the property. For the purpose of administering the offices of the trust, it was the owner of the land. The bank was the trustee of an express trust (Code Civ. Proc. § 369), and, had it sued to recover moneys due the trust estate, or for damages for trespass upon the trust property, being the holder of the legal title thereto, the bank could have sued in its own name and without the joining therein as coplaintiffs the cestui que trust. Code Civ. Proc. § 369, supra; Lauer v. Williams, 163 P. 687, 32 Cal. App. 590, 594, and cases therein cited. And in stating in the complaint that it was the owner of the land, it would tell the truth, so far as the

purposes of the action were concerned, and still would say nothing which could be taken as in derogation of its real or true legal relation to the property, or necessarily as proof of its absolute ownership. So, in the present case, the bank's statement in the affidavit that it was the owner of the land was not intended as setting forth the claim that it was the absolute owner of the land, but only such owner for the purpose of administering the affairs of the trust. This, as we have said, was known to Raney at the time the affidavit was filed. As against the admitted fact that the bank was acting merely as a trustee as to the property, said statement in the affidavit referred to was wholly devoid of force as proof that the bank held the absolute or an unqualified fee in the land.

It is deemed the more orderly to consider now the point urged here by the defendant Raney that, even if the bank took the property for the benefit of Stanforth & Blair or as trustee for the latter, the transaction, as a trust, is absolutely void by virtue of the terms of sections 869a, 2221, and 2222 of the Civil Code. The section first named was passed by the Legislature of 1923. Stats. 1923, p. 275. It in substance provides that any conveyance of real estate or interest therein, which has been or hereafter is made to any person or persons in trust, or where such person or persons is or are designated "trustee" or "as trustee," or "trustees," or "as trustees," and no beneficiary be indicated or named in said conveyance, it shall be presumed that the grantee or grantees, as the case may be, holds or hold the title to the estate or interest therein absolutely in his or their own individual right and free from any trust, and a conveyance executed by such grantee or grantees, whether purporting to be the act of such grantee or grantees in his or their individual right, or in his or their capacity as trustee or trustees, shall prima facie convey such title or interest to his or their grantee or grantees; that, as to a conveyance by such trustee or trustees in their capacity as such, such presumption shall be conclusive as to an undisclosed beneficiary of such trust and the original grantor or trustor and any one claiming under them, in favor of a purchaser or incumbrancer in good faith and for a valuable consideration, upon the filing of such conveyance for record in the office of the county recorder, etc. The section further provides that, as to such conveyance so filed prior to the taking effect of said section, such presumption shall not become conclusive, except in favor of a purchaser or incumbrancer in good faith and for a valuable consideration, until one year after the taking effect of "this act," when it shall become conclusive without qualification whatsoever, "and no action to avoid or impugn any such conveyance * * * shall be commenced after the time when such pre-

sumption becomes conclusive as hereinbefore provided," etc.

[10] No agreement in writing to the effect that the Stanislaus county land was to be held by the defendant bank in trust for Stanforth & Blair was made between said parties. Stanforth testified, however, that for a long period of time prior to the date of the conveyance of the land in question to the defendant bank, and to and including said date, the latter had managed and handled and was managing and handling, under a trust agreement, a number of other and different pieces of real property, situated in different localities belonging to or owned by him. Among the property so handled were, as we have shown, the interests in the Madera county land, as to which, as also shown, there was a trust agreement in writing. He stated that, following his custom of having all his real property and real estate deals so managed by said bank, he and Blair caused the conveyance of the Stanislaus land to be made to the defendant bank for the same purpose—that is, to be held and managed by the bank in trust and for the benefit of him and Blair. But, conceding that the trust as to the Stanislaus county land is void under the Code section above named, in so far as are concerned innocent purchasers or incumbrancers of said land, for a valuable consideration, it was not void as between the bank and Stanforth & Blair. The latter having paid the consideration for the transfer of the property to the bank, a trust is presumed to result in their favor (Civ. Code, § 853), and a court of equity would promptly enforce it. But all these propositions are not of controlling or, indeed, any special importance in the decision of the question now in hand.

[11] The single question here is whether the defendant bank, upon taking the conveyance, assumed the payment of the debt secured by the mortgage, and, there being shown no express agreement that it did, the question whether the conveyance was taken by it in trust for Stanforth & Blair or in its own right was one of singular evidentiary importance in that respect, and this is equally true whether the trust was or was not void for the reasons and the purposes specified in section 869a of the Civil Code, or under the terms of sections 2221 and 2222 of said Code. If, to illustrate, the bank, as we hold is shown to be true, took the conveyance merely as a trustee, then that fact regardless of whether the trust was void under the sections above named or for any reason, would not only be competent but convincing evidence that the claim that it assumed the payment of the note secured by the mortgage was not true or well founded. Counsel for Raney have not made it clear in their briefs precisely what their claim is as to the effect of the invalidity of the trust, if, as they claim, it is invalid or void as to the persons named in

section 869a, upon the question whether the bank took the conveyance in its own right or only as a trustee. It may be that the theory was that, since, as is the claim, there was, as to said land, no written trust agreement in which beneficiaries were indicated or named, and none indicated or named in the conveyance to the bank, the presumption would follow that the land was not taken in trust but in the bank's own right, as an absolute conveyance to it. Code Civ. Proc. § 1963, subds. 19, 33. But, if such a presumption were permissible in that connection, or possesses any force as evidence that the bank accepted the conveyance in its own right and not as a trustee, it is more than met and we think is dispelled by the uncontradicted positive testimony in the case, reinforced by the same presumption, possessing equal if not greater compelling probative force than as applied above, following from the proposition that a savings bank is absolutely prohibited by the laws of this state from dealing or trading, either directly or indirectly, in real property, save and except in several instances, which are indicated in section 61 of the State Bank Act, and of which the case here is not one. Section 61 and also section 62, Act 652 (Gen. Laws of California 1923, pp. 202, 209).

But there is advanced another theory upon which it is claimed that liability for the deficiency judgment should be decreed against the appellant. It is this: That the evidence discloses that the appellant, at the time the transfer was made, did not impart to Raney information that it was taking the conveyance merely as trustee for Stanforth & Blair, or, in other words, did not explain to or inform Raney that it (appellant) was not taking the property in its own absolute right, as the deed of conveyance upon its face indicates. The significance of this contention is, obviously, that, having been given no such information, either by the bank officials or Stanforth & Blair, Raney was justified in inferring that Stanforth & Blair, in negotiating and consummating the exchange of the properties, were in truth and in fact acting for said bank, and that as such representatives or agents were authorized to agree for the bank to assume the payment of the deficiency judgment, Raney having testified that Stanforth & Blair did agree to assume such payment, that, at all events, the silence of the parties, at the time the transfer to the bank was suggested and made, as to the true relation to the property that it was intended that the bank should sustain, should be sufficient to foreclose any right in the bank now to claim immunity from liability for the deficiency judgment.

[12] In the outset, it is well enough to state that, after a most careful and painstaking examination of the testimony, we have been convinced that Raney, at the time he conveyed the land to the bank, well knew, or,

at the least, from all the facts and circumstances attending the making of the conveyance, with which he was perfectly familiar, ought to have known, that the deed to the bank was accepted by the latter solely in trust for Stanforth & Blair. In announcing this conclusion, we are not forgetful of the rule so thoroughly established and understood that where there is a substantial conflict in the evidence addressed to the fact or facts in issue, the decision thereon in the court below cannot be disturbed without an arbitrary disregard of the limitation placed by the Constitution upon courts of review in the matter of considering and reviewing on appeal the evidentiary phases of a case. But we think there is practically no conflict in the evidence upon the point now being considered, as will presently be made to appear.

[13] In considering the question now before us, these propositions must be borne in mind: That Raney and the plaintiffs, in attempting to establish the bank's liability for the deficiency judgment, and, to that end, in attempting to show that, if the bank took as trustee, knowledge of that fact was withheld from Raney when the transfer was made, are practically relying upon the doctrine or defense of estoppel in pais, or estoppel by conduct by reason of silence when it was the duty of the party thus sought to be estopped to speak; that this defense often means, as it means in this case, that the tongue of the party against whom it is invoked is silenced against the right of uttering the truth as to a matter involving a substantive right. And as to the defense of equitable estoppel, particularly where it is set up as against the assertion of a substantive right, and the ground of the estoppel is conduct by silence on the part of the party against whom the defense is pleaded, "the facts proved must be such that an estoppel is clearly deducible from them." *Wheaton v. N. B. & M. Ins. Co.*, 18 P. 758, 76 Cal. 415, 429, 430, 9 Am. St. Rep. 216. In other words, estoppel, by conduct, founded upon the silence of the party whose duty it is to speak and so expose all the material facts of a transaction which are within his knowledge and of which the other party is ignorant, involves an implied representation of the existence of the apparent facts of the transaction, and, to justify a prudent man in acting upon it, "it must be plain, not doubtful, or matter of questionable inference." *Bigelow on Estoppel* (5th Ed.) pp. 570, 578. As that author further says at page 578, same edition: "Certainty is essential to all estoppels. The courts will not readily suffer a man to be deprived of his property where he had no intention to part with it." With the above principles before us, the testimony bearing upon the defense of estoppel will be considered.

[14] In taking up for consideration Raney's testimony, we may well start with these

undisputed facts: That he was himself a banker, being the president of the bank with which he was connected, and that he was not alone presumptively but also presumably actually familiar with the laws of the state governing the banking business in all its phases; that, accordingly, he is to be assumed as well as presumed to know, and to have known at the time he conveyed the land to the defendant bank, that a savings bank cannot, under the laws of this state, acquire title to real property, either by purchasing the same or exchanging property for it, except in the cases enumerated in the State Bank Act, supra, and within which exceptions the case here does not fall; that all his dealings with the bank relative to the land in question were entirely with the trust department of the bank and the trust officers thereof.

After detailing the facts and circumstances of the negotiations leading to the execution of the agreement of sale and purchase by him and Stanforth & Blair, Raney testified, giving his testimony in substance only: That, upon the completion of the contract for sale of the land, the papers or deed and agreement of sale were to be deposited with the defendant bank in escrow, and so remain pending the examination of abstracts of title of the properties to be exchanged and a report thereon; that the provisions of the written agreement of sale were to be accepted as setting forth the escrow instructions; that after the matter of the title to the respective properties was satisfactorily adjusted and approved, he caused a deed to be prepared conveying the land to Stanforth & Blair; that thereafter the latter instructed Raney to convey the property to defendant bank; that he made no inquiry either of Stanforth & Blair or the bank as to the reason for the conveyance of the land to the latter; that, after being so instructed, he went to the trust officers of the bank and asked if it would be "satisfactory" to the bank to make the deed to it, to which question said officers replied in the affirmative, and that thereafter he changed the grant so as to make the bank the grantee, and also erased from the deed, at the request of Blair and the bank, a covenant therein contained as originally prepared to the effect that Stanforth & Blair were to assume the payment of the debt secured by the mortgage. "Stanforth & Blair," Raney proceeded, "were to assume and pay the mortgage; they were the ones who originally agreed to it. Nobody else ever agreed to it. I had no talk about this assumption and payment by any one else except Stanforth & Blair. I had no talk about whether—with the bank—whether they would assume it." Prior to the delivery of the deed to the bank and after it was understood by him that the conveyance was to be to the bank, Raney addressed a letter to

defendant bank, which, at the beginning of the page, bore the words, "Attention, Mr. Vianello," trust officer of the bank with whom Raney testified he principally conducted the transactions involved herein. Said letter in part, read:

"I hand you herewith an offer signed by Messrs. Stanforth & Blair on a piece of property that they are purchasing from me, and also my acceptance of same. This offer recites full details of escrow arrangement. Herein you will notice that said contracts now held by you are to be assigned to me. I will appreciate it if you will get these contracts assigned at your earliest possible convenience. I have ordered certificate of title covering on the property I am selling to Messrs. Stanforth & Blair, and as soon as the said certificate is completed I will send it to you along with a deed made in your favor viz.; Fidelity Trust & Savings Bank of Fresno, California. * * * In my talk with you personally, some ten days ago, you expressed the opinion that you thought the contracts were all good ones and held by people that would pay up satisfactorily. At any rate I would deem it a special favor if you would be good enough to write me a letter just giving a general outline of each contract in accordance with what you think of them, especially the addresses, and whether you think they will make improvements as called for on the contracts in each case, whether you think they will go on the land personally in any cases, and also your opinion as to their financial standing and ability to carry out the contracts. I do not expect you to put yourself on record in this matter any more than to just give me a general outline such as you talked with me in person. If you will do this I will attempt in some way to show my appreciation."

Raney testified that some ten days prior to the date of the above letter (August 13, 1920), he had a conversation with Mr. Vianello, the trust officer of the bank, in which the latter explained to Raney "about the value of the various Madera county contracts and the amount of them. I thought at the time it was an acceptance of those for and on behalf of Stanforth & Blair. There was," Raney continued, "a question in my mind for awhile, I think for a long time, what the bank's connection was, when I was asked to deed it to them."

A letter, under date of August 31, 1920 (four days prior to the execution and delivery of the deed to the bank), was addressed by Raney to Stanforth & Blair, in which he apologized for the delay in delivering the deed, explaining, though, that, while "the abstract could have been over promptly," still he "figured it was best for all concerned that an unlimited certificate of title be issued, and it has taken longer than I figured to get it, but it is now absolutely clear and ready." Another reason for the delay, he added, was the absence of plaintiffs' attorney on a vacation, "and they have deferred making out the papers until now for the

reason that Mr. Reeder (said attorney) attends all such matters, and they (plaintiffs) insisted that he close this matter up. The papers are now made out," Raney proceeded in said letter, "and as soon as I can get Mrs. Brichetto's signature (at the present time she is in San Francisco) they will be immediately forwarded to the bank as agreed upon. In fact, I think I will have them sent through the abstract company here, and a letter can accompany them setting forth the condition of title, and withholding the issuance of such title until the transfers are made, so when it is issued it can be brought down showing it in your name, or rather the name of the Fidelity Trust & Savings Bank. This, I imagine, will be what you want. I feel and hope that these papers will be in the bank's hands by September 4, and I am writing to assure you they are on their way." In the same letter was the following written in red ink: "There is one redeeming feature of this delay, and that is that the mortgage will be dated later, thereby saving us quite an item on interest."

Raney stated that a copy of the foregoing letter was forwarded to defendant bank. A letter addressed to the defendant bank by Raney and dated September 3, 1920, and at the beginning of which on the paper on which it was written were the words, "Attention, Mr. Vianello," stated, in part: "Inclosed please find deed from myself to your bank conveying," describing the land in question. "I also inclose," continued said letter, "an unlimited certificate of title issued by * * * covering on this property, and showing it to be in the name of L. F. and George Brichetto, free from all incumbrances, except taxes for the present year not yet payable, and which are assumed by Stanforth & Blair. * * * I also inclose a crop lease in duplicate from yourselves to Brichetto Bros. * * * This deed and these papers are, of course, sent to you in trust under the escrow agreements and instructions, wherein they are not to be delivered until certain contracts mentioned in the escrow agreement (offer and acceptance agreement) have been assigned to me. * * * You will also note that the escrow instructions call for an unlimited certificate of title covering the property covered by the various contracts to be assigned to me, showing it to be free and clear of any and all incumbrances save the mortgage to the Berkeley bank."

Raney explained that he inclosed with the above letter the lease from the bank to Brichetto Bros. for the Stanislaus county land, because "it was part of my transaction with Stanforth & Blair that I agreed to secure for them a tenant. * * * This is the lease I made by reason of my arrangement with Stanforth & Blair. * * * The Brichettos, the tenants in this lease, are the same parties who are plaintiffs in this action. I bought this land from Brichetto Bros. and

put a mortgage on it in their favor for \$45,000. I was instrumental in securing this lease as a part of that transaction." Raney testified that the agreement for the exchange of the properties was completed by the delivery of the receipt to him by the bank of the contracts covering the Madera county lands, his receipt therefor to the bank being dated September 7, 1920.

In a letter addressed by Raney to Stanforth and dated November 26, 1920, the latter asked Stanforth if he (Stanforth) "cannot help me" regarding the taxes on the Madera county lands. "I have never received my tax notice," he stated in said letter, "but I imagine that either you or the bank have received such notice. * * * Also let me know how you have handled the taxes in the past. I imagine you or the bank have paid them, and then have collected pro rata from the different contract buyers. Awaiting your early advice," etc. Raney addressed to defendant bank a letter under date of December 24, 1920, in which he informed said defendant that the several contracts that he "took over from Stanforth & Blair" had been turned into trust deeds, "and are held as collateral by the Berkeley Bank of Savings & Trust Company."

A letter, dated April 18, 1921, was written and sent by Raney to Stanforth & Blair, which contained some significant statements. The letter is quite lengthy, but the more important portions may be extracted without garbling or perverting the meaning thereof. "I am just in receipt of a letter from the * * * bank" (appellant), stated the letter, "in reference to the payment of a certain amount of interest on the mortgage connected with the Madera contracts. That I assure you was a surprise, * * * for it was not specified in our agreement. * * * In all fairness it seems to be up to me to take care of and reimburse you for a certain amount of interest. * * * I am somewhat uncertain and doubtful * * * just when this interest should start. * * * It seems to me that, arriving at what is absolutely just and fair, September 4th should be the date to commence my interest liability rather than August 9th. I would also like to call your attention to what I think is an error on the bank's part and be to your interest, namely, that the mortgage in question was paid by me to the Berkeley bank in November 6, 1920, and therefore they should not pay interest up to December 15th and charge you with it."

There were many other letters passing between Raney and the defendant bank and Stanforth & Blair of the same general tenor, or practically upon the assumption that the bank as to this land was merely acting as a trustee for Stanforth & Blair. Raney, it is true, repeatedly declared in his testimony that, when he delivered the deed to the bank, he did not know that the bank's position in

that transaction was that of a trustee only, nor, so he stated, did he learn that such was the fact until about a month after the deed was delivered to the bank. All those asseverations, though, are not supported by the letters written by him to the bank and Stanforth & Blair prior to and after the transfer of the Stanislaus county land was made to the bank, nor by his testimony, reasonably interpreted. Typical of his testimony in general is the following, elicited on cross-examination:

"Q. Now, I am asking you if it was not Stanforth & Blair who was to assume and pay this mortgage? A. They were the ones that originally agreed to it, yes.

"Q. Did anybody else ever agree to it? A. No.

"Q. By Mr. Maddux (Raney's attorney, interrupting): What do you mean by that, 'nobody else ever agreed to it'? A. I had no talk about this assumption and payment by any one else except Stanforth & Blair; I had no talk with the bank whether they would assume it.

"Q. (By bank's attorney, resuming cross-examination): You knew, didn't you, Mr. Raney, during all these negotiations that the * * * bank was not the principal in the matter? A. I did not.

"Q. Who first approached you concerning the sale of this land in this county? A. Mr. Grigsby. * * * He was a real estate agent or broker at Fresno.

"Q. He discussed with you, then, the matter of making an exchange of certain property? A. Yes, sir.

"Q. And during all those negotiations you were informed that Stanforth & Blair had equities in properties in Madera county? A. Yes. * * *

"Q. You were willing to make an exchange of your land (Stanislaus county land) for these equities—so-called equities—in the Madera county land, is that not correct? A. After I had looked up those equities, yes.

"Q. Now, then, during these negotiations you were informed, weren't you, that those Madera county lands were held in trust for Stanforth & Blair by the bank? A. No.

"Q. Now, didn't you know anything about that at all? A. I did not. I knew the bank held title to them. I didn't know what way they held them.

"Q. You never inquired, did you? A. No.

"Q. You never asked the bank how it happened that they were holding those, did you? A. No.

"Q. And every time you dealt with the bank you dealt with the trust officers, didn't you? A. I did.

"Q. And you were in the trust department of this bank during all those negotiations, weren't you? A. Yes.

"Q. The bank never made any offer to convey to you any land whatsoever or to transfer to you any equities in any contract, did it? A. Yes; they agreed to transfer these contracts on the Madera county land that they held title to.

"Q. Now, wasn't that the agreement you had with Stanforth & Blair and not with the bank? A. Stanforth & Blair made one agreement, and

then I talked with the bank and got the understanding from them that they would.

"Q. But now, Mr. Raney, wasn't it simply the proposition that the bank was carrying out the agreements that Stanforth & Blair made—isn't that it? A. I didn't know what it was.

"Q. Well, now, as a matter of fact, didn't you know that that was it? A. I did not. I never saw any evidence of it.

"Q. Did you have any agreement at all with the bank that they would buy your land in this county? A. No.

"Q. It never at any time agreed to transfer to you any property, did they, in exchange for your property? A. Yes; they did.

"Q. And all the negotiations were with reference to this exchange of that property with Stanforth & Blair, wasn't it? A. Originally; until later on—(interrupted).

"Q. Then in order for Stanforth & Blair to carry out that agreement you went to the bank, didn't you? A. Stanforth & Blair started and the bank finished it. * * * It was agreeable to the bank.

"Q. It was agreeable to you for the bank to finish it, wasn't it? A. Yes; I didn't question the men when they asked to deed it to the bank; that was satisfactory to me for the bank to take title to it.

"Q. You were putting the matter in escrow with the bank so the bank would represent you in the transaction also, didn't you? A. Yes, I did; I sent the papers up to them which were not to be turned over until I got certain papers."

Raney proceeded to say that at the time the agreement of sale (the offer and acceptance), which was signed by him and Stanforth & Blair, was sent by him (Raney) to the bank, with the other papers mentioned above, he did not know that the land was to be conveyed to the bank. He was thereupon asked, on cross-examination:

"When this negotiation was had leading up to the signing of this, Raney—Defendant's Exhibit 22 (the agreement of sale)—you knew that the * * * Savings Bank (defendant bank) had in trust those various agreements and equities on the Madera county lands, didn't you? A. I knew then that they had title; I didn't know what shape it was in trust."

At this point counsel for defendant bank called Raney's attention to his letter to the bank, under date of August 13, 1920, or four days after Raney executed his written acceptance of the offer of Stanforth & Blair, and of which certain parts are hereinabove reproduced, and he admitted writing said letter.

"Up to that time," testified Raney, referring to the time of writing said letter, "I was dealing with Stanforth & Blair alone, as far as I knew. Q. (By counsel for bank): In this contract it is recited 'that these contracts are in trust'—said contracts are to remain in trust at the Fidelity Trust and Savings Bank,' reading now from Exhibit 22 (offer and acceptance), so that your statement is incorrect, is it, Mr. Raney, to the effect that you did not know before the writing of this letter, dated August 13, 1920, that the bank had anything

to do with it. That is not correct, is it? A. That is the first time I knew that they were to take a deed to it.

"Q. That is what you meant? A. That I should deed it to them direct.

"Q. Now you had previously—some days prior to the writing of that letter of August 13, 1920—had a talk with Mr. Vianello, the trust officer of the bank, had you? A. Yes.

"Q. And during that talk he had explained to you the holding by the bank of these various Madera county contracts, hadn't he? A. He explained about their value and the amount of them.

"Q. Yes; and it was an acceptance of those for and on behalf of Stanforth & Blair, wasn't it? A. Well; I—

"Q. You thought so, didn't you, at the time? A. I took it so at the time, yes.

"Q. Yes; and always have thought so since, haven't you?"—To which Raney returned the answer given above in connection with the reproduction herein of parts of his letter to Stanforth & Blair, under date of August 31, 1920.

Enough from Raney's testimony is thus given to show that no other conclusion can rationally follow therefrom, when considered in connection with his letters to the bank and to Stanforth & Blair, and the fact that he is himself a banker, and the further fact that his dealings with the bank in all these transactions were with the trust department thereof, than that he well knew, at the time he conveyed the Stanislaus county land to the bank, that the latter was taking said conveyance merely as a trustee for Stanforth & Blair. It is plain from reading his testimony that he was more or less evasive in replying to pointed questions upon the subject of his knowledge respecting that matter. His statement at one time, that he did not know, at the time the agreement of sale was finally executed by his written acceptance thereof on the very sheet of paper upon which the offer of Stanforth & Blair was written, that the Madera land contracts were then being held in trust by the defendant bank for Stanforth & Blair, is not entitled to any credence whatever, assuming, as we must assume, that he was and is a man at least of average intelligence and possessed of that degree of business sagacity which is always to be expected in a person intrusted with and capable of assuming the responsibility of administering in a proper way the functions of a bank president. It is not at all probable that such a man would enter into and carry out transactions of such magnitude—transactions involving the purchase and sale or exchange of properties valued at many thousands of dollars—without first thoroughly investigating and so becoming conversant with every vital phase thereof, the conditions of the sale or exchange, the value of the property he was to receive, the title, legal and equitable, if thus it was divided, in whom such title rested,

and the many other incidents attending the inauguration and consummation of such transactions. Indeed, we are justified in declaring, upon the question whether he knew, at the time he transferred the land to the bank, the latter was taking it only as a trustee, Raney's testimony is inherently improbable. At any rate, it is perfectly clear that the plea of estoppel upon which he and the plaintiffs solely rely to establish and fix liability upon the defendant bank for the deficiency judgment herein entered is not supported by his or any other testimony received in the case, either documentary or oral, with the degree of certainty which is and should always be required before a court of equity will, solely upon such plea, interpose to deprive a person of his property. Even if Raney, before transferring the property to defendant bank, was without actual knowledge of the fact that the bank was to take the property in no other capacity than that of a trustee, he ought to and would have learned that fact by the prosecution of an inquiry upon the circumstances of which he had actual notice (which are hereinabove fully stated and frequently adverted to), and which were sufficient to put him, as a prudent man, upon inquiry as to the legal relation to the property or to Stanforth & Blair with reference thereto that the bank thus proposed to assume. Civ. Code, §§ 18, 19. The statement in the agreement of sale between him and Stanforth & Blair that the Madera land contracts were then held in trust by the defendant bank and the provision therein that they were to remain in trust with said bank were themselves sufficient so to operate upon the mind of a party to the transaction as to put him, as a prudent person, upon inquiry as to the specific purpose for which he was, by the request of Stanforth & Blair, to transfer title to the land to the bank, with which previously he had had no dealings relative to the negotiations between himself and Stanforth & Blair of which said agreement was the culmination. As has been shown, Raney, after having been told by Stanforth & Blair to make the deed to the bank, manifested no interest in such request other than to know that such transfer would be satisfactory to the bank.

It is not necessary to examine in detail herein the testimony given by the witnesses for the defendant bank upon the question of Raney's knowledge of the fact before and at the time of the conveyance of the land in question to said bank that the latter took the conveyance as a trustee. It will be sufficient to repeat that both Vianello and Stanforth positively testified that they explicitly stated to Raney, prior to the date the conveyance was made, that the bank was to take the deed to the land as a trustee for Stanforth & Blair, and that the bank was interested in the land to that extent only.

The judgment as to the defendant and appellant bank is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

76 Cal. App. 478

CITY OF MARYSVILLE v. POOLE.
(Civ. 3019.)

(District Court of Appeal, Third District, California. Feb. 5, 1926.)

Pleading  362(3)—Where city's tenant was notified before expiration of lease that it would not be extended nor new one executed, allegations of answer in unlawful detainer that lease provided that, if land was required for municipal purposes, growing crops should remain until maturity, not exceeding year from notice of termination of lease, and that notice of termination for such reason was not given, held properly stricken; provision applying only to termination before end of term.

Where tenant of city was notified before expiration of lease that city would not extend it nor execute new lease, allegations of answer, in city's action for unlawful detainer after expiration of term, that lease provided that, if land were needed for municipal purposes, growing crops should remain until maturity and harvest, not exceeding one year from notice of termination of lease, that land was not needed for such purposes, and that no notice of termination for such reason was served on defendant, held properly stricken; such provision applying only if city terminated lease before expiration of term.

Appeal from Superior Court, Yuba County; E. P. McDaniel, Judge.

Action by the City of Marysville against A. E. Poole. Judgment for plaintiff, and defendant appeals. Affirmed.

W. E. Davies, of Marysville, for appellant.

W. P. Rich, of Marysville, for respondent.

PLUMMER, J. Action for unlawful detainer. Plaintiff had judgment, and defendant appeals. It appears from the record that from year to year the plaintiff had leased to the defendant by written lease certain premises belonging to the city of Marysville, in the county of Yuba; that on or about the 13th day of March, 1924, the city of Marysville executed and delivered to the appellant a written lease, under the terms of which plaintiff let and leased to the appellant certain real property from the 13th day of March, 1924, to and including the 28th day of February, 1925. The lease was executed by the mayor and city clerk of the city of Marysville and by the appellant. The property was occupied by the appellant under the terms of said lease. Prior to the 28th day of February, 1925, the appellant asked the mayor and city council of Marysville for a new lease, but was informed that the city

would not lease the property for any further period of time, and the city clerk of the city of Marysville, in writing, notified the defendant that the city would not lease said premises for any further period of time after the expiration of said lease, which would occur on the 28th day of February, 1925, as before stated. The appellant, however, continued to hold possession of the property. Thereafter, and on or about the 15th day of April, 1925, the plaintiff served a formal demand upon the defendant to deliver up and surrender the possession of said premises. This the defendant failed to do. Hence this action.

The defendant set forth in his answer by way of equitable defense that for some 15 years previously the defendant had continuously occupied the premises in question under a lease made from year to year; that in all the leases there was a provision that, in event the plaintiff required the land for municipal purposes, all growing crops should be permitted to remain thereon until maturity and harvest, not exceeding in any case one year from the giving of notice of termination of lease; that the defendant thereafter alleges that the said lands are not required for municipal purposes, and that no notice of termination of said lease for said reason has been served upon this defendant; that a crop of barley and alfalfa was growing on said land, and defendant had expended large sums of money in clearing said lands, and would not have expended moneys in improving the same or sown said crops but for such understanding between plaintiff and defendant, and that said defendant should remain in possession until said lands were required by plaintiff for municipal purposes. This allegation was stricken out upon motion. The defendant and appellant assigns this as error, and cites the cases of *Arnold v. Krigbaum*, 146 P. 423, 169 Cal. 143, Ann. Cas. 1916D, 370; *Knight v. Black*, 126 P. 512, 19 Cal. App. 518; *Schubert v. Lowe*, 223 P. 551, 193 Cal. 291. These cases, however, are not applicable, because this is not an attempt to forfeit a lease on account of condition broken, but is simply a case where a lease has expired and the lessee notified prior to the expiration of the lease that it would not be extended, and that no further lease for the property in question would be executed. The lease under which the defendant was holding and under which the equitable defense was attempted to be set up did contain provisions relating to the right of the defendant to remove improvements and crops in the event that the lessor should desire to terminate the lease prior to the expiration of the specified term thereof. The language of the lease is (referring to the city):

"Shall have the right to at once terminate this lease and declare the same to be null and void,

(245 P.)

and that the said party of the first part shall be the sole judge thereof through the mayor and city council, * * * provided that the party of the second part shall in case of such termination of this lease be allowed 60 days from and after notice of the same within which to remove any buildings, fences, or improvements, etc., and also all growing crops at maturity not exceeding in any case one year from the giving of such notice."

Nothing of the kind was attempted in this case. The lease expired by its own terms, of which the appellant had notice, and he also had notice that no additional lease would be executed. The findings of the court in favor of the plaintiff appear to be supported by sufficient testimony.

The judgment of the trial court is therefore affirmed.

We concur: FINCH, P. J.; HART, J.

198 Cal. 440

PATCHETT et al. v. WEBBER.
(S. F. 11021.)

(Supreme Court of California. April 1, 1926.
Rehearing Denied April 29, 1926.)

1. Statutes ⚡230—Statute amended at later period regarded as latest expression of legislative will (Civ. Code, § 1265; Code Civ. Proc. § 1474).

Civ. Code, § 1265, having been amended at a later period in 1874 than Code Civ. Proc. § 1474, must be regarded as the latest expression of legislative will, and which controls devolution of homesteads existing at that period.

2. Homestead ⚡136—Statute authorized one who had selected a homestead of his own separate property to dispose of it by will (Civ. Code, § 1265, as amended by St. 1873-74, p. 231).

Civ. Code, § 1265, as amended by St. 1873-74, p. 231, providing for devolution of homestead to owner's heirs or devisees, authorized one who had selected a homestead of his own separate property to dispose of it by will.

3. Executors and administrators ⚡53, 453(4)—Homestead property, subject to testamentary disposition of owner, held to have become part of his estate, and judgment decreeing that administrator had no claim therein was binding on administrator and all heirs of that estate (Civ. Code, § 1265).

Homestead property, in view of Civ. Code, § 1265, being made subject to testamentary disposition of owner, became a part of his estate on death, and hence judgment rendered in suit of administrator of such estate against another, in which it was decreed, following stipulation of parties, that administrator had no claim or interest in such homestead property, was binding on him as administrator and on all heirs of that estate.

4. Executors and administrators ⚡453(4)—Decree determining that administrator was without interest in homestead property held binding on all parties thereto, even though erroneous, where it was executed within jurisdiction of the court.

In administrator's suit to recover homestead property, in which issue as to ownership of such property covered a subject-matter over which trial court had jurisdiction, and all necessary parties having been present, decree of trial court, following stipulation that administrator had no claim or interest in property, even though erroneous as a matter of law, was a decree executed within jurisdiction of court, and binding on all parties thereto.

5. Adverse possession ⚡111 — Defendant's special plea that predecessor was in quiet and peaceful possession of land in controversy, and that no claim had been made thereto on part of plaintiffs, held sufficient to raise issue of adverse possession in defendant (Code Civ. Proc. § 318).

In suit to quiet title, defendant's special plea, under Code Civ. Proc. § 318, that his predecessor was in quiet and peaceful possession of the land during a certain period, and that no claim had been made thereto during that time on part of plaintiffs, held to raise issue of adverse possession in defendant.

6. Quieting title ⚡10(1).

In action to quiet title, plaintiff must prevail on strength of his own title and not on weakness of another's.

7. Quieting title ⚡12(1)—Plaintiffs, to recover in action to quiet title, must show that they or their ancestors were seized or possessed of the property within five years before commencement of action.

In action to quiet title, plaintiffs, to recover, must show that they or their ancestors had been seized or possessed of the property within five years before commencement of the action.

8. Quieting title ⚡12(1)—Plaintiffs held not entitled to recover possession of property, where they failed to show that they or their ancestors had been in possession within five years before commencement of action.

Plaintiffs held not entitled to recover in action to quiet title, where they failed to show that they or their ancestors had been seized or possessed of the property within five years before commencement of the action.

9. Adverse possession ⚡13 — Plaintiffs held barred by limitations from recovering property in controversy, where defendant had been in actual, peaceable, and adverse possession for 46 years (Code Civ. Proc. §§ 318, 322).

Plaintiffs held barred by statute of limitations, under Code Civ. Proc. § 318, from recovering property in controversy, where defendant and his predecessor, during a period of 46 years, had been in actual and peaceable possession, exercising all acts of ownership which an ordinary person would have done under like circumstances; defendant not losing

title under section 322 because he subdivided tract into lots.

In Bank.

Appeal from Superior Court, Napa County ; Charles O. Busick, Judge.

Action by Mary Patchett and others against Eugene I. Webber, as administrator of the estate of Benjamin Bradshaw, deceased. Judgment for plaintiffs, and defendant appeals. Reversed.

John T. York, Henry C. Gesford, and E. L. Webber, all of Napa, for appellant.

Percy S. King, Jr., of Napa, for respondents.

LENNON, J. Further consideration of this case, after hearing and determination by the Court of Appeal in the first instance, satisfies us that the reasoning and conclusion of the Court of Appeal are correct, and we therefore adopt the opinion of Mr. Justice Nourse as the opinion of this court as follows:

"This action was commenced on December 11, 1922, for the purpose of quieting title to certain property situated in the city of Napa. Plaintiffs had judgment quieting their title to a portion of the property involved, and defendant had judgment awarding him the remaining portion. From the portion of the judgment adverse to him the defendant has appealed upon a record prepared under section 953a, Code of Civil Procedure.

"On May 5, 1875, John M. Patchett duly executed and recorded a declaration of homestead upon a tract of land, a portion of which is involved in this suit. The entire tract was his separate property, and comprised at the time about six acres upon which he resided with his family. Patchett died on August 13, 1876, leaving children by a former wife, who were the predecessors in interest of the plaintiffs in this action, and also leaving surviving him his wife, Martha Patchett, and Benjamin Bradshaw, her son by former marriage. John Patchett left a will by which he devised all his real and personal property of every nature to his wife, Martha, 'to be used and enjoyed by her during the term of her natural life, hereby giving, devising and bequeathing unto my said wife Martha Patchett, the full, free and uninterrupted use, occupation and enjoyment of all the property * * * as fully and freely as I might or could do if living; and from and immediately after her death, I give and devise what then remains of the same to the persons hereinafter named' (the predecessors of the plaintiffs in this action). This will was admitted to probate, Martha Patchett was appointed executrix, immediately entered into possession of the six-acre tract, and continued in the possession thereof until her death on August 29, 1904, when Benjamin Bradshaw, her only child, was appointed executor of her estate. He took possession of the premises as such executor on October 4, 1904, and continued in possession as such until November 1, 1909, when the entire property was distributed to him in the closing of his mother's estate, at which time he took and continued possession of the home place in his own right.

"On September 23, 1876, Martha Patchett, the widow of John M. Patchett, listed the homestead property in her inventory, which was filed with the papers of the estate of John M. Patchett, and at the same time took possession of the property, and it appears in the amended complaint filed in the case of Patchett v. Bradshaw, which will hereinafter be referred to, that, since the 14th day of February, 1879, the said Martha Patchett exercised complete and exclusive control and possession over all of said property, claiming it as her own. From the same pleading it appears that, immediately upon the death of Martha Patchett (August 29, 1904), Benjamin Bradshaw entered into the possession of the same premises, and claimed the same 'as the property of and belonging to the estate of Martha Patchett, deceased.' The action just referred to was instituted by Charles H. Patchett, one of the plaintiffs herein, and the grandson of John M. Patchett, the original homesteader; he having been duly substituted as administrator with the will annexed of his grandfather's estate following the death of Martha Patchett. The action was brought against Benjamin Bradshaw as the executor of the estate of Martha Patchett, and was for the purpose of securing an accounting of the properties claimed to belong to the estate of John M. Patchett and held in the possession of Martha Patchett during her life, and thereafter held by her executor, and asked particularly for the delivery to the plaintiff as the administrator of the John M. Patchett estate certain real property alleged to belong to that estate, including the property here in suit. That action was commenced on February 20, 1905, and on January 31, 1907, a stipulation was filed, signed by the attorneys for the respective parties therein, in which it was stipulated that the defendant Bradshaw was the sole owner of the property here in suit and designated as the homestead property; that the other real property involved in that action should be awarded to the plaintiffs therein; and that the defendant Bradshaw should release all claim thereto; and that the court might enter its judgment and decree in accordance herewith without findings of fact or conclusions of law. Pursuant to that stipulation, a decree was duly entered on the 15th day of June, 1907, wherein, after disposing of the various claims in favor of the plaintiff in that litigation, it was ordered and decreed that the so-called homestead property 'vested absolutely in, and became the property of, Martha Patchett, the surviving widow of said John Patchett, as successor to said homestead,' and that the defendant, as executor of the estate of Martha Patchett, was entitled to the full possession thereof, and that the plaintiff as administrator of the estate of John Patchett, was not entitled to the possession of any part thereof, 'nor have the heirs, devisees or other legal representatives of said John Patchett, deceased, any right or interest in any portion thereof.' This decree was filed on June 15, 1907. No appeal or other attack was made thereon, and it became final in due course of law.

"Subsequent to the entry of the foregoing decree the proceedings in the estate of John M. Patchett were concluded by the filing of a final account and a petition for final distribution by Charles Patchett, the plaintiff in the litigation just referred to. The administrator did

not include in either of these documents the homestead property, and made no mention of any claim thereto on behalf of the estate or the heirs. In due course a decree of distribution was filed in that estate wherein the entire estate was distributed to the plaintiffs in the action before us or to their predecessors in interest, omitting therefrom, however, all interest in, or claim to, the homestead property, the property now in suit.

"On June 18, 1909, Benjamin Bradshaw, while in possession of the property as executor and sole heir of his mother's estate, duly filed for record a subdivision of the entire tract of land comprising the homestead. In this subdivision a street was opened directly through the middle of the entire tract, and lots were laid out in the usual way, each having a frontage of approximately 54 feet. Thus by the subdivision the 6-acre tract was divided into two blocks numbered block 1 and block 2; block 1 containing 16 separate lots and block 2 containing 15. On November 1, 1909, the entire property, as originally described in the homestead declaration, was distributed to Benjamin Bradshaw in closing the estate of Martha Patchett, and immediately thereafter sales were made and deeds were executed by said Bradshaw conveying some 16 of the lots as segregated by Bradshaw's subdivision. These deeds were executed over a period commencing November 16, 1909, down to March 4, 1922. All were duly recorded, and in each instance the deed described the lot as being a part of block 1 or 2, as shown on the 'map of Bradshaw's subdivision, a part of Patchett's addition in the city of Napa, Cal.,' giving the number and date of the filing of such map. On July 22, 1922, Benjamin Bradshaw died, and the defendant, as public administrator of the county, was duly appointed as administrator of the estate.

"This action was commenced on December 11, 1922, by the plaintiffs, who are the descendants of John M. Patchett, deceased, the issue of his marriage prior to his marriage with Martha Bradshaw. The complaint is in the usual form of an action to quiet title to property alleged to be subjected to an adverse claim by the defendant. The plaintiffs carved out of the original homestead tract all the tract of land delineated on Bradshaw's subdivision recorded in the manner above referred to which had not prior to the commencement of the action been sold by Bradshaw to other individuals. They are claiming, therefore, all the lots of land appearing upon this subdivision which were held in the possession of Bradshaw at the time of his death, but omit from their pleadings all reference to those lots of land which he had sold prior to the commencement of the action, as well as the entire strip of land known as Third street, which he had dedicated to the use of the public upon the filing of his map in 1909. The trial court granted the plaintiffs all the relief they asked for, excepting lot 13 in block 1, a tract of land which is described upon this map as approximately 54 feet by 115. This lot was awarded to the defendant upon the theory that, the old home building having been located on that particular lot, the defendant was entitled thereto through adverse possession, it appearing that he, or his mother preceding him, had lived in the premises since the death of John M. Patchett in 1876, a period of about 46 years.

"The plaintiffs' claim is based upon the theory that they are the successors to the remaindermen, under the will of John M. Patchett, to the entire estate; that, though the property is claimed by them as devisees under the will, in accordance with section 1265, Civil Code, they insist that the homestead did not become a part of the estate of John M. Patchett, and that they are accordingly not bound by the judgment in *Patchett v. Bradshaw*, which awarded the property to the predecessor of the defendant herein. It is the defendant's contention that the homestead did not vest in the predecessors of the plaintiff, but that it became a part of his estate; that the plaintiffs are therefore estopped by the judgment in *Patchett v. Bradshaw*; that the defendant and his predecessor in interest have acquired title to all the lands by adverse possession; and that the devise in the will of John M. Patchett, purporting to grant a life estate only to Martha, is invalid to that extent, and in fact constituted a devise of the entire estate to her. The trial court followed plaintiffs' theory of the case to the full extent urged by them, excepting as to the one small lot upon which the home was located, and as to that the court found that Bradshaw had acquired title thereto by prescription. Judgment was entered accordingly awarding all the property in suit to the plaintiffs other than lot 13, which was awarded to the defendant. The defendant has appealed from all that portion of the judgment adverse to him.

[1] "On this appeal the principal question involved is the construction of the homestead laws as they existed at the time of the death of John M. Patchett in 1876. A reference to the Codes as they stood at that time discloses a slight inconsistency in wording, but a very vital difference in effect, between sections 1265, Civil Code, and 1474, Code of Civil Procedure. Both of these sections were amended by the Legislature in 1874. The amendment to section 1474, Code of Civil Procedure, was approved on March 24, 1874 (St. 1873-74, p. 362), while the amendment to the Civil Code section was approved on March 30th of the same year (St. 1873-74, p. 231). The Civil Code section must, therefore, be regarded as the latest expression of the legislative will and the one which controls the matter of the devolution of homesteads existing at that period. *Weinreich v. Hensley*, 54 P. 254, 121 Cal. 647; *Estate of McGee*, 97 P. 299, 154 Cal. 204, 206.

"In order to avoid confusion in the history of this legislation, it should be said that the foregoing cases involved a similar situation which arose in the amendment of these two Code sections by the Legislature of 1880, with, however, a reversal of the situation as to the time, that is to say, the amendment to the Civil Code section was approved prior to the approval of the amendment to the section of the Code of Civil Procedure, and it was held in those cases that section 1474, Code of Civil Procedure, controlled over the Civil Code section.

[2, 3] "All parties agree that, in accordance with the former rulings of the Supreme Court, section 1265, Civil Code, as amended in 1874, that being the law which existed at the time of the death of the homesteader, controls the devolution of this particular homestead. That section, after making provision for the disposition of homesteads selected from community

property, provides that "in other cases, upon the death of the person whose property was selected as a homestead, the property shall go to his heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent." The provisions of section 1474, Code of Civil Procedure, as amended at the same session, were almost identical with the Civil Code section with this important exception—that in the case of a homestead selected by the owner of separate property the section declared that it "vests * * * in his or her heirs." It will be seen, therefore, that the main distinction between the sections as they read at that time was that the Civil Code section carried the homestead selected from separate property over to the heirs or devisees, whereas the section of the Code of Civil Procedure carried it to the heirs only. As said in *Estate of McGee*, 97 P. 299, 154 Cal. 204, 205, "the word 'heirs' cannot be construed to mean 'devisees,'" and section 1474 therefore operates, as was said in construing similar language in section 1468, Code of Civil Procedure, "to vest the title to the homestead in the heirs at law and so to withdraw it from the disposition made by the testator under his will." This, it must be recalled, was said in construing a case which came to the Supreme Court under the Code sections as amended in 1880, when section 1474 was held to be controlling over section 1265. We, however, are confronted with a directly opposite situation, and must find that the Civil Code section which provides for the devolution to 'heirs or devisees' is controlling, and that, accordingly, under the homestead laws as they existed in 1876, it permitted one who had selected a homestead of his own separate property to dispose of it by will. This conclusion necessarily follows from the use of the words 'or devisees' in the Code section, as otherwise those words would have no meaning at all. In fact, the proposition is conceded by all parties to this litigation; the point of difference between them being whether the homestead became a part of the estate of John M. Patchett, the respondents claiming that it went to them as devisees under the will without administration. It would seem evident that, if the property is by law made subject to the testamentary disposition of the owner, it becomes a part of his estate, and must be administered on in probate in the ordinary way. On the other hand, where the law declares that certain property shall on the death of one party vest in another—shall vest in the survivor or in the heirs of the deceased—the rule is that such property goes directly to the person designated without administration, and that it is accordingly not a part of the estate of the decedent.

"It follows from this that, if the property is subject to the testamentary disposition of the owner, and thus becomes a part of his estate, the administrator of his estate is permitted to sue or be sued concerning the property without joining the heirs in such litigation, and that any judgment in which the administrator is a party is equally binding on all the heirs and on all persons claiming under such administrator. This proposition is conceded by the respondents. If, therefore, we are correct in holding that, by reason of the language of section 1265, Civil Code, the homestead became a part of the estate of John M. Patchett, it must necessarily

follow that the judgment and decree rendered in the suit of Charles H. Patchett, as administrator of that estate, against Bradshaw, in which it was decreed, following the stipulation of the parties thereto, that the administrator had no claim or interest in this homestead property is binding upon him as such administrator and upon all the heirs of that estate who are the plaintiffs and respondents in this action.

"Respondents have cited a number of cases holding that the homestead vests absolutely in the survivor or in the heirs, as the case may be, and that it does not become a part of the estate subject to administration. All these cases, however, involved an interpretation of a statute which expressly declared that the homestead would, upon death, vest either in the survivor or in the heirs. None of these cases involved an interpretation of section 1265, Civil Code, as it stood between the period of its amendment in 1874 and the amendment in 1880, during which time it was the controlling statute, and during which time the statutory law was that, in a case of separate property selected by the owner, the homestead should, on the death of its creator, go to his heirs or devisees.

"Therefore, in the action instituted by Charles H. Patchett, as administrator of the estate of John M. Patchett, to recover the property which was alleged to have been unlawfully seized and held by Martha Patchett and her executor, the issue was raised as to the validity of this will and particularly as to that portion of the will which related to the disposition of this homestead property. Growing out of this issue were the questions whether the will was valid in its attempt to devise the homestead property to the widow for the period of her life only, with the remainder over to certain designated heirs, or whether the will was entirely ineffectual in its attempt to devise any interest in the homestead property. The further issue arose in that particular litigation as to whether the attempt of the testator to give a life estate in the homestead to the widow (assuming the power of testamentary disposition) was ineffectual because of the peculiar wording of the will, from which the defendant and appellant here argues that the widow was in fact given the power by the will to defeat the entire remainder, and that she therefore took an estate in fee and not a life estate.

[4] "With these issues before them the parties stipulated that the decree should be entered awarding the entire homestead to the defendant therein as the successor in interest of the widow. As consideration for this the defendant therein waived all claim to all the other lands involved in that litigation, and these were accordingly awarded to the plaintiff. It may be that, if these issues had gone to trial, and the court had held that the widow took the entire estate through the right of survivorship, to the exclusion of the other heirs, such holding would have been erroneous. Nevertheless, the issue as to the ownership of the homestead property covered a subject-matter over which the trial court had jurisdiction, and, all the necessary parties having been present, the decree of the trial court, even though we may concede it to have been erroneous as a matter of law, was nevertheless a decree executed

within the jurisdiction of the court, and is binding upon all the parties thereto. The respondents are in this peculiar position: If they take under the will as a part of the estate, they are bound by the judgment; if they 'succeed as heirs,' they would be entitled to a portion of the estate only as Martha Patchett, the widow, was an 'heir' also. Under this theory she would be entitled to her share under section 1386, Civil Code, free from any limitation as to a life estate under the will, and to this share the appellant herein would succeed. Thus the judgment as rendered could not stand under either theory.

[5-8] "In addition to this, the appellant specially pleaded as a separate defense the provisions of section 318, Code of Civil Procedure, which provide that no action for the recovery of real property or of the possession thereof can be maintained, unless it appears that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the property in question within 5 years before the commencement of the action, and further pleaded that ever since the 1st day of November, 1909, and until his death, in 1922, Benjamin Bradshaw was in the quiet and peaceful possession of the land described in the complaint, and that no claim had been made thereto in that period on the part of the plaintiffs. Some criticism is made as to the character of this pleading as being insufficient to raise the issue of adverse possession in the appellant, but we do not deem these criticisms important in view of the rule announced in *Alhambra, etc., Co. v. Richardson*, 14 P. 379, 381, 72 Cal. 598, 601, where it is said: 'So far as the title to real property is concerned, prescription and limitation are convertible terms; and a plea of the proper statute of limitations is a good plea of a prescriptive right.' The evidence showed without conflict that, outside of the claim appearing in the complaint in *Patchett v. Bradshaw*, none of the respondents, either directly or indirectly, asserted any claim or title to any of the property in suit at any time during the period of 46 years when it was held by the appellant and his predecessor. All the evidence showed without conflict that since the entry into possession in his own right by Benjamin Bradshaw he had paid all the taxes on the entire tract other than the lots which he had sold to others; had dedicated a street cutting the tract in two; had paid for the improvements upon that street, as well as the others surrounding the entire tract while it was in his possession. The only answer to this showing of uninterrupted possession on the part of the appellant is that, by reason of the subdivision of the premises into lots in 1909, the exception found in section 322, Code of Civil Procedure, 'when it consists of a tract divided into lots, the possession of one lot is not deemed the possession of any other lot of the same tract,' should be invoked to defeat the appellant's claim to adverse possession of the entire tract. The difficulty with respondents' position on this phase of the case is that they have overlooked the well-known rule that in actions of this nature a party must prevail upon the strength of his own title and not upon the weakness of another's. It was incumbent upon the respondents to show that they or their ancestors had been

seized or possessed of the property within five years before the commencement of the action (*Akley v. Bassett*, 209 P. 576, 189 Cal. 625, 646), and this they failed to do.

[9] "There is evidence in the record showing without dispute appellant's entry into possession of the entire tract on October 4, 1904, and his accord with the findings of the trial court to that extent. This finding is not subject to attack on this appeal. There is no evidence tending to show a change of possession since that time. It is, therefore, a case for the application of the presumption that a thing once proved to exist continues as long as is usual with things of that nature.

"We cannot escape the conclusion that, irrespective of the manner of pleading the issue of adverse possession, the trial of the issue was fairly had before the lower court, and that the error of the court consists in its adoption of respondents' theory that, because the occupant of the premises subdivided them into lots, he thereby lost the right to claim a prescriptive title to the entire tract because of section 322, Code of Civil Procedure. Without a particle of conflict the evidence shows that the respondents and their predecessors, for a period of 46 years at least, had not been in possession of the premises, while during that whole period the appellant and his predecessor had been in actual and peaceable possession exercising all the acts of ownership which an ordinary person would have done under like circumstances. For these reasons the respondents were barred by the statute of limitations, mentioned in section 318, Code of Civil Procedure, as pointed out in *Beckett v. City of Petaluma*, 153 P. 20, 171 Cal. 309, 312. * * *

"For these reasons we conclude that the portion of the judgment adverse to the appellant and from which he appeals should be reversed, with directions to the trial court to retry the issues relating to the property described in the complaint other than lot 13 of block 1 thereof."

Judgment is reversed.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.; LAWLOR, J.; CURTIS, J.

198 Cal. 426
PEOPLE v. SELBY. (Cr. 2842.)

(Supreme Court of California. April 1, 1926.)

1. Homicide ☞177—Testimony as to friendly conduct and conversation of deceased and her divorced husband shortly before homicide held admissible to refute suicide theory.

In murder trial, testimony as to friendly conduct and conversation of deceased and her divorced husband, in defendant's absence on day of her death and preceding day, held admissible, not to show motive, but as tending to refute suicide theory.

2. Criminal law ☞1134(6).

Admission of testimony on wrong theory is not error, if admissible under another theory.

3. Witnesses $\hookrightarrow$ 255(9) — Permitting district attorney to refresh witness' recollection by presenting transcript of her testimony before grand jury and asking her if she so testified held not error (Code Civ. Proc. § 2047).

Where state's witness stated that, if she testified before grand jury that defendant admitted killing deceased, "it was my theory of expressing it, not his," district attorney was properly permitted to present transcript of such testimony to witness and ask her if she so testified, in attempt to refresh her recollection, under Code Civ. Proc. § 2047.

4. Homicide $\hookrightarrow$ 166(3)—Testimony that defendant held up patrons of deceased's store and shot two of her friends on morning after homicide held admissible to show motive.

In murder trial, testimony that defendant held up and robbed patrons of deceased's store and shot two of her friends on morning after homicide held admissible as tending to show motive, in view of evidence that some of persons assailed had incurred defendant's ill will by attempting to influence deceased against him.

5. Homicide $\hookrightarrow$ 338(1) — Admission of testimony that defendant held up patrons of deceased's store and shot two of her friends on morning after homicide held not sufficiently prejudicial to justify reversal.

In murder trial, admission of testimony that defendant held up and robbed patrons of deceased's store and shot two of her friends on morning after homicide held not sufficiently prejudicial to defendant, if erroneous, to justify reversal, in view of all evidence in case, especially as it tended to support claim of insanity.

6. Criminal law $\hookrightarrow$ 815(8)—Instruction held properly refused as precluding consideration of accused's extrajudicial statements, admissions, or confessions for any purpose until corpus delicti was established to moral certainty and beyond reasonable doubt by evidence aliunde.

In murder trial, instruction that evidence of defendant's confessions, admissions, or statements might not be considered "for any purpose" until jury were satisfied to moral certainty and beyond reasonable doubt that deceased's death was caused by unlawful act of another than herself held properly refused, as precluding consideration of such evidence for any purpose until corpus delicti was so established by evidence aliunde.

7. Criminal law $\hookrightarrow$ 409, 538(3)—Jury may consider all evidence, including extrajudicial statements, admissions, or confessions, in determining whether offense and accused's connection therewith are established to moral certainty and beyond reasonable doubt.

Jury may consider all evidence, including accused's extrajudicial statements, admissions, or confessions, in determining whether all elements of offense charged and accused's connection therewith have been established to moral certainty and beyond reasonable doubt.

8. Criminal law $\hookrightarrow$ 673(1).

Evidence, not admitted for limited purpose, will be considered for every purpose.

9. Criminal law $\hookrightarrow$ 768(3)—Instruction pending jury's deliberations that they should refrain from emphatic declarations of opinion and hold minds in state of abeyance, it being for state's interests and defendant's benefit that verdict be returned, held not erroneous as causing compromise verdict.

Instruction pending jury's deliberations that jury would be given ample time for deliberation and that they should refrain from emphatic declarations of opinion and hold their minds in state of abeyance, so that they might freely interchange views, it being for state's interest and defendant's benefit that verdict be returned, held not erroneous as causing compromise manslaughter verdict.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Norman Selby was convicted of manslaughter, and he appeals. Affirmed.

H. L. Giesler, G. H. Shreve, and F. H. Thompson, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Erwin W. Widney, Deputy Atty. Gen., and Tracy Chatfield Becker, Deputy Dist. Atty., of Los Angeles, for the People.

LAWLOR, J. The defendant, Norman Selby, was charged with the murder of one Theresa W. Moers in an indictment returned by the grand jury of the county of Los Angeles. To the charge, the defendant pleaded not guilty, and upon the trial he was convicted of the crime of manslaughter. A motion for a new trial was duly interposed on his behalf and denied; judgment of conviction was pronounced, whereupon he appealed from the said judgment and from the said order denying his motion for a new trial.

Appellant states in his brief that, "in view of the conflict of evidence as to the cause and manner of deceased's death, insufficiency of the evidence is not urged here as a ground for reversal." While counsel for appellant in his oral argument on the hearing of the appeal herein discussed the evidence at some length in support of the claim that the refusal to give an instruction proposed by appellant, hereinafter considered, was prejudicial, nevertheless it was again conceded that the evidence was sufficient as matter of law to support the verdict rendered. The appellant thus having conceded the sufficiency of the evidence to support the verdict, a general statement of the facts and circumstances surrounding the death of the deceased will suffice before taking up the asserted errors relied upon for a reversal.

The deceased came to her death from a bullet wound in her head, inflicted on the night of August 12, 1924, between 11:30 p. m. and midnight, in the Nottingham Apartments, in the city of Los Angeles, where she and appellant had been living together as husband and wife. As a defense, the appellant maintained

that the deceased had either committed suicide or died as the result of the accidental discharge of a revolver while struggling with him as he was attempting to disarm her to prevent her self-destruction. The evidence of the prosecution tended to show that the body of the deceased was found by the janitor in the apartment on the morning of August 13, 1924, and that it was, at the time, partly covered with her clothing and a sheet or bed cover; that there were signs of violence indicated by bruises about the eyes, the arms, one leg, and the right side of the chest, as well as the bullet wound in the head; that a revolver, having one exploded shell, was found lying close to the body; that a man was seen running from the areaway of the apartment house on the night deceased met her death; that the appellant had taken his automobile from the garage on the night of the deceased's death between 11 and 11:30 p. m., and returned it about 4 a. m., at which time, as testified by the garage man, appellant was intoxicated; that appellant then stated to the garage man, "You don't know what I know"; that the appellant, according to the testimony of certain police officers, came into the Hollywood Police Station about 3:45 a. m. and said, among other things, "Wait till you see the papers," and that he "would go to the electric chair for Theresa"; that before this he had driven to the home of his sister, Mrs. Jennie Thomas, a witness for the prosecution, a distance of about 8 miles from the apartment, arriving about 1 or 1:30 a. m., gave her certain jewelry and personal effects belonging to the deceased and himself, and told her that the former was dead, the witness testifying, "I am not certain in my mind whether he said she was dead or that he had killed her, because I was frightened," but the witness, on being confronted with her testimony before the grand jury, admitted she may have testified, "He told me she was dead * * * and that he had killed her; he was afraid he had, but he had nothing more to live for himself."

[1, 2] 1. The first point relied upon for a reversal touches on the admission of certain evidence. The prosecution called as a witness, among others, F. M. Andreani, an attorney, who had a short time before the homicide represented the deceased in an action of divorce against her husband. This witness was permitted, over the objection of the appellant, to testify to two conversations, occurring, respectively, on August 11 and 12, 1924, a day prior to and the day of her death, between the deceased and her divorced husband in the office of her attorney, in which property and other matters were discussed, and having been held in the absence of the appellant. The deceased saluted her former mate with a kiss, and what was said tended to show that an attitude of friendliness existed between the deceased and her husband. A motion to strike out this testimony was de-

nied. This testimony was apparently admitted by the trial court as tending to show motive for the offense charged against appellant. In view of the appellant's defense that the deceased committed or attempted to commit suicide, we are of the opinion that these conversations were properly admitted in evidence, not to show motive, but to reveal the condition of mind of the deceased just prior to her death from which the jury might have inferred that she was not without hope that the former relationship might be resumed, thus tending to refute the appellant's theory of suicide. And these conversations or declarations of the deceased immediately prior to her demise, as bearing on the question whether she intended to commit self-destruction, were admissible, whether or not made in the presence of the appellant. The cases of *People v. Tugwell*, 152 P. 740, 28 Cal. App. 348, 359, and *People v. Wilson*, 112 P. 579, 14 Cal. App. 518, support this view, though in those cases the evidence of the conversations or declarations of the deceased just prior to death tended to support the suicide theory whereas here it tended to overcome such theory. The testimony in the instant case was not admissible to show motive, because it involved hearsay, but the hearsay quality, as we have indicated, would not be objectionable when admitted as tending to refute the theory of suicide. And the rule is that, if testimony is admitted on a wrong theory, but is admissible under another theory, its admission under the wrong theory will not constitute error.

[3] 2. We find no error in the action of the court in permitting the district attorney to present to the prosecution's witness Mrs. Jennie Thomas a transcript of her testimony taken before the grand jury and to ask her if she so testified. The testimony of this witness before the grand jury tended to show that the appellant had admitted to her he had killed the deceased, whereas her testimony at the trial was, to say the least, equivocal on the point. The witness at the trial had, in answer to an interrogation apparently intended to aid in refreshing her recollection, admitted she may have so testified before the grand jury, but, if she did, "it was my theory of expressing it, not his." In view of the uncertain state of the witness' recollection of the fact in question, we think the prosecution followed the proper course in attempting to refresh her recollection. Section 2047, Code Civ. Proc. In *People v. Durrant*, 48 P. 75, 84, 116 Cal. 179, 213, involving a charge of murder prosecuted by information, the court allowed the prosecution to refresh the recollection of the witness by his deposition taken at the preliminary examination. We perceive no reason why the testimony of a witness given before a grand jury may not likewise be availed of to refresh the recollection of the witness. Citing *Reid v. Reid*, 14 P. 781, 73 Cal. 206, 209, it was held in *People v. Durrant*, supra, that the testimony at the prelim-

inary examination may "at least be regarded as a private memorandum." Under the present practice the defendant is entitled to a copy of the testimony taken before the grand jury. Section 925, Pen. Code.

[4, 5] 3. It is claimed that the testimony of various witnesses, in detailing certain facts and statements of the appellant, immediately after and on the morning following the death of the deceased, was improperly admitted. Some of this testimony was to the effect that, on the morning after deceased's death, the appellant went to the store conducted by the deceased during her lifetime and there held up and robbed a number of patrons; that he then repaired to the place of business of a Mr. and Mrs. Samuel Schapp, friends of the deceased, shot both of them, and then left the place. It was urged in support of the admission of this testimony that the holding up of a number of patrons in the store of the deceased and the assault upon her friends tended to show animus toward her and her friends; that it tended to furnish a motive for the crime. The evidence sufficiently showed that some of the persons thus assailed were friends of the deceased, who had incurred the appellant's ill will by attempting to influence her against him, and thus tended to show a malignant disposition toward both deceased and her friends which would furnish a motive for the homicide. In any event, even if it be assumed the rulings complained of were erroneous, we think that the errors were not sufficiently prejudicial to the appellant to justify a reversal, in view of all the evidence in the case and that it tended to support his claim that he was insane.

[6] 4. The following instruction was requested by the appellant and refused:

"With respect to the proof of the corpus delicti, I instruct you that in determining that question you must not consider any evidence of alleged confessions, admissions, or statements of the defendant. Evidence of alleged confessions, admissions, and statements may not be considered for any purpose until you have first satisfied your minds to a moral certainty and beyond a reasonable doubt that the deceased came to her death through the unlawful act of some person other than herself. Proof of the dead body alone, joined with evidence of alleged confessions, admissions, and statements of the defendant, would not be sufficient to convict, for there must be evidence tending to show the commission of a homicide and unlawful killing, before evidence of alleged confessions, admissions, or statements of defendant could be considered for any purpose. Evidence of alleged confessions, admissions, or statements of the defendant alone cannot be relied upon to establish as sufficient any fact which is a necessary ingredient to form the body of the crime. If after consideration of the evidence in connection with the proof or lack of proof of the corpus delicti, you believe that proof of one or more of the necessary elements of the corpus delicti, as I have defined it to you, would be wholly lacking without the

evidence of alleged confessions, admissions, or statements of the defendant, then I instruct you you must acquit the defendant."

It is contended by the people that:

"It is not the law of this state that evidence of confessions, admissions, and statements of the defendant may not be considered for any purpose until the jury have first satisfied their minds to a moral certainty and beyond a reasonable doubt that the deceased came to her death through the unlawful act of some person other than herself. * * * It was enough under all the authorities if the killing of the deceased by violence was established by a preponderance of satisfactory proof, and, after that, if the confessions and admissions of the defendant, even though extrajudicial, tended to corroborate the proof of such death by violence and to show that the defendant committed the act of violence, the jury should be permitted, and have always been permitted, to take such admissions and confessions into consideration in arriving at a proper verdict. The true rule is well stated in volume 8, p. 168, § 248, of the recent and well written work, California Jurisprudence, and in a note of that section, attention is called to the fact that some of the expressions in *People v. Tapia*, 63 P. 1001, 131 Cal. 651, run counter to and have been practically overruled by other California authorities."

In response thereto, the appellant urges that:

"The respondent cites and quotes from numerous cases the force or logic of which we cannot see. Most of the cases thus quoted from refer to the admissibility in evidence of confessions and admissions and the extent to which the proof of the corpus delicti must go to supply a foundation for this admission. With that rule we are in accord. There is not the slightest question but that slight proof is all that is necessary to justify the admission of such evidence. But there is a clear and sharp line of demarcation between those cases so holding and the cases which refer to the quantum of proof of the corpus delicti required as a matter of sufficiency of evidence to sustain a verdict of guilty based upon it and as to when and how confessions and admissions may be considered by the jury in making up their verdict. The unbroken line of authority in this state is that the corpus delicti and all of its essential elements must be established by the prosecution in the final analysis by evidence independent of extrajudicial statements, admissions or confessions of the accused."

In our view the requested instruction did not contain a correct statement of the law, and it was therefore properly refused. Preliminarily it should be kept in mind that there is a sharp distinction between the rule governing the *admission* of extrajudicial statements, admissions, or confessions and the rule governing the jury in its *consideration*, of such evidence after it is admitted. Concerning the *admissibility* of extrajudicial statements, admissions, or confessions, it has been correctly declared that:

"Proof of the corpus delicti of the conclusive and convincing character required to support a conviction of the crime charged was not a prerequisite to the reception in evidence of the extrajudicial statements of the defendant that he had killed the deceased. *Prima facie* proof of the corpus delicti was sufficient for that purpose; and it was not essential to the proof and purpose to show that the crime charged was committed by the defendant." *People v. Wagner*, 155 P. 649, 29 Cal. App. 363. (Italics added.)

The following cases, among others, deal alone with the degree of proof of the corpus delicti essential to warrant the *introduction in evidence* of the extrajudicial statements, admissions, or confessions of the accused, and are therefore of little value or assistance in determining the point here involved. *People v. Simonsen*, 40 P. 440, 107 Cal. 345, 346; *People v. Besold*, 97 P. 871, 154 Cal. 363, 367; *People v. Frey*, 131 P. 127, 165 Cal. 140, 146; *People v. Vertrees*, 146 P. 890, 169 Cal. 404, 408; *People v. Quarez* (Cal. Sup.) 238 P. 363; and *People v. Garcia* (Cal. Sup.) 238 P. 367.

The instruction in question here does not involve the *admissibility* of such evidence, and, as already indicated, the foregoing line of cases are therefore not in point. The refused instruction, if given, would have precluded the jury, after the introduction in evidence of the extrajudicial statements, admissions, or confessions of the appellant upon a *prima facie* showing of the corpus delicti by evidence aliunde, from considering such evidence "for any purpose" until the corpus delicti had been established to a moral certainty and beyond a reasonable doubt by such evidence aliunde.

[7] Research has revealed that the cases passing upon the degree of proof of the corpus delicti necessary before the jury may consider the extrajudicial statements, admissions, or confessions of a defendant are not as numerous as the cases involving the measure of proof essential before such evidence may properly be admitted. The following cases may throw some light on the first question which is here involved:

Though the case of *People v. Jones*, 55 P. 698, 700, 123 Cal. 65, 68, was concerned primarily with the question whether or not the corpus delicti of the offense therein charged had been sufficiently proved to *admit* the extrajudicial statements, admissions, or confessions of the accused, nevertheless the court, apparently with approval, quoted the following:

"Mr. Justice Clifford, commenting upon the language used in *Greenleaf on Evidence*, said: 'Considering the language employed by that author, it is somewhat doubtful how far he would carry the doctrine; and, if it is to the extent that the corpus delicti must be *fully proved independently of the confession*, we are not prepared to adopt it, as in that view the admission of the confession would be useless, except to prove the agency of the accused, and would op-

erate as an exclusion of the confession for any other purpose, whereas, if freely and voluntarily made, it is clearly admissible as evidence in support of *any* element in the charge to which it applies. Full proof of the body of the crime, the corpus delicti, independently of the confession, is not required, says Nelson, C. J., in *People v. Badgley*, 16 Wend. [N. Y.] 59, by any of the cases; and in many of them slight corroborating facts were held sufficient.' United States v. Williams, 1 Cliff. 5, 24 [Fed. Cas. No. 16707]." (Italics added.)

People v. Hatch, 125 P. 907, 909, 163 Cal. 368, 375, contains this pertinent declaration:

"It is claimed that the corpus delicti was not proved by evidence outside of the declarations and admissions of defendant. It must be remembered that the rule does not require that the evidence, other than the admissions and declarations of defendant, establish the commission of the offense beyond all reasonable doubt. *People v. Jones* [55 P. 698] 123 Cal. 65; *People v. Ward* [66 P. 372] 134 Cal. 306; *People v. Rowland* [106 P. 428] 12 Cal. App. 7. We are satisfied that the record presents substantial and sufficient evidence besides the admissions and declarations of the defendant to establish the commission of the crime charged."

The last case above cited (*People v. Rowland*, 106 P. 429, 12 Cal. App. 10) also involved the question of the admissibility of the accused's extrajudicial statements, admissions, or confessions, but the court there declared:

"It is, of course, a well-established rule of law that the confession or extrajudicial admissions of a party accused of crime cannot be considered for the purpose of proving the corpus delicti, or, in other words, of proving the elements necessary to constitute the crime with which he is charged. * * * But this rule has never been so far extended in its scope or application as to require the elements or the body of the crime to be proved beyond a reasonable doubt before the admissions or confessions may be received and *considered* as evidence." (Italics ours.)

At first blush the two sentences of this quotation may seem inconsistent, but, in view of the express declaration in the latter and the fact that the court was there considering whether or not the corpus delicti had been sufficiently proved to *admit* the accused's extrajudicial statements, it must be held that the first-quoted sentence was dealing with the *kind* of proof necessary to sufficiently establish the corpus delicti in order to *admit* such extrajudicial statements, admissions, or confessions—the point involved in that case.

The case of *People v. Hatch*, 109 P. 1097, 1101, 13 Cal. App. 521, 531, is decidedly in point on the question here involved. An instruction almost identical with the one requested and refused in the instant case was likewise refused in that case, and the appellate court held the refusal to be proper. A hearing was denied in the Supreme Court. The instruction in *People v. Hatch*, *supra*, read:

"In determining whether or not a crime has been committed in this case, apart from who committed it, you must not consider any admission or statement of the defendant; you must carefully exclude from your minds any and every statement made or alleged to be made by the defendant, when you come to consider whether a crime has been committed, and on that question you must look exclusively to the other evidence in the case. If the other evidence in the case does not show the commission of the crime charged beyond a reasonable doubt, then the defendant must be acquitted, notwithstanding his statements or admissions, if any. In other words, the law prohibits a conviction of crime solely upon the statements or admissions of the defendant."

The District Court of Appeal declared:

"The court refused to give this instruction, and was justified in so doing. The vice of the instruction is that it requires that the *corpus delicti* be proved beyond any reasonable doubt before extrajudicial statements or admissions of defendant may be considered at all. This is not the law. The correct rule is laid down in *People v. Jones* [55 P. 698] 123 Cal. 65. While it is true that there must be some proof of the body of the crime before extrajudicial statements or admissions of the defendant may be considered, it is not required that such proof shall go to the extent of establishing the crime beyond all reasonable doubt."

The case of *People v. Gonzales* (Cal. App.) 240 P. 291, concerned the question of *admissibility* of such evidence, and, while turning upon the failure of the prosecution to establish *prima facie* the *corpus delicti* by evidence aliunde before the admission into evidence of the extrajudicial statements, admissions, or confessions of the accused, nevertheless the following excerpt from that opinion passes upon the identical point we have under consideration here:

"The proof of the *corpus delicti*, which must be produced before admissions or confessions of the defendant may be allowed to be put in evidence, need not be sufficient to satisfy the minds of the jurors beyond a reasonable doubt of the *corpus delicti*. It is sufficient if the preliminary proof be of a substantial character tending to establish the *corpus delicti*. * * * *Such substantial evidence may be corroborated and strengthened by admissions and confessions of the defendant, and the proof beyond a reasonable doubt required by the law thus supplied.* * * *" (Italics added.)

See, also, *People v. Roganovich and Duzich* (Cal. App.) 246 P. 132.

It is apparent from this review of the cases that the general trend of authority has been to hold that, upon *prima facie* proof of the *corpus delicti*, the extrajudicial statements, admissions, or confessions of the accused may be admitted in evidence, and, having been so properly admitted, they may, with the evidence aliunde, be considered by the jury in its determination whether or not all the elements of the crime and the connection therewith of the accused have been established to

a moral certainty and beyond all reasonable doubt.

We have found only two cases which seem to be in conflict with this principle. It was held in *People v. Wagner*, 155 P. 649, 653, 29 Cal. App. 363, 372, that it was error to refuse to give an instruction similar to the one involved in the instant case, and which stated that the jury must be "convinced from the evidence beyond a reasonable doubt and to a moral certainty that a criminal homicide was in fact committed" before they might consider the extrajudicial statements of the defendant. And there is language in *People v. Tapia*, 63 P. 1001, 1005, 131 Cal. 647, 651, 655, taken from *Gray v. Com.*, 101 Pa. 380, 47 Am. Rep. 733, which announces a similar rule. The trial court in the *Tapia* Case stated in an opinion that it did not think the evidence sufficient to sustain the verdict. Manifestly, the trial court should have granted a new trial on that ground (*People v. Knutte*, 44 P. 166, 111 Cal. 453, 455), but instead of doing so it erroneously stated that it doubted its authority to grant a new trial in such a situation and declared it would pass the question to the Supreme Court, which tribunal, of course, had no authority to determine the weight of the evidence. It was to obviate this situation and because the opinion of the trial court was no part of the record on appeal and could not therefore be considered that resort was had by the court to a strict appraisal of errors asserted to have occurred at the trial in order to secure a reversal of the judgment and order. The court said:

"That this decision is based upon the very peculiar features of this case as above shown; and that in many cases the errors above noticed would not call for a reversal."

The presence of these facts must therefore be regarded as tending to greatly weaken *People v. Tapia*, supra, as an authority on the point involved in the instant case. Furthermore, as indicated in the note to the text in 8 Cal. Jur. p. 167, § 248, the case of *People v. Tapia*, supra, is at variance on this particular rule with the weight of authority in this state.

It may finally be said that the authorities are unanimous on the proposition that the *corpus delicti* is not required to be established to a moral certainty and beyond a reasonable doubt before the extrajudicial statements, admissions, or confessions of a defendant may be received in evidence—*prima facie* proof of the *corpus delicti* being sufficient for that purpose. And, with the exception of *People v. Tapia*, supra, and *People v. Wagner*, supra, the rule is likewise unanimously declared that it is *not* necessary that the jury, in resolving the question of the guilt or innocence of a defendant upon all the evidence in the case, should, before considering for any purpose the extrajudicial statements, admissions, or confessions of a defendant, be first

satisfied to a moral certainty and beyond a reasonable doubt that the corpus delicti has been established by evidence aliunde.

[8] When the case is submitted for their verdict, the jury may consider *all* the evidence in the case, including the extrajudicial statements, admissions, or confessions of the accused, in determining whether or not all the elements of the offense charged and the connection therewith of the accused have been established to a moral certainty and beyond a reasonable doubt. If this were not the correct rule, proof of the extrajudicial statements, admissions, or confessions of the accused would have no utility except to connect him with the crime charged. The general rule is that, unless evidence is admitted for a limited purpose, it will be considered for every purpose. Any expressions in *People v. Tapia*, *supra*, and *People v. Wagner*, *supra*, to the contrary of what we have declared are at variance with the authorities and are not binding. It follows from the foregoing that the proposed instruction was erroneous, and was therefore properly refused.

[9] 5. We cannot agree with appellant's contention that the oral instruction given to the jury pending its deliberations caused or resulted in a "compromise" manslaughter verdict. This instruction, a written copy of which was also supplied to the jury upon request, merely told the jury, and correctly so, that they would be given ample time for deliberation and that, upon retiring to the jury room, it would be better that they refrain from emphatic declarations of opinion and hold their minds "in a state of abeyance," so that they might "fully and freely interchange views with each other," it being "for the interests of the state and the benefit of the defendant, that a verdict should be returned."

The judgment and the order appealed from are, and each of them is, affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; LENNON, J.

76 Cal. App. 635

KAMMERER v. MARINO et al. (Civ. 3063.)

(District Court of Appeal, Third District, California. Feb. 24, 1926.)

1. Appeal and error ⇨907(2) — Where evidence is not brought up, it will be presumed that none was offered in support of affirmative matters in answer, and that findings thereon were not required.

Where no findings are made on affirmative matters alleged in answer, and evidence is not brought up on appeal, it will be presumed in support of judgment that no evidence was offered in support of such affirmative allegations, and that therefore no findings were required.

2. Pleading ⇨430(2) — Findings according to evidence submitted without objection held not objectionable as outside pleadings (Code Civ. Proc. § 470).

Where plaintiff pleaded that he "furnished boxes" to defendant, but without objection from defendant introduced evidence that he furnished materials for making boxes, finding of court, under Code Civ. Proc. § 470, "according to the evidence," was not objectionable as outside the pleadings.

3. Pleading ⇨430(2) — Finding that plaintiff, who pleaded he had performed work and labor for defendant, had by and through his minor son performed such work and labor held not objectionable as outside pleadings (Code Civ. Proc. § 470; Civ. Code, § 197).

Where plaintiff pleaded that he performed work and labor for defendants, and, without objection by defendants, proved work and labor performed by his son, *held* finding that plaintiff by and through a son had performed work was not objectionable as outside pleadings, in view of Code Civ. Proc. § 470, and Civ. Code, § 197.

4. Interest ⇨19(2).

Where amount of claim is capable of being made certain by calculation, interest is allowable from due date.

5. Appeal and error ⇨932(1) — Claims for materials, work, and labor will be presumed based on contracts for agreed compensation in support of judgment allowing interest from date such claims became due.

In support of judgment allowing interest on several claims for materials, work, and labor from time they became due, it will be presumed that the several causes of action were based on contracts in which rates of compensation were agreed on, and that amounts due were capable of being made certain by calculation.

6. Interest ⇨19(2) — Existence of dispute as to amount of plaintiff's claims does not render it unascertainable by calculation as affects defendants' liability for interest from due date.

Existence of dispute between parties as to quantity of materials or work furnished or done does not make amount of plaintiff's claims unascertainable by calculation or relieve defendant from liability to pay interest from due date which could have been avoided by tender of amount due.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by John Kammerer against Guiseppe Marino and others. From a judgment for plaintiff, certain defendants appeal. Affirmed.

Donald R. Green, V. L. Hatfield, Martin I. Welsh, and W. H. Hatfield, all of Sacramento, for appellants.

C. E. McLaughlin and C. P. McLaughlin, both of Sacramento, for respondent.

FINCH, P. J. This is an appeal on the judgment roll alone from the judgment herein in favor of plaintiff.

The complaint states separately five causes of action. The first count alleges the delivery of a certain quantity of grapes by plaintiff to defendants at an agreed price. The second alleges that "at the special instance and request of defendants plaintiff furnished boxes for said grapes to the value of \$1,493.57." The third alleges that "Phillip Ehersman sold and delivered to defendants at their special instance * * * 5,876 pounds of grapes at \$75 per ton," and that Ehersman assigned his claim therefor to plaintiff. The fourth alleges that on the 1st day of December, 1921, the defendants were indebted to John J. Kammerer in the sum of \$19.25 for work and labor, and that he assigned his claim therefor to plaintiff. The fifth alleges that "plaintiff, * * * at the special instance and request of said defendants, performed work and labor for said defendants in the sum of \$101.45." Each count alleges the amount due and unpaid thereunder, and that payment thereof was demanded and refused. The court found against appellants in accordance with the allegations of the third and fourth counts, and also as alleged in the first count, except that a smaller quantity of grapes was found to have been delivered than was alleged. As to the second count, the court found that the amount alleged therein was due and unpaid from appellants to plaintiff "as the balance due and unpaid for materials for making boxes, to wit, box lumber, laths, and nails furnished by plaintiff to said defendants at their special instance and request, * * * and for transporting and trucking box lumber." As to the fifth count, the court found that "plaintiff, by and through his minor son, David Kammerer, * * * performed work and labor in making and putting grape boxes or lugs together at the special instance and request" of appellants "in the sum of \$311.45. That said defendants have paid to plaintiff on account of said work and labor the sum of \$210, leaving a balance of \$101.45 due" from appellants to plaintiff. Judgment was entered for the total amount remaining unpaid, "together with interest thereon from the 1st day of November, 1921, at the rate of 7 per cent, per annum."

[1] The appellants alleged certain affirmative matters in their answer to the complaint, and the court made no direct finding thereon. Appellants contend that such omission constitutes error. Since the evidence has not been brought up, it must be presumed in support of the judgment that no evidence was offered to prove such affirmative allegations, and therefore no findings thereon were required. Hertel v. Emireck, 174 P. 30, 178 Cal. 534; Mohr v. North Rawhide Min., etc.,

Co., 170 P. 600, 177 Cal. 264; Continental Nat. Bank v. Stoltz, 189 P. 712, 46 Cal. App. 532; Terry v. Southwestern Building Co., 185 P. 212, 43 Cal. App. 366.

[2, 3] Appellants urge that the finding relative to the second cause of action is outside the issues raised by the pleadings. Upon objection at the trial that evidence offered for the purpose of showing that plaintiff furnished "materials for making boxes" was not admissible to prove that he "furnished boxes," the court doubtless would have permitted an amendment to overcome the objection. As the record fails to show that any such objection was made, it must be presumed that the parties treated the complaint as sufficient to justify the admission of the evidence, and that such evidence was introduced without objection. Silvers v. Grossman, 192 P. 534, 183 Cal. 696, 702, and cases there cited. Under such circumstances, it was proper for the court to "direct the fact to be found according to the evidence." Code Civ. Proc. § 470. For like reasons, it was not error to find in favor of plaintiff for work and labor performed by his minor son. Cannon v. McKenzie, 85 P. 130, 3 Cal. App. 286, 290. The plaintiff was entitled to the earnings of his son. Civ. Code, § 197.

[4-6] The court allowed the plaintiff interest upon the amount of the several claims from the time they became due and payable. Appellants contend that such claims were unliquidated, and that therefore interest should have been allowed only from the date of the judgment. The presumption in support of the judgment is that the several causes of action are based upon contracts in which the rates of compensation were agreed upon in advance, and that the amounts due thereon were capable of being made certain by mere calculation. In such a case interest is allowable from the time payment becomes due. Gray v. Bekins, 199 P. 767, 186 Cal. 389, 399; Western L. Co. v. Vanomar Producers, 217 P. 534, 62 Cal. App. 644, 647; Robinson v. American Fish, etc., Co., 119 P. 388, 17 Cal. App. 212, 220. The fact that there was a dispute between the parties as to the quantity of grapes or materials furnished or work done did not have the effect of rendering plaintiff's demands unascertainable by calculation. Fairchild v. Bay Point, etc., Ry. Co., 134 P. 338, 22 Cal. App. 328, 330. Appellants could have avoided their liability to pay interest by tendering the amount actually due plaintiff. The mere fact that plaintiff demanded more than was due is not a sufficient ground for disallowing interest. Western L. Co. v. Vanomar Producers, supra.

The judgment is affirmed.

We concur: PULLEN, Justice pro tem.; PLUMMER, J.

76 Cal. App. 590

T. TANAKA et al. v. HIGHWAY FARMING CO. et al. (Civ. 3076.)

(District Court of Appeal, Third District, California. Feb. 19, 1926.)

1. Appeal and error §880(2)—In action to recover compensation for work in production of grapes, exclusion of parol evidence to show that buyers' contract was intended to bind them to pay plaintiff held not error against owner.

In action to recover compensation under contract with landowner to do work in production of crop of grapes which had been sold without plaintiffs' knowledge, exclusion of parol evidence to show that buyers' contract was intended to bind them to pay plaintiffs was not error against owner of which he could complain, where landowner had demanded no affirmative relief against buyer, as owner was primarily liable to plaintiffs despite such contract.

2. Judgment §729—Seller of grapes may recover from buyers, who agreed to pay laborers, amount recovered by laborers, though buyers were codefendants in laborers' action (Code Civ. Proc. §§ 1909, 1910).

Seller of grapes may recover from buyers, who had agreed to pay laborers, amount of judgment recovered by laborers, though buyers were codefendants in laborers' action, where seller had demanded no affirmative relief against buyers in such action, and was not permitted to show buyers' agreement to pay, since buyers' liability was therefore not adjudicated in such action, in view of Code Civ. Proc. §§ 1909 and 1910.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Action by T. Tanaka and others against the Highway Farming Company and others. Judgment for plaintiffs, and the named defendant appeals. Affirmed.

Williams & Fenstermacher, Chester O. Hansen, and Gallaher, Simpson & Hays, all of Fresno, for appellant.

L. L. Cory, W. H. Stammer, and B. H. Cory, all of Fresno, for respondents.

FINCH, P. J. The appellant Highway Farming Company and the plaintiffs entered into a contract, by the terms of which the latter were to perform all the work and labor in the production of a crop of grapes on 120 acres of land belonging to the former, and to receive therefor "45 per cent. of the gross proceeds of all the grapes," the same to be sold "jointly by the first party and the second parties in their names." The complaint alleges that thereafter the defendants E. S. Ardzooni and L. S. Ardzooni, as copartners, "did assume each and all of the obligations of said contract on the part of said Highway Farming Company to be kept and performed"; that the plaintiffs complied with all the terms of the contract, and duly

delivered the crop produced upon the premises; that the defendants did not comply with the terms of the contract, but, on the contrary, sold all of the crops "without the knowledge and consent of said plaintiffs, or in the name of said plaintiffs or either of them," and refused "to account for or pay to plaintiffs, or any one of them, said 45 per cent. of said crops to which the plaintiffs are entitled, or any amount in excess of 9 per cent. thereof." The complaint then alleges the reasonable value of the crops so sold, and prays for judgment against the defendants for the amount remaining unpaid, based upon such reasonable value.

The appellant, in addition to certain denials, admitted the allegation that Ardzooni Bros. had assumed the appellant's obligations under the contract, and, for "a second, separate, and affirmative answer to the plaintiffs' complaint," alleged that, after the execution of the contract, Ardzooni Bros. "did assume each and all of the obligations of said contract on the part of said defendant, Highway Farming Company, * * * and * * * performed each and every covenant in said contract on the part of the Highway Farming Company * * * to be kept and performed, and that the said plaintiffs did accept the performance of each and every covenant of said contract by said * * * Ardzooni Bros., in full satisfaction of the several obligations of said defendant, Highway Farming Company * * * under and by virtue of the terms of said contract." Appellant prayed that "plaintiffs take nothing by reason of his complaint against the said Highway Farming Company," and that it "be hence dismissed with its costs."

Ardzooni Bros. filed a separate answer, denying, among other things, that the copartnership, or the members thereof, had assumed any of the obligations of the appellant under the contract.

The court found that "the defendants E. S. Ardzooni and L. S. Ardzooni did not, as copartners, or otherwise, assume any of the obligations of said contract on the part of said Highway Farming Company to be kept and performed, * * * and that the plaintiffs did not accept performance of any of the covenants of said contract by said firm of Ardzooni Bros. in full or any satisfaction of any of the obligations of the defendant Highway Farming Company under or by virtue of any of the terms of said contract." The court found in favor of the plaintiffs against the appellant. Judgment was entered in accordance with such findings in favor of plaintiffs against the appellant and in favor of Ardzooni Bros. for costs of suit against the plaintiffs. The appeal is "from the judgment * * * and from the whole thereof."

The contract was executed October 26, 1921. On the following day, without the knowledge or consent of the plaintiffs, the ap-

pellant entered into a contract of sale of the crops to be produced during the life of the contract on the land in question and on other lands belonging to it. The crops produced by the plaintiffs were delivered to defendants, who disposed of the same in accordance with such contract of sale thereof. The plaintiffs testified that they had no knowledge of the sale contract until after the crops had been delivered. Before the crops were harvested the appellant entered into a contract of sale of all its lands, including the land here in question, to Ardzrooni Bros. That contract contained the following:

"It is further understood and agreed that, whereas first party has been employing certain parties to properly farm said land, the second party agrees to assume the obligation of the first party in connection with the hiring and employing of those parties and to make proper adjustments of these obligations."

The contract was introduced in evidence. Counsel for the appellant called a witness who was present during the negotiations leading up to and at the time of the execution of the contract, and calling his attention to the clause herein quoted, examined him as follows:

"Q. * * * Did you hear any discussion in regard to that particular clause of this contract? A. I did. * * *

"Q. What was said in the discussion in regard to that particular clause? * * *

"Counsel for Ardzrooni Bros.: Objected to as irrelevant, incompetent, and immaterial, and varies the terms of a written contract by parol evidence. * * *

"The Court: I will sustain the objection."

Referring to this ruling of the court, counsel for appellant say in their opening brief:

"We will raise only one point in this appeal. The point to be here argued is as to whether or not the trial court erred when it excluded all testimony as to that portion of the contract between the appellant Highway Farming Company and Ardzrooni Bros., wherein and whereby, we contend, the defendant Ardzrooni Bros. became legally bound to respond to the plaintiffs for any moneys due the plaintiffs under and by virtue of their contract with defendant Highway Farming Company."

[1, 2] The plaintiffs were not parties to the contract between appellant and Ardzrooni Bros., and it was neither alleged nor proved that they agreed to look to the latter for performance of appellant's obligations to them or to release appellant therefrom. While, as between the defendants themselves, Ardzrooni Bros. may have become the principal obligor and appellant a mere surety, as between the plaintiffs and appellant the obligation of the latter is primary. The appellant demanded no affirmative relief against Ardzrooni Bros., but merely alleged, as a defense,

that the latter had assumed and discharged the obligations of the former. The error complained of was against the plaintiffs in favor of Ardzrooni Bros. and not against appellant. The latter, therefore, is not in a position to complain. *Patten & Davies Lumber Co. v. Inman*, 180 P. 26, 40 Cal. App. 111, 112; *Talcott Land Co. v. Hershiser*, 195 P. 653, 184 Cal. 748, 756. Under the pleadings, no judgment could have been made between the defendants alone. As between them, therefore, the question whether Ardzrooni Bros. assumed appellant's obligations to plaintiffs has not been adjudicated. *Code Civ. Proc.* 1909 and 1910; *Victor Oil Co. v. Drum*, 193 P. 243, 184 Cal. 226, 239; *Robson v. Superior Court*, 154 P. 8, 171 Cal. 588, 593; *Hubermann v. National Surety Co.*, 174 P. 79, 37 Cal. App. 569, 570; *Hentig v. Johnson*, 96 P. 390, 8 Cal. App. 221, 224. Upon payment of the judgment, appellant will be in a position to maintain an action against Ardzrooni Bros. for the recovery of the amount paid in satisfaction thereof, if in fact, the latter assumed the obligations of the former to plaintiffs.

The judgment is affirmed.

We concur: PULLEN, Justice pro tem.; PLUMMER, J.

76 Cal. App. 800

K. NAKAGAWA, S. Awamura, and R. Tsujimura, Plaintiffs and Respondents, v. HIGHWAY FARMING CO., a corporation, Defendant and Appellant, E. S. Ardzrooni, and L. S. Ardzrooni, Copartners Doing Business Under the Firm Name and Style of Ardzrooni Bros., Defendants and Respondents. (Civ. 3075).

(District Court of Appeal, Third District, California. Feb. 19, 1926.)

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Williams & Fenstermacher, Chester O. Hansen and Gallaher, Simpson & Hays, all of Fresno, for appellant.

L. L. Cory, W. H. Stammer, and B. H. Cory, all of Fresno, for respondent.

FINCH, P. J. The defendant Highway Farming Company has appealed from the judgment herein in favor of plaintiffs against that company and in favor of defendants Ardzrooni Bros. against the plaintiffs. The appeal is submitted upon the briefs and oral arguments in the case of Tanaka and others against the same defendants (Civ. No. 3076, 245 P. 434), this day decided by this court. But one point is made by the appellant, and that the same as made in the Tanaka Case, and the facts material to the appeals are the same in both cases.

For the reasons stated in the opinion filed in the Tanaka Case, the judgment is affirmed.

We concur: PULLEN, Justice pro tem.; PLUMMER, J.

76 Cal. App. 525

PEOPLE v. DRYDEN. (Cr. 1302.)

(District Court of Appeal, Second District, Division 1, California. Feb. 16, 1926.)

1. Automobiles ⇐355.

Evidence *held* to sustain conviction of driving automobile while intoxicated.

2. Criminal law ⇐1186(4)—Admission of arresting officer's testimony that he told defendant, arrested for driving while intoxicated, that he had arrested defendant before for being drunk, held not to have resulted in miscarriage of justice requiring reversal, in view of defendant's denial thereof and his admission that he had been drinking shortly preceding arrest (Const. art. 6, § 4½).

In prosecution for driving automobile while intoxicated, admission of testimony of arresting officer that he talked with defendant about previous arrest or near arrest for the very same thing, and for being drunk, though improper, *held* not to have resulted in miscarriage of justice, and hence not ground for reversal, in view of Const. art. 6, § 4½, where defendant denied having been arrested on charge of drunkenness and admitted that he had been drinking whisky shortly prior to his arrest.

3. Criminal law ⇐1171(6)—District attorney's conduct in asking defendant if he had not been arrested for drunkenness on two occasions, after defendant without reason had on direct examination denied ever having been arrested for drunkenness, held not so prejudicial as to have induced miscarriage of justice.

Where defendant, without reason therefor, denied on direct examination ever having been arrested for drunkenness, *held*, district attorney's conduct in asking defendant if he was not arrested for being drunk on two occasions was not so prejudicial as to have induced miscarriage of justice, since controversy arose through defendant's own act, and especially where objection to question was sustained and no assignment of misconduct on part of district attorney was made at the time.

Appeal from Superior Court, San Diego County; L. D. Jennings, Judge.

David Dryden was convicted of driving an automobile while intoxicated, and he appeals. Affirmed.

Jos. H. Egermayer and N. S. Hammack, both of San Diego, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

HOUSER, J. Defendant appeals from a judgment of conviction of the offense of driving an automobile upon a public highway of this state at a time when defendant was under the influence of intoxicating liquor.

[1] It is contended by appellant that the evidence of defendant's guilt was insufficient to support the judgment. The witnesses for

the prosecution, among whom were two policemen and a doctor, testified unqualifiedly that shortly after defendant had driven his automobile on a public highway he was intoxicated. Defendant himself testified that within 20 minutes next preceding his arrest he had taken two drinks of whisky. He also made certain incriminating admissions as to his condition at the time of his arrest, including the statement that he was in no condition to drive an automobile; and other witnesses gave testimony regarding acts and declarations on the part of defendant which were not consistent with normal, sober, conduct on his part—from all of which, notwithstanding other evidence in the case from which defendant's sobriety on the occasion in question might possibly be deduced, it follows that appellant's contention as to the insufficiency of the evidence to justify the verdict of the jury cannot be sustained.

[2] Appellant also complains that the trial court erred in admitting in evidence over defendant's objection a statement made by one of the arresting officers to the effect that, in a conversation had between him and defendant, the arresting officer told defendant "that he had been arrested before, almost been arrested, for the same thing not very long before that, * * * that he had had a chance, that he had been arrested once before for being drunk, and that he did not learn his lesson then—had an awful time pulling his car out of the canyon that time."

At the time the evidence to which objection is made was admitted, the judge of the trial court said:

"Well; that sort of evidence is receivable, but is not receivable as testimony of what occurred on some other occasion, and has no value in that regard, but is receivable only as discovering what reply the defendant made, if any, and what his attitude was when the question or statement was made to him. That is the only reason that that sort of evidence goes in. It is not because of what the officer says to the individual whom he arrests, but it is the idea of what the arrested person says in reply to it. I think the motion should be denied, the jury bearing in mind my observation on the statement just made by the officer."

Appellant now urges the point that defendant was prejudiced because evidence of another alleged offense by him was permitted to go before the jury. An examination of the statement made by the officer shows that, strictly speaking, he gave no testimony that defendant had actually committed any other offense. The officer was merely narrating what had occurred in the way of conversation between him and defendant. However, it is clear that whether before that time defendant had ever been arrested for the commission of a similar offense had no bearing upon the question of whether he was intoxicated at the time in question, and at such

time had been driving an automobile on a public highway.

As suggested by the judge of the trial court, the replies made by defendant to material and competent questions directly connected with the offense with which defendant was charged, or statements made by the arresting officer in the presence of the defendant, in certain circumstances (not here present), might be admissible in evidence; but it is plain that such a rule should not be extended to a point which would permit the introduction of any and all statements made by the arresting officer to a defendant under the guise of noting the replies or the attitude of the defendant thereto. If such flexibility of the principle should be recognized, the result would be that the rule which requires that a defendant be tried only for the offense of which he is charged would cease to exist. It would always be possible for some person, lacking possibly in the spirit of fairness to an accused, at any time before or even during the trial, to purposefully engage the defendant in conversation and therein to either casually or pointedly refer to some other offense or difficulty laid to the door of the defendant, and thereafter to testify to the details of such conversation, thereby insinuating into the minds of the members of the jury evidence of former derelictions on the part of the defendant for the sole purpose of prejudicing the defendant's case. The rules of evidence adopted for the protection of litigants should not be so easily circumvented. The law forbids that to be done indirectly which may not be done directly.

In the case at bar, however, admitting the impropriety of placing before the jury the statements made by the arresting officer, to which objection is made, it must be assumed that the jury was guided by the statement made by the court to the effect that "what occurred on some other occasion * * * has no value in that regard, but it is receivable only as discovering what reply the defendant made, if any, and what his attitude was when the question or statement was made to him." The defendant testified that he had not been arrested before on a charge of drunkenness, nor was any evidence admitted that he had ever been arrested for the commission of such offense. Moreover, the evidence in the case, including the defendant's admission that he had been drink-

ing whisky within 20 minutes next preceding the time of his arrest and that he was in no condition to drive an automobile, leaves no room for doubting the fact that the error in admitting the evidence to which reference has been had did not result in a miscarriage of justice, and consequently that it affords no ground for a reversal of the judgment. Const. art. 6, § 4½.

[3] In the same connection, misconduct of the district attorney is predicated upon the fact that, after defendant had testified in his own behalf and, in response to questions asked him by his counsel, had denied that he had ever been arrested on a charge of having been intoxicated, the district attorney, on cross-examination, inquired:

"Q. As a matter of fact, weren't you arrested on that charge of being drunk on July 19, 1924, and on November 24, 1924, on each of which occasions you forfeited the amount of \$15 in police court as bail?"

It should be remembered that no direct evidence was admitted of the fact that defendant had ever been arrested on such a charge, and, consequently, no reason existed why defendant should deny that such was the fact. If he chose to do so, he presented an issue which, although irrelevant to the inquiry before the court, in a measure justified an attempt in good faith on the part of the district attorney by way of cross-examination to rebut it. The controversy arose through defendant's own act, and he cannot justly charge the district attorney with intentional misconduct for attempting in good faith to cross-examine the defendant on testimony given by him. *People v. Allen*, 137 P. 1148, 166 Cal. 723, 732. It further appears that defendant's objection to the question propounded by the district attorney to the defendant was sustained by the court. No assignment of misconduct on the part of the district attorney was made by the defendant at the time. In view of all the circumstances, if any prejudice resulted to defendant from the asking of the question, it was very slight, and, like the statement made by the arresting officer regarding what he had told the defendant, could not have induced a miscarriage of justice.

It follows that the judgment should be affirmed, and it is so ordered.

We concur: CONREY, P. J.; YORK, J.

76 Cal. App. 606

CROCKER v. CROCKER et al. (Civ. 3096.)

(District Court of Appeal, Third District, California. Feb. 23, 1926.)

1. Appeal and error ⇨607(1).

Giving notice to clerk of trial court to prepare transcript is jurisdictional step to be taken when appeal is by alternative method.

2. Appeal and error ⇨627(1) — **Failure of stenographic reporter to file transcript within time allowed is not jurisdictional, since provision requiring it is directory (Code Civ. Proc. § 953a).**

Code Civ. Proc. § 953a, requiring stenographic reporter to transcribe report of trial and file it within 20 days after notice to prepare transcript has been filed with clerk of trial court, *held* directory, and failure of reporter to file transcript within time allowed is not jurisdictional.

3. Appeal and error ⇨387(2).

Filing undertaking with clerk of trial court to pay cost of preparing transcript provided for in Code Civ. Proc. § 953b, is matter of security to clerk and not jurisdictional.

4. Appeal and error ⇨629—**Remedy for delay in having transcript on appeal prepared must be in trial court, where there is no failure as to necessary jurisdictional steps.**

Where there has been failure to proceed with diligence to have transcript on appeal prepared in lower court, but no failure as to jurisdictional steps necessary to be taken, remedy for delay must be in trial court.

5. Appeal and error ⇨627(2) — **Appeal will not be dismissed because of short delay by appellant in having transcript prepared, where jurisdiction is not shown to be wanting (rule 6 of Rules of Supreme Court and District Courts of Appeal).**

Appeal will not be dismissed because of short delay by appellant in having transcript prepared, where jurisdiction is not shown to be wanting, in view of rule 6 of Rules of Supreme Court and District Courts of Appeal; such delay being matter of procedure which is not fatal to hearing on merits.

Action by Mary Estell Crocker, as executrix of the estate of William Franklin Crocker, deceased, against Mary Estell Crocker and Warren Crocker. From the judgment, Mary Estell Crocker appeals. On motion of defendant Warren Crocker to dismiss the appeal. Motion denied.

James F. Gaffney, of Sacramento, and J. D. Elliott, of Placerville, for appellant.

C. E. McLaughlin, of Sacramento, and Henry S. Lyon, of Placerville, for respondent.

PLUMMER, J. This matter is before the court upon the respondent's motion to dismiss appellant's appeal from a judgment entered in said cause in the superior court of the county of Placer on the 17th day of July, 1925, on the following grounds:

"First. That no 'notice of appeal' as prescribed by section 953a of the Code of Civil Procedure of the state of California was filed within 10 days after notice of the court's decision denying the motions for a new trial in the above-entitled cause. Second. That no 'draft' or 'bill of exceptions,' as prescribed by section 650 of the Code of Civil Procedure of the state of California was presented or filed or served on the adverse party within the 10 days after notice of the court's decision denying the motion for a new trial, or at all, in the above-entitled cause. Third. That no 'transcript' was filed within 20 days after the filing of the notice of appeal, or at all, as prescribed by section 953a of the Code of Civil Procedure of the state of California."

Although several grounds for the motion are set forth in the notice, only one fact is really argued and presented for determination, to wit: The failure of the appellant to file an undertaking with the clerk of the trial court in which the cause was tried, as provided for by section 953b of the Code of Civil Procedure. The record shows entry of judgment on July 17, 1925, motion for new trial heard and determined August 14, 1925. There is nothing in the record showing that notice of the order of the trial court overruling appellant's motion for a new trial was given. On September 12, 1925, the appellant filed a notice of appeal and on the same day filed a notice with the clerk to have a transcript prepared. No question is made as to the sufficiency of these notices. On the 17th day of September, 1925, the appellant filed an undertaking to pay all costs on appeal. On the 6th day of February, 1926, the appellant filed an undertaking securing the payment of costs for preparing the transcripts. This undertaking was filed two days after the service of notice to dismiss. It would appear from the record that counsel for appellant, at the time of filing the undertaking on the 17th day of September, 1925, was laboring under a misapprehension as to the kind of undertaking that should be filed in order to comply with the sections of the Code governing appeals taken according to the alternative method.

There is nothing in the record showing whether the testimony in the case has or has not been transcribed; the only evidence is the certificate of the county clerk to the effect that no transcript of the evidence has been filed. Prior to the filing of the undertaking referred to on the 6th day of February, 1926, it appears that no arrangement was made with the clerk relative to costs. It does not appear one way or the other whether any such arrangements were made with the stenographic reporter.

[1, 2] Upon this state of facts, it is argued that the filing with the clerk of an undertaking to pay costs of preparing the transcript, or making some arrangement for the payment thereof, is jurisdictional, that the time has expired for preparing such transcript, and

therefore that the appeal cannot be perfected. That the giving of notice to the clerk to prepare transcript is one of the jurisdictional steps to be taken when the appeal is by the alternative method is well established, and, based upon the authorities sustaining this rule, it is argued that the giving of an undertaking, as provided for in section 953b, is also jurisdictional. Section 953a specifies that it is the duty of the stenographic reporter to transcribe fully a report of the trial and file the same within 20 days after the notice to prepare a transcript has been filed with the clerk. This provision has been held to be merely directory, and a failure of the reporter to file the transcript within the time allowed is not jurisdictional, and, as said in 2 Cal. Jur. 623:

"Neither by statute nor rule of the appellate courts is there any provision prescribing a limit to the time within which the transcript is to be prepared, nor any penalty for the failure of the reporter to file the transcript within 20 days."

[3] That the filing of an undertaking with the clerk to pay costs is directory only and not mandatory, and therefore, not jurisdictional, has been decided so many times that we need only to refer to the cases. *Pierce v. Works*, 154 P. 852, 171 Cal. 684; *Fisher v. Oliver*, 164 P. 800, 174 Cal. 781; *Smith v. Jaccard*, 128 P. 1023, 1026, 20 Cal. App. 280; *Carr v. Stern*, 120 P. 35, 17 Cal. App. 397; *Harpold v. Slocum*, 143 P. 609, 168 Cal. 364; 2 Cal. Jur. 620, 625. The giving of the undertaking provided for in section 953b, Code of Civil Procedure, is a matter of security to the clerk and not jurisdictional. That there is neither rule nor statute as to the time of preparing the transcript has been decided by this court. *Shaw v. Blasevich*, 132 P. 278, 21 Cal. App. 498; *Jaques v. Board of Supervisors*, 135 P. 686, 22 Cal. App. 627. In the latter case it is held that rule 2 of the Supreme Court, relating to the filing of the transcript, dates from the date of certification of the transcript by the trial judge, and has nothing to do with the time allowed for the preparation of the transcript. In *Smith v. Jaccard*, supra, it is also pointed out that no penalty is provided on account of the failure of the reporter to complete his notes within 20 days after notice filed with the clerk.

[4] Where there has been a failure to proceed with diligence to have the transcript on appeal prepared in the lower court and no failure as to the jurisdictional steps necessary to be taken, the remedy for the delay must be in the trial court. As stated in *Smith v. Jaccard*:

"It is doubtless the duty of the appellant, as the moving party, to take the necessary steps to secure the filing of such transcript, and for want of diligence in such matter on his part it is within the power of the trial court to

terminate his proceedings for procuring such transcript. The determination of the question as to whether or not there has been due diligence in such matter is one largely lying in the discretion of the trial court, with which the appellate court will not interfere unless it appears that the court in its action has abused its discretion"—citing *Galbraith v. Lowe*, 75 P. 831, 142 Cal. 295, and cases there cited.

In the case of *Mill Valley v. Massachusetts, etc., Co.*, 207 P. 253, 189 Cal. 52, it is also held that the proceeding for want of diligence in the preparation of the transcript should be first taken in the trial court.

[5] Rule VI of the Rules of the Supreme Court and District Courts of Appeal of the state of California, effective March 1, 1919, requires before ordering the dismissal for the reasons set forth in this case, that there must be a showing of a dismissal of the proceedings for a settlement of a bill of exceptions or transcript in the trial court, or that the time to institute such a proceeding has expired. There is no such showing in this case. The delay in this case has not been of any great duration, and the delay is incident to matters over which the trial court has jurisdiction, and this court ought not to order a dismissal of an appeal where jurisdiction is not shown to be wanting and the alleged delays are only in matters of procedure, which are in no wise fatal to a hearing of the cause upon its merits. The motion to dismiss the appeal is denied.

We concur: FINCH, P. J.; HART, J.

76 Cal. App. 601

ALLMAN et al. v. RICH. (Civ. 5282.)

(District Court of Appeal, First District, Division 2, California. Feb. 23, 1926. Hearing Denied by Supreme Court April 22, 1926.)

1. Specific performance $\S$ 119—Plaintiff, in action for specific performance of contract relating to real property, must prove that contract was in writing or partially performed, and contained all material terms expressed in sufficiently definite manner (Civ. Code, $\S$ 1741).

Plaintiff, in action for specific performance of contract relating to real property, must prove that contract was either in writing or partially performed, in view of Civ. Code, $\S$ 1741, and that it contained all material terms, expressed in sufficiently definite manner.

2. Specific performance $\S$ 121 (9).

Conflicting evidence as to meaning and intent of parties held not to warrant decree of specific performance of alleged contract for purchase of land, especially in view of conflicting finding.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action to establish a trust in certain real property by Solomon Allman, as administra-

tor, and another, against Solomon V. Rich. Judgment for plaintiffs, and defendant appeals. Reversed.

R. J. Welch, Jr., of Riverside, for appellant.

Duke Stone, of Los Angeles, for respondents.

NOURSE, J. Morris Allman and Bernard Altman commenced this action to impress a trust on certain real property alleged to have been purchased by the defendant with funds furnished by the plaintiffs. Morris Allman has since deceased, and the action has been prosecuted by his administrator. Judgment went for the plaintiffs, from which the defendant appeals on typewritten transcripts.

In their complaint the plaintiffs alleged that on October 5, 1920, each of the plaintiffs entered into a contract in writing with the defendant in the same form, substance, and tenor, by which it was agreed that the defendant should purchase the land in suit on behalf of himself and the two plaintiffs, the interest of each to be an undivided interest in proportion to the amount paid by each, and that each of the plaintiffs was to furnish defendant the sum of \$1,500 for that purpose; that each of the plaintiffs, on the execution of his contract, paid the defendant \$1,500. It is then alleged that at the time of the execution of the contract the defendant represented to each of the plaintiffs that he was purchasing the land from the Southern Pacific Railway Company at the price of \$15 an acre, while in truth he paid but \$3.90 an acre therefor; that defendant thereafter deeded to each of the plaintiffs 100 acres of said land, and retained for himself about 400 acres thereof; that the entire purchase price of said lands was furnished by plaintiffs, and that no part thereof was paid out of the funds of defendant. Appropriate denials were made in the answer, and the cause went to trial on the issues thus framed.

The plaintiffs followed one of the approved forms of pleading an action upon a written contract "by setting forth its substance according to its legal effect." *Santa Rosa Bank v. Paxton*, 86 P. 193, 194, 149 Cal. 195, 198. The contracts were not attacked for fraud, mistake, misrepresentation, or on other equitable grounds, and no revision or reformation of the contracts was sought. The allegations of fraud and misrepresentation go only to the alleged breach of that portion of the alleged contracts by which it was claimed that the defendant agreed to convey to each of the plaintiffs an undivided interest in the lands in proportion to the amount paid by each, but that, having falsely represented to them the cost of the lands, had conveyed to them but 100 acres each. The plaintiffs do not claim that the defendant, while occupying a station of trust and confidence, had overreached his position, or that they had suffered any damage because the proper-

ty was not worth what they paid for it, or because the defendant had done any act to their injury. They do not repudiate their written contracts as they allege them to be, but, relying upon them, ask for their specific performance.

On the trial of the case the plaintiffs did not offer the alleged written contracts in evidence, made no offer of proof that they had ever been executed, and made no pretense that they had been lost or destroyed. Their case consisted of oral evidence of the conversations and negotiations had by the parties prior to the execution of the alleged written contracts, which evidence tended to show that the parties orally agreed in the same terms as the complaint alleged they contracted in writing. All this evidence was offered over the objections of defendant, who subsequently put in evidence two written contracts executed by the parties at the time alleged in the complaint, but which were materially different from those alleged. The situation is that the plaintiffs sued upon allegations that two written contracts were executed, proved that they were not, and then recovered upon them.

The difference between the parties is this: The plaintiffs alleged that the parties agreed in writing that the defendant should purchase from the Southern Pacific Railway Company a tract of land, describing it, and which consisted of 628.88 acres, and that the defendant agreed to transfer to them an undivided interest in said tract in proportion to the amount paid by each. The defendant answered that he had arranged for the purchase of the south half only of said tract, consisting of 314.44 acres; that he had paid to the Southern Pacific Company the purchase price thereof on October 1, 1920, but that a few days thereafter he was informed by the railway company that it would not sell the south half of said tract, but that it would be necessary for him to buy the entire tract of 628.88 acres, and that the money already paid would be accepted on account of the purchase of the entire tract. He then denied that the parties had ever agreed that the interest of the plaintiffs therein should be in proportion to the amount paid by each. It was then specifically alleged that the parties had on different dates separately entered into a contract to buy an undivided 100 acres of said land from the defendant for the sum of \$1,500.

The undisputed proof is that the written contracts as alleged in the complaint were never executed, but that on October 5, 1920, the plaintiff Altman, and, on November 5, 1920, Morris Allman, each entered into a contract in writing with the defendant, both of the same tenor and effect, wherein it was recited that the defendant had purchased the entire tract of land, and that the second party (one of the plaintiffs) was purchasing from the defendant an undivided 100 acres of said

land for the sum of \$1,500, the payment of which was therein acknowledged. The purpose of these agreements seems to have been to satisfy the purchasers as to their interest in the land while the defendant was completing the purchase from the Southern Pacific Company. For this purpose it was agreed that the defendant should execute his quitclaim deed to an undivided 100 acres of said land to each of the purchasers, and that they were to hold these deeds in escrow until the defendant had obtained a warranty deed from the Southern Pacific Company, and that when the defendant's title to the land was clear he should execute to each of them a deed conveying 100 acres to each, which should thereupon be recorded. It further appears that these deeds were duly executed and delivered and recorded some time in February, 1921.

The trial court found that on or about October 5, 1920, the parties entered into "an agreement" (not written contract as alleged in the complaint), whereby the defendant agreed to purchase the land described in the complaint for the three parties as a joint adventure at the price of \$15 an acre, and "the interest of each to be an undivided interest in proportion to the amount paid by each in cash, * * * and that said Bernard Altman and Morris Allman should receive each an undivided 100 acres of the above-described lands." There is a hopeless conflict in these findings. If the plaintiffs were to each receive an undivided 100 acres of the tract, they have no complaint so far as the transfer is concerned, as it is conceded that they each received and recorded their deeds to that acreage and hold the undisputed title thereto. On the other hand, if the agreement called for a division in proportion to the amount paid by each, it is apparent they were entitled to more than the 100 acres which they have received. The confusion seems to have come from the fact that the preliminary arrangements were made on the basis of the contemplated purchase by the defendant of a tract of land consisting of 314.44 acres. When, therefore, the defendant promised to each of the plaintiffs that he would transfer to each of them an undivided 100 acres of the tract he would have retained for himself about 114 acres, and thus each of the three parties would have owned approximately one-third of the entire tract. All the evidence of conversations between the parties relating to the contemplated purchase occurred prior to October 1st, when for the first time the defendant learned that it would be necessary for him to buy the entire tract of 628.88 acres.

[1, 2] There is a complete failure of the proof to correspond with the allegations of the complaint. Treating the action as one for the specific performance of a contract relating to real property, it was necessary to

prove: (1) Either that the contract was in writing or that it had been partially performed (section 1741, Civ. Code); and (2) that the contract, whether written or oral, contained all the material terms expressed in a sufficiently definite manner. Unless the meaning and intent of the parties can be placed beyond the bounds of mere conjecture by full and clear proof a court of equity cannot enforce its provisions. *Raymond v. Laboudigue*, 84 P. 189, 148 Cal. 691, 694; *Buckmaster v. Bertram*, 200 P. 610, 186 Cal. 673, 676. It is impossible to say from the record before us, and particularly in view of the conflicting finding, whether the plaintiffs agreed to take an undivided one-third interest in the 314.44 acres; whether they agreed to take a proportion of 628.88 acres equal to the amount paid by them or whether they agreed to take but 100 acres, and, if so, whether this acreage was to come from the south half of the entire tract or from any portion thereof which the defendant elected to convey to them. Because of these uncertainties the case comes squarely within the rule of *Buckmaster v. Bertram*, supra, and on a retrial of the case care should be taken to determine with exactness the actual agreement which the parties made.

Judgment reversed.

We concur: LANGDON, P. J.; STURTEVANT, J

76 Cal. App. 594
COPPUCK v. HUFF. (Civ. 5016.)

(District Court of Appeal, First District, Division 1, California. Feb. 23, 1926.)

Trover and conversion $\S$ 40(3)—Evidence held to show plaintiff had no title to cigar stand fixtures and merchandise alleged to have been converted.

Judgment for defendant, in suit for conversion of cigar stand, business, and fixtures, held sustained by evidence showing plaintiff never was owner of fixtures nor of merchandise at time of conversion, but that fixtures were part of hotel of which defendant was manager; that only right plaintiff had in cigar stand was that of a month to month tenant, who had relinquished possession by failure to pay rent.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Albert H. Coppuck against John Doe Huff. From a judgment for defendant, plaintiff appeals. Affirmed.

Goldman, Nye & Surr, of San Francisco, for appellant.

Leon Samuels, M. V. Spicer, and Chas. J. McDonnell, all of San Francisco, for respondent.

TYLER, P. J. Action in conversion. The complaint alleges that on or about the 11th day of June, 1923, plaintiff was the owner and entitled to the possession of a certain cigar stand, business, and fixtures located in the Hotel Keystone at No. 54 Fourth street, San Francisco; that on said last-named day defendant unlawfully took possession of the same and converted the property to his own use, to plaintiff's damage in the sum of \$650, which amount is alleged to be the reasonable value of the property.

Defendant answering denied title in the plaintiff. The trial court found that plaintiff had no title to the property in question and never was the owner thereof, and it was decreed that he take nothing by his action, and judgment was accordingly entered in favor of defendant. It is claimed that the evidence does not support the findings as to ownership or title.

There is no merit in this contention. There is ample evidence to show that the only right plaintiff ever had in the premises was as a tenant at the monthly rental of \$50 per month. It was alleged in the answer and it appeared in evidence that plaintiff purchased the business conducted at the cigar stand from one Shannon in the month of February, 1923. The cigar stand was located in the lobby of the building mentioned, and the fixtures connected therewith, including the cash register, were owned by the hotel.

When plaintiff took possession of the stand, he installed a manager therein, who was to conduct the same under a working agreement. The manager was to pay the sum of \$50 a month to the hotel as rent, which amount was its charge for the premises, and an additional sum of \$75 per month to plaintiff. These sums were to be paid out of the profits derived from the business, the manager to replenish and furnish the merchandise. Defendant Huff, who managed the hotel, did not approve of the arrangement. He was familiar with the amount of business usually carried on at the stand, and he knew that such business would not justify or even pay such a profit, and so informed plaintiff. Plaintiff, therefore, concluded to dispose of the stand. He advertised the place for sale and succeeded in procuring a purchaser in one J. Fleming, who agreed to give \$850 for the business. Of this sum he paid \$500 on account, and possession was surrendered to him. Fleming remained but a short time and sold the business to one Duke. Duke concluded that he had been swindled and he abandoned the business on May 25, 1923, and surrendered the keys to defendant as manager of the hotel, at the same time requesting him to dispose of the small quantity of stock on hand for his benefit.

The value of this merchandise was the sum of \$12. Plaintiff, at the time he acquired the business, agreed to pay as rental \$50 per

month in advance commencing on the 26th day of February, 1923. He failed to pay any rent after April 26th following. After Duke had abandoned the property, plaintiff had a conversation with defendant concerning the business. Defendant agreed to permit him to again take possession of the stand upon condition that he would install therein merchandise to the extent of \$300 and agree not to dispose of the business for a sum in excess of \$650. This offer was made by defendant, for the reason that he was desirous of having a cigar stand operated in the hotel, but at the same time he wanted to see to it that no one else was swindled. Plaintiff refused to accept the offer or to have anything further to do with the enterprise. At this time plaintiff made no claim of any kind whatsoever upon defendant growing out of his connection with the business. Defendant thereafter restocked the stand at an outlay of some \$300 and subsequently disposed of it, whereupon plaintiff brought this action. From this evidence it is manifest that plaintiff never was the owner of the fixtures, but, on the contrary, the same were a part of the Keystone Hotel, of which defendant was the manager. Nor was plaintiff the owner of any merchandise pertaining to the business at the time of the alleged conversion. Whatever merchandise he may have had was disposed of by his vendee or his successor long prior thereto.

As above stated, the only right that plaintiff had in the cigar stand was that of a month to month tenant. He had failed to pay his rent and had relinquished possession. The appeal is devoid of any merit.

The judgment is affirmed.

We concur: **KNIGHT, J.; CASHIN, J.**

76 Cal. App. 533

MORROW v. LEARNED. (Civ. 5285.)

(District Court of Appeal, First District, Division 2, California. Feb. 18, 1926.)

Appeal and error ⇐ 154(4)—Stipulations ⇐ 18(9).

A "stipulation for judgment" is consent to entry of judgment, and "consent to judgment" is waiver of errors by consenting party.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by William L. Morrow against George O. Learned. From the judgment rendered pursuant to oral stipulation, plaintiff appeals. Affirmed.

E. Neal Ames, of Los Angeles, for appellant.

Jesse F. Watterman and A. W. Hutton, both of Los Angeles, for respondent.

NOURSE, J. Plaintiff sued to cancel two written contracts and for damages for de-

fendant's failure to perform. Judgment was rendered in pursuance to an oral stipulation made in open court granting plaintiff all he prayed for, with a condition favorable to the defendant. The plaintiff has appealed on typewritten transcripts.

The contracts in question were executed on May 24 and May 25, 1918. At the time plaintiff was owner of certain patents for the manufacture of gasoline engines, and was also the owner of some manufactured engines, an air pump, and an air compressor. By the terms of the contracts these manufactured articles were sold outright to the defendant, and he agreed to manufacture and sell other engines in accordance with plaintiff's patents sufficient to supply the demand therefor, and to account to the plaintiff for a stipulated portion of the proceeds. On August 5, 1919, plaintiff served notice of cancellation of the contracts upon the ground that defendant had failed to perform, and subsequently commenced an action for a cancellation and for damages. Judgment went against the plaintiff, and no appeal was taken.

On August 26, 1921, plaintiff again served notice of cancellation, and then commenced this action for a cancellation and for damages. The defendant pleaded the former action as a bar, and that was the principal question before the trial court. The plaintiff waived the claim for damages, and offered no evidence on that issue. After the defendant had rested and while the plaintiff was finishing his rebuttal he called the defendant to the stand and drew from him the admission that he would be satisfied to have the contracts canceled and to return to plaintiff all his plans, blue prints, and patterns if plaintiff would only concede his right to manufacture and sell a two-cylinder engine which the defendant had perfected and which was not covered by any of plaintiff's patents. Plaintiff was immediately called to the stand by his counsel and agreed that he had no patent on the two-cylinder engine mentioned by the defendant, and that he had no objection to the defendant's continuing to manufacture and sell that engine on his own responsibility. Counsel for defendant then interposed that that was all his client desired, and that if such an agreement could be made he would consent to judgment as prayed by plaintiff. The trial court then suggested a recess to enable the parties to reach an agreement.

When court reconvened, the following proceedings occurred:

"Mr. Watterman (attorney for defendant): If your honor please, the matter of compromise has just been submitted, and it was this: In consideration of the cancellation of the contracts Mr. Morrow will allow Mr. Learned a license to sell this two-cylinder engine in consideration of a small royalty such as Mr. Learned may be willing to pay. He said he is willing to pay \$1 to Mr. Morrow. I think that is sufficient for each engine manufactured and

sold. Not to be paid, of course, until within 30 days after Mr. Learned receives payment for the engines that he sells. Mr. Learned naturally is willing to turn back to Mr. Morrow all the patterns that he received from him, blue prints, whatever they are, but to retain, of course, the engines which he bought from him and the so-called air pump or compressor.

"Mr. Palmer (attorney for plaintiff): I think that is a correct statement, Mr. Watterman.

"The court: Better postpone the case for a few days and draw up that agreement and dismiss the action.

"Mr. Watterman: I think we better have judgment entered by stipulation.

"The Court: All right.

"Mr. Palmer: I think the court had better return judgment by stipulation.

"The Court: All right; what do you propose be received as the stipulation, then?

"Mr. Palmer: Mr. Watterman stated it.

"Mr. Watterman: Suppose we prepare a proper judgment, including the stipulation, and have it o. k'd.

"Mr. Palmer: That is all right.

"The Court: All right.

"Mr. Watterman: The only question to be considered, then, is the question of costs.

"Mr. Palmer: Each party pay his own costs.

"The Court: That is satisfactory.

"Mr. Watterman: Each party pay his own costs.

"The Court: I don't understand exactly what the stipulation is. I suppose you will put it in writing and bring it here later on and postpone this to a date certain, or just mark it submitted until you bring in the judgment.

"Mr. Watterman: I think it may be just marked submitted.

"The Court: All right; mark it submitted."

Plaintiff subsequently became dissatisfied, engaged new counsel, and refused to sign a written stipulation for the judgment. The court, following the agreement made by the parties in open court, entered judgment accordingly, from which the plaintiff has appealed.

On this appeal several technical grounds are urged by the appellant—the failure to file findings of fact and conclusions of law, that the provision in the judgment permitting the respondent to manufacture and sell the two-cylinder engine was without the issues, that as the stipulation was not in writing it should have been entered in the minutes of the court by the clerk, and that the judgment was entered *ex parte* without the knowledge of appellant. It is not necessary to consider any of these grounds, because, if any error occurred, the appellant has not suggested any possible prejudice.

The judgment was entered on the stipulation of the parties given in open court. A stipulation for a judgment is a consent to the entry of the judgment, and "a consent to a judgment is a waiver of errors by a party consenting thereto." *Jackson v. Brown*, 23 P. 142, 82 Cal. 275, 278. A judgment so entered will not be disturbed on appeal. *Erlanger v. Southern Pacific R. R. Co.*, 42 P. 31,

109 Cal. 395; *Hibernia Savings & Loan Society v. Waymire*, 92 P. 645, 152 Cal. 286.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

76 Cal. App. 290

HANHART v. MADERA COUNTY.
(Civ. 3029.)

(District Court of Appeal, Third District, California. Jan. 22, 1926.)

1. Time ⚡6—Publication once each week for designated number of weeks satisfies requirement of publication for designated number of weeks.

Requirement that notice be published for designated number of weeks in some newspaper of county is fully satisfied by publication once each week for designated number of weeks, it not being necessary that full time prescribed shall intervene between first and last publication.

2. Counties ⚡114—Estoppel ⚡62(3)—Tax collector not authorized to contract for publication of delinquent tax list for four successive weeks and claim for fourth publication properly disallowed, and county board of supervisors not estopped from rejecting claim by reason of previous custom of paying therefor (Pol. Code, § 3766).

In view of Pol. Code, § 3766, providing for publication of delinquent tax lists once a week for three successive weeks, tax collector is without authority to contract for publication for four successive weeks, and, fourth publication being of no benefit to county, board of supervisors properly disallowed publisher's claim therefor, and, it being illegal, previous custom of paying for fourth publication does not estop rejection of claim.

Appeal from Superior Court, Madera County; Wm. D. Dehy, Judge.

Action by D. R. Hanhart, doing business under the firm name and style of Madera Mercury, against the county of Madera. Judgment for defendant, and plaintiff appeals. Affirmed.

Barcroft & Barcroft, of Madera, for appellant.

Mason A. Bailey, of Madera, for respondent.

FINCH, P. J. Plaintiff published the delinquent tax list of the defendant county, in the month of June, 1924, once each week during four successive weeks. His claim therefor was allowed for the first three publications, but disallowed as to the fourth. This action was brought to recover for the fourth publication. It was stipulated:

"That since the year 1893 it has always been the custom of the tax collector of the county of

Madera to require the publication of the delinquent tax list or roll to be made four times during the three weeks' interval prescribed by law, and until the rejection of the claim on which this suit is brought, the supervisors of the county of Madera have always paid for making four publications of said delinquent tax list or roll."

After three publications of the list had been made, the tax collector, "by his requisition in writing," directed plaintiff to "complete the printing of the 1924 delinquent tax roll of Madera county (for taxes of 1923) according to section 3766 of the Political Code of California." The plaintiff thereupon made the fourth publication. The defendant was given judgment, and the plaintiff has appealed.

[1] Section 3766 of the Political Code provides for the publication of delinquent tax lists by the tax collector as follows:

"The publication must be made once a week for three successive weeks in some newspaper of general circulation published in the county, and must be paid therefor at the county rate for advertising as fixed by the board of supervisors,"

In the construction of similar statutes the decisions of the courts of different jurisdictions are not in harmony. "In some jurisdictions it is held that a provision of the statute for publication 'once a week for four successive weeks' contemplates 'a full four weeks' publication, and not four times in four different weeks. In others the courts have held that such a provision does not mean four weeks of seven days each, and that the publication is completed on the day on which the summons is published in the fourth successive week, although less than twenty-eight days have elapsed since it was first published." 21 R. C. L. 1301. The latter rule of construction has been followed in this state. "Where the publication is made once each week instead of daily, it is not necessary that the full time prescribed by the order shall intervene between the first and last publication, but only that the summons shall be published once each week during the time prescribed." 21 Cal. Jur. 517. "It is settled in this state that a requirement that a notice be published for a designated number of weeks in some newspaper published in the county is fully satisfied by a publication once each week for the designated number of weeks. * * * The two publications, one each week, constituted a publication for two weeks." *Sherwood v. Wallin*, 154 Cal. 735, 739, 99 P. 191, 193. Where a defendant is a nonresident of the state, publication of summons must be made at least once a week for not less than two months. Code Civ. Proc. § 413. "It is not at all necessary that two full calendar months should intervene between the first and last publication." *Foster v. Veh-*

meyer, 133 Cal. 459, 460, 65 P. 974; *S. & L. Society v. Thompson*, 32 Cal. 347, 353. See, also, *Hensley v. Superior Court*, 111 Cal. 541, 542, 44 P. 232; *Wise v. Williams*, 88 Cal. 30, 34, 25 P. 1064; *Beck v. Wilson*, 49 Cal. App. 281, 282, 193 P. 158; *Hoffecker v. Board of Supervisors*, 23 Cal. App. 405, 408, 138 P. 371.

[2] Appellant contends that the tax collector had discretion to cause the list to be published for four weeks, and that the defendant is legally bound to pay for such publication. The tax collector is no more authorized to contract for publication for one week more than the law requires than for five or any number of weeks. The statute is the measure of his authority. A fourth publication was unnecessary and was of no benefit to the county. A board of supervisors may certainly disallow a claim for an unnecessary and unauthorized expense incurred by an officer of the county. The complaint alleges that the county accepted the benefit of the fourth publication, and appellant contends that defendant is estopped thereby and by its previous uniform custom of paying for a fourth publication. As stated, the county received no benefit from the fourth publication, and it requires no citation of authorities to show that the custom of allowing illegal claims for any length of time does not estop a public officer to reject a similar illegal claim. Undoubtedly the plaintiff made the fourth publication in good faith, but that fact does not warrant payment therefor from the public funds.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

76 Cal. App. 565

COOMBS v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.
(Civ. 5133.)

(District Court of Appeal, Second District, Division 1, California. Feb. 19, 1926.)

1. Master and servant §417(4¼).

Reviewing court cannot consider affidavits in reference to stipulation made at hearing before referee hearing claim for compensation for injuries.

2. Master and servant §373—Injury to employee's knee from putting more weight on it than on other, caused by position assumed in work, held compensable (Workmen's Compensation, Insurance and Safety Act [St. 1917, p. 833, § 3, subd. 4, as amended by St. 1919, p. 911, § 1]).

Injury to employee's knee, resulting from kneeling and putting more weight on injured knee than on the other, caused by position assumed in process of finishing cement work for employer, held compensable, in view of Workmen's Compensation, Insurance and Safety Act

(St. 1917, p. 833, § 3, subd. 4, as amended by St. 1919, p. 911, § 1).

3. Master and servant §417(7)—Reviewing court can annul award of Industrial Accident Commission only where finding of fact is without any evidence.

Reviewing court can annul Industrial Accident Commission's conclusions on questions of fact only where commission's finding of fact is without any evidence whatever to support it, and, where there is a conflict in testimony, commission is final arbiter.

4. Master and servant §417(7).

Reviewing court must assume that Industrial Accident Commission believed all evidence given which tends to sustain award.

5. Master and servant §417(5).

Reviewing court cannot annul award of Industrial Accident Commission because findings are inconsistent.

6. Master and servant §416—Industrial Accident Commission does not lose jurisdiction by failing to make award within 30 days (Workmen's Compensation, Insurance and Safety Act [St. 1917, p. 850, § 20a]).

Industrial Accident Commission does not lose jurisdiction of claim for compensation by failing to make award within 30 days; Workmen's Compensation, Insurance and Safety Act, § 20a, being directory only.

7. Certiorari §49—On writ of review, record of proceedings in lower tribunal must be ascertained wholly from record.

On writ of review, record of proceedings in lower tribunal must be ascertained wholly from record as shown by return to the writ, except that in a proper case an amended or supplementary return might be required.

Proceeding under the Workmen's Compensation Act by Oliver J. Musland, claimant, opposed by S. H. Coombs, employer. To review an award of the Industrial Accident Commission to claimant, the employer brings certiorari. Award affirmed.

John A. Rush, of Los Angeles, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondents.

YORK, J. [1] The only questions raised in support of the allegations of the petition for a writ of review herein are questions that involve the sufficiency of the evidence to sustain the findings. We cannot, of course, consider the affidavits in re the stipulation made at the hearing before the referee, as the record of this matter before us cannot be so made up or so changed.

[2] The evidence of the claimant was that he was not injured in a ball game as several witnesses have stated that he had told them. He denied having ever stated this. He further testified that he first noticed the injury to his knee but a few days before he quit

work; that it was a gradual swelling, not the result of a sudden injury, but rather the effect of kneeling and putting more weight on the injured knee than on the other, necessarily caused, he stated, by the position he had to assume in the process of finishing cement work, which was the work which he was employed by the employer to do. This constituted a compensable injury. Subdivision 4 of section 3 of the Workmen's Compensation, Insurance and Safety Act of 1917, as amended, Stats. 1919, p. 911; Deering's Gen. Laws (1923 Ed.) Act 4749.

[3-5] In Walker, Petitioner, v. Industrial Accident Commission et al., respondents, 171 P. 954, 177 Cal. 738, L. R. A. 1918F, 212, the Supreme Court says:

"Our authority, with respect to the commission's conclusions on questions of fact, goes no further than to permit the annulment of an award where the commission's finding of a fact is without any evidence whatever to support it. Where there is a conflict in the testimony, or where opposing inferences may reasonably be drawn, the commission is the final arbiter."

In the case of Southern Pacific Co. v. Industrial Accident Commission, 170 P. 823, 177 Cal. 380, the Supreme Court says:

"This court, in reviewing awards of the commission, is not acting as a court of appeal. It has no power to weigh the effect of positive evidence. It must assume that the commission believed all the evidence given which tends to sustain the award made. Likewise the court has no power to annul an award because the findings are inconsistent."

In quoting from Dr. Magan's certificate of September 17, 1925, the petitioner herein omits from each reference to the same the word "apparently," and makes such statement out as an unequivocal statement of positive fact. Quoting from the brief of respondent Industrial Accident Commission, page 15, we adopt the following:

"The findings of fact of April 7, 1925, state that the employer was liable for the medical expense, the amount to be determined by supplemental proceedings. The award omits allowance of medical expenses for this reason. The award, therefore, is not subject to annulment. Whether a finding of fact can be annulled where the award is not involved is doubtful, as section 67, referring to review by the courts, provides only for review of orders, rules, regulations, decisions, and awards, and not findings of fact which are expressly made not subject to review.

"Furthermore, in the petition for rehearing filed by Coombs with respondent commission, no contention is made of error with respect to the finding of medical expense. The illegality was therefore waived and cannot now be raised.

Savercool's Case, Great Western Power Co. v. Industrial Accident Commission (Cal. Sup.) 238 P. 662. Section 64 (c), Workmen's Compensation Act.

"On May 26, 1925, respondent Commission made a supplemental award for medical expense. No petition for rehearing has been filed by petitioner challenging this order, and the supplemental award would seem therefore to have become final. Section 64(c), 65(a)."

The record shows that the following stipulation was entered into in the presence of the parties:

"7. That at said time the actual daily earnings of the employee were \$6, for employment six days a week, and that the average weekly earnings may be computed upon that basis."

As to the third proposition raised by the petitioner, the question is covered by the case of Moore Shipbuilding Co. v. Industrial Accident Commission (Cal. App.) 233 P. 392, 393.

There is no evidence in this matter to show any fact as to any part or portion of the injury suffered by respondent Musland having occurred or having been contributed to by any prior employment. The only evidence which we have is the evidence of Musland as to the fact that he first noticed the injury coming on a few days before he quit his employment. As a matter of fact, the petitioner herein contends that the injury occurred on the day after he quit his employment, in a ball game, which would probably of itself dispose of any such contention. Therefore it would have been beyond the power of the commission to make any award to be distributed in proportion among any other employers and for whom the applicant may have theretofore worked. As to the length of time that Musland worked there was a conflict as to that, but the total period under any way of figuring was more than 10 days, as claimed in the third paragraph of petitioner's points and authorities.

[6] As to the question of the Commission losing jurisdiction for failing to make the award within 30 days, we hold that section 20 (a) of the Compensation Act is directory only.

[7] On writ of review the record of the proceedings in the lower tribunal must be ascertained wholly from the record, as shown by the return to the writ, except that in a proper case an amended or supplementary return might be required. Bryant v. Board of Supervisors, 163 P. 341, 32 Cal. App. 502.

As there are sufficient facts in evidence, or shown by the stipulation, to sustain each and every one of the findings of the commission, the award is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

76 Cal. App. 621

ANGELOPOULOS v. BOTTORFF, City Manager, et al. (Civ. 3067.)

(District Court of Appeal, Third District, California. Feb. 24, 1926.)

1. Constitutional law ☞275(1)—Fundamental right to engage in lawful business, not inimical to public welfare, cannot be taken away, except by due process of law and opportunity to be heard (Const. U. S. Amend. 14; Const. Cal. art. 1, §§ 1, 13).

The fundamental right to engage in a business or occupation otherwise lawful, and not inimical to public welfare, is different from occupations considered as mere privilege, and cannot be taken away except by due process of law and opportunity to be heard, in view of Const. U. S. Amend. 14, and Const. Cal. art. 1, §§ 1, 13.

2. Constitutional law ☞275(1)—Right to conduct restaurant business is a property right, which cannot be taken away, except by due process of law.

The right to conduct a restaurant business is a property right as distinguished from an occupation or business permitted to be conducted or engaged in as a mere privilege, and the deprivation, interference, or prevention of one's engaging therein is a deprivation of a property right, which cannot be done except by due process of law.

3. Constitutional law ☞287—Cancellation of restaurant license without notice or opportunity to be heard held a deprivation of property right without due process of law (Const. U. S. Amend. 14; Const. Cal. art. 1, §§ 1, 13).

Cancellation of restaurant license under ordinance, without notice and opportunity to be heard, held void as deprivation of property right without due process of law, in violation of Const. U. S. Amend. 14, and Const. Cal. art. 1, §§ 1, 13.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by John Angelopoulos against H. C. Bottorff, as City Manager of the City of Sacramento, and others, to enjoin interference with plaintiff's business as restaurant keeper. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

Ralph H. Lewis, of Sacramento, for appellant.

R. L. Shinn and C. J. Hasman, both of Sacramento, for respondents.

PLUMMER, J. Plaintiff, a restaurant keeper of the city of Sacramento, began this action to restrain the defendants from interfering with his business as such restaurant keeper, under and by virtue of a purported revocation of a license theretofore issued to him authorizing such business upon payment of certain fees, etc.

The demurrer of the defendants to the

plaintiff's complaint was sustained without leave to amend, and the plaintiff appeals. It appears from the complaint that the plaintiff is the owner of a certain leasehold interest in property situate at 205 K street in the city of Sacramento; that the value of said lease is the sum of \$1,000; that at the time of interference complained of the plaintiff was conducting a restaurant business at the location named under a license authorizing him so to do. The record shows that on or about the 1st day of October, 1921, the city council of the city of Sacramento enacted an ordinance providing for the licensing and regulating the carrying on of certain trades, professions, occupations, etc.; that on or about the 1st day of December, 1921, the ordinance just referred to was amended by including restaurant keepers. Thereafter, and on or about the 11th day of May, 1922, the city council enacted Ordinance No. 73, fourth series, purporting to amend the ordinance first mentioned herein, known as Ordinance No. 18, fourth series. Ordinance No. 73, so enacted, contained a provision that licenses issued under Ordinance No. 18, fourth series, might thereafter be canceled by the city council at any time without notice to holders thereof, upon satisfactory evidence to the city council that the holder had violated any of the conditions of the license, or had violated any law of the United States or of the state of California or any ordinance of the city of Sacramento, and that thereafter the person whose license had been so canceled should not be entitled to receive any business license of any character from the city of Sacramento except upon a permit from the city council. On the 17th day of August, 1922, the city council of the city of Sacramento enacted Ordinance No. 87, fourth series, providing further that, in the event of a cancellation for cause of any business license issued by the city of Sacramento, the license fee paid by the licensee for such license should be forfeited to the city of Sacramento. In the event of the cancellation for cause of any license issued by the city of Sacramento for any business at a particular location, no other license shall be issued to any person for the same kind of business at said location, nor for the conducting of any of the following businesses: (Here follows a list of businesses named, including that of restaurant keeper) within one year after said cancellation, except upon a permit from the city council. The ordinance then provides that the license may be granted or refused at the discretion of the city council, and may be revoked without notice to the holder thereof upon evidence satisfactory to the council that any of the statements set forth in the application are untrue, or that the conditions specified in the application have been violated; also that the applicant shall deposit with the city controller the sum of \$500 in cash as se-

curity that the licensee will not violate, nor permit to be violated, any law of the United States, or of the state of California or any ordinance of the city of Sacramento in the conducting of, or in connection with, said business, and, further, that, if the city council shall at a hearing thereof determine any of said laws or ordinances have been violated, or permitted to be violated by the licensee, the council shall have the right to declare said deposit forfeited to the city of Sacramento.

The record shows further that upon the enactment of Ordinance No. 18, fourth series, the plaintiff applied to the city controller of the city of Sacramento for a license to conduct a restaurant business on the premises named; that a license was issued to him, and ever since said date the plaintiff has paid the fees provided by said ordinance for the license pertaining to his business as a restaurant keeper; that said license was in full force and effect at the dates herein mentioned; that on the 3d day of January, 1924, the city council of the city of Sacramento revoked plaintiff's license upon the ground that he had theretofore, to wit, on the 30th day of December, A. D. 1923, in the police court of the city of Sacramento, been convicted on a charge of having in his possession three ounces of intoxicating liquor, and for no other cause whatever; that on the 4th day of January, 1924, the defendants notified the plaintiff that his license had been revoked, and that he would not longer be permitted to conduct his restaurant business at the place named, and that he could not thereafter engage in any business in the city of Sacramento without the consent of the city council, and threatened to arrest the plaintiff and prosecute him upon the charge of violating Ordinance No. 18, fourth series, for the attempt to continue in business. The complaint contains further allegations as to what the defendants threatened to do, and concludes with the allegation of the damages suffered by such acts. It also further appears that the purported revocation of plaintiff's license was had without any notice being served upon him or opportunity of hearing being given, nor does it appear anywhere in the record that the possession of the three ounces of liquor referred to as the alleged cause of the revocation of plaintiff's license was had or possessed by the plaintiff in connection with his restaurant business.

While the same constitutional objections are urged by the appellant against the various provisions of the different ordinances set forth herein for the purposes of this decision, we need consider only one question—the fact that the plaintiff's license was ordered revoked by the city council without notice being given to the plaintiff and an opportunity afforded him to be heard and show cause, if any he had, why his license should not be revoked.

[1] There appears to be some conflict in the authorities relating to the power of the city council to revoke a license without notice, apparently due to the fact that the distinction has not been kept clearly in mind between a right to do business and a privilege to engage in certain occupations, usually attended by acts inimical to the public welfare, such as the keeping of saloons. But whatever the rule is in other states it is now well settled in California that the fundamental right to engage in a business or occupation otherwise lawful and not inimical to the public welfare is different from occupations considered as a mere privilege, and is surrounded with certain constitutional safeguards, among which is the right to be heard, and the further fact that this right cannot be taken away except by due process of law. These matters are clearly set forth in the case of *Abrams v. Daugherty*, 212 P. 942, 60 Cal. App. 297:

"The Fourteenth Amendment to the Constitution of the United States provides that no person shall be deprived of life, liberty, or property, without due process of law. Article I, section 1, of the Constitution of California, provides that all men have certain inalienable rights, among them being those of enjoying liberty and possessing and protecting property, and section 13 thereof provides that no person shall be deprived of life, liberty, or property, without due process of law. The deprivation of such right without due process of law would be a violation of these provisions. The meaning of this is that no one can be deprived thereof without notice and an opportunity for a hearing before some tribunal authorized to determine the question.' To the same effect is *Brecheen v. Riley* (200 P. 1042, 1044) 187 Cal. 121, 124, where the court, having the Real Estate Brokers' Act under consideration, say: 'It is firmly established that it is the right of every person to pursue any lawful business or vocation he may select, subject to such legal restrictions and regulations as the proper governmental authority may impose for the protection and safety of society, and that such right is valuable and must be protected and secured, and cannot be taken from those who possess it, without 'due process of law.' In *Schomig v. Keiser* (209 P. 550, 551) 189 Cal. 596, while considering the same act, the court say: 'The portion of the act which authorizes the real estate commissioner to forfeit the license of a broker or salesman and take it away from him is highly penal in its nature, and should not be construed to include anything which is not embraced within its terms.' In *Hovey v. Elliott*, 17 S. Ct. 841, 167 U. S. 409, 418 (42 L. Ed. 215, see, also, *Rose's U. S. Notes*), it is said: 'It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered.'"

In *Suckow v. Alderson*, 187 P. 965, 182 Cal. 247, in considering the right to be heard, the court holds that due process of law includes "the meaning of this is that no one can be deprived thereof without notice and an opportunity for a hearing before some tribunal authorized to determine the question," and that these are matters guaranteed by the Constitution of the state of California. In *Brechen v. Riley*, 200 P. 1044, 187 Cal. 122, the court, in considering the questions which we have here presented, said:

"It is firmly established that it is the right of every person to pursue any lawful business or vocation he may select, subject to such legal restrictions and regulations as the proper governmental authority may impose for the protection and safety of society, and that such right is valuable and must be protected and secured, and cannot be taken from those who possess it, without 'due process of law'"—citing a number of authorities.

[2] We do not think it necessary to cite authorities that the right to conduct a restaurant business is a property right, as contradistinguished from occupations or businesses permitted to be conducted or engaged in as a mere privilege, and that the deprivation or interference or prevention of one's engaging in the business of conducting a restaurant is a deprivation of a property right, and that all the cases of this state holding that such property rights cannot be taken away except by due process of law are applicable. In *Modern Loan Co. v. Police Court*, 108 P. 56, 12 Cal. App. 582, the court, in considering certain sections of the Penal Code relating to the restoration of stolen property, said:

"One who is in possession of property under a claim of right cannot be deprived of its possession without due process of law; and in order to constitute due process of law, there must be notice of the time and place of hearing and an opportunity to be heard. * * * The statute should give the parties interested in the property an opportunity of presenting, in a deliberate, regular and orderly method, issues of fact and of law to the court or to a court and jury unless a jury is waived. Under these two sections, irrespective of the value of the property, and without any right of appeal, and without the slightest notice, * * * the magistrate may proceed * * * to * * * make an award. A proceeding permitting this contravenes the provisions of the state and federal Constitutions that a person cannot be deprived of his property without due process of law."

It has been held that notice and opportunity to be heard is a right and not a mere matter of discretion. In *Brookes v. City of Oakland*, 117 P. 433, 160 Cal. 423, the same rule is applied with regard to sewer assessments, holding notice and an opportunity to be heard necessary. Also in *Bannerman v. Boyle*, 116 P. 732, 160 Cal. 197, it is held that, where it is provided that an officer may be removed for cause without other qualifying

words, such removal can only be had after notice and hearing. The same rule is also laid down in 16 Cal. Jur. 261. In the case of *State ex rel. Makris v. Superior Court of Pierce County*, 193 P. 845, 113 Wash. 296, 12 A. L. R. 1428, the questions which we are here considering were fully considered, and the rule which we have stated followed. In the *Makris Case*, supra, the ordinance involved contained the following:

"The license of any business mentioned in this section may be revoked by the commissioner of public safety in his discretion for disorderly or immoral conduct or gambling on the premises, or whenever the preservation of public morality, health, peace or good order shall in his judgment render such revocation necessary," etc.

No provision was made for hearing. The commissioner of public health, being of the opinion that a certain candy store having permission to sell soft drinks, without any previous notice or hearing, notified Makris, among other things, as follows:

"You are hereby advised that said license is revoked, effective to-day, under the provisions of section 47 of Ordinance No. 6749 as amended by Ordinance No. 7301."

The court, in holding the order of revocation void and the section of the ordinance providing therefor void, used the following language:

"Our decision in *Seattle v. Gibson* [165 P. 109, 96 Wash. 425] and those of the federal and state courts upon which that decision is rested render it plain that it is sufficient to render a law or ordinance void in the light of these constitutional guaranties, if the prescribed manner of administering such law or ordinance results in leaving the question of the propriety of issuing, withholding, or revoking a license to conduct an ordinarily lawful business, and thus the question of who may and who may not engage in such business, to the decision of any officer or set of officers, uncontrolled by any prescribed rule of action,"

—and further said that no law can be passed "grant[ing] to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens," which corresponds to section 21 of article I of our state Constitution.

[3] Nothing said herein is intended to limit or restrict the powers of the city council to enact all such regulations generally classified as police regulations to protect the public health and morals in relation to the conduct of the business licensed. The ordinances under consideration go much further and include violations of law having no relation to the businesses being conducted. Under the terms of the ordinances, the violation of the state traffic laws might be made the basis for the revocation of a license, which leads to only one of two conclusions, that the violations of law or ordinance referred to must have relation to the business licensed, or that

the ordinance is void in toto. The violation of law alleged in this case does not appear to have been in connection with the business licensed, but, whether such be or be not the case, the fact that the revocation was had without notice or hearing renders the purported order of cancellation void, and, as that is the only question necessary to be decided in this case, we limit our ruling to the failure to give notice and afford an opportunity for a hearing.

Upon the matters set forth in plaintiff's complaint, it would appear that the plaintiff is entitled to the relief asked, but, as the cause is before us upon a judgment entered after an order of the trial court sustaining the defendants' demurrer to the plaintiff's complaint, we are limited to reversing the judgment, with directions to the trial court to overrule defendants' demurrer and permit the defendants to answer the plaintiff's complaint within such reasonable time as such court may allow, and it is so ordered.

We concur: FINCH, P. J.; PULLEN, Justice pro tem.

76 Cal. App. 645

PEOPLE v. CUNNINGHAM. (Cr. 1297.)

(District Court of Appeal, First District, Division 2, California. Feb. 26, 1926.)

1. Criminal law $\S$ 829(6)—Refusal of instructions to acquit if defendant was laboring under defect of reason, could not distinguish between right and wrong, or was moved by irresistible impulse, held not error, in view of instructions given.

In murder trial, refusal of instructions to acquit if defendant was laboring under any defect of reason, could not distinguish between right and wrong, or was moved by irresistible impulse, and that law excepted insane persons and incapables from responsibility for crime, held not error, in view of instructions given.

2. Criminal law $\S$ 773(1)—Instructions to acquit if defendant was laboring under defect of reason, could not distinguish between right and wrong, or was moved by irresistible impulse, and that insane persons and incapables are not responsible for crime, held not called for by evidence.

Evidence in murder trial held not to call for instructions to acquit if defendant was laboring under defect of reason, could not distinguish between right and wrong, or was moved by irresistible impulse, and that law excepts insane persons and incapables from responsibility for crime.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Merrie Cunningham was convicted of second degree murder, and she appeals. Affirmed.

Joseph L. Fainer, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

NOURSE, J. The defendant was tried upon an information charging her with the murder of Robert Smith. She was convicted of second degree murder and has appealed from the judgment of conviction and from the order denying her motion for a new trial.

[1] The sole ground raised on the appeal is that the trial judge erred in refusing to give five different instructions requested by the appellant touching the subject of mental incapacity. In these proposed instructions the trial judge was asked to advise the jury that the appellant was entitled to an acquittal if they should find that at the time of the commission of the act she had been laboring under any defect of reason, temporary or otherwise, or was without sufficient capacity to distinguish between right and wrong or was moved by an irresistible impulse, and that the law of the state excepted from responsibility for crime insane persons and "incapables." Though these instructions were refused, the trial judge did instruct the jury fully on the subject of the necessity of a finding of the existence of a criminal intent, a sound mind, and discretion on the part of the accused. This was followed by instructions covering the presumptions of law regarding the existence of criminal intent and the presumptions covering sanity and insanity. All this was followed by an instruction reading:

"A person is not guilty of any crime, if at the time of the commission of the act charged such person is not conscious of its commission, or if the person committed the act or made the omission charged through misfortune or by accident, where it appears that there was no evil design, intention or culpable negligence."

[2] From an examination of the entire record, we are satisfied that the jury was fully and fairly instructed on all the material issues of the case, and that there was no error in the refusal to give any one of the five proposed instructions heretofore mentioned. The case was a clear case of murder frankly and freely admitted by the appellant. She and the deceased had been living together as husband and wife for a period of about two months when the deceased informed her that he intended to leave her and go back to an old sweetheart in Oregon. This statement was made to her at about 2 o'clock in the morning while they were in bed together, and was followed by some pleading on the part of the appellant and stout resistance on the part of the deceased. The deceased went to sleep, and about two hours later the appellant, having remained awake and brooded upon the approaching separation, arose from

bed, went to a dresser that stood in the room, and procured a revolver, and, returning to the bed, shot the deceased in the back while he still slept. The revolver was discharged four times; two bullets striking the deceased, one shattering a mirror hung over the dresser, and another striking the wall of the bedroom. The appellant immediately confessed her part in the shooting and gave as the only reason therefor the threat of the deceased to leave her on the following day. There was not at any stage of the trial any plea or any suggestion of insanity or mental incapacity of either a temporary or of a permanent nature. In this view of the record, the evidence did not call for or justify the giving of the instructions which the appellant proposed.

Judgment and order affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

76 Cal. App. 530

WELDON v. LAWRENCE et al. (Civ. 5196.)

(District Court of Appeal, First District, Division 1, California. Feb. 18, 1926.)

1. Quieting title ☞10(1).

Plaintiff, in action to quiet title, cannot prevail unless he shows title in himself.

2. Vendor and purchaser ☞228(2)—Attempted conveyance of title to one who was not a bona fide purchaser for value without notice is ineffective, as against a prior grantee to whom grantor had theretofore conveyed valid title.

Where grantor conveyed title by valid deed, an attempted subsequent conveyance of title by same grantor to another, who was not a bona fide purchaser for value without notice, is ineffective as against prior grantee.

3. Appeal and error ☞1011(1)—Trial court's finding, on conflicting evidence, that grantor delivered deed with intent and understanding that grantee should record it, held controlling on appeal.

Question of delivery of deed being one of fact to be found from surrounding circumstances, trial court's finding on conflicting evidence that grantor executed and delivered deed conveying property, with intent and understanding that grantee should record the same, held controlling on appeal.

4. Deeds ☞60—Delivery of deed as present deed of grantor operates to vest title immediately, without reference to performance of conditions, though contrary to express stipulation of parties (Civ. Code, § 1056).

In view of Civ. Code, § 1056, on delivery of deed to grantee as present deed of grantors, it became free of any conditions not expressed in deed itself, and operated to vest title immediately without reference to performance of conditions, though such result may have been contrary to expressed stipulation of parties.

5. Fraudulent conveyances ☞172(1).

That grantor may have executed deed for purpose of defrauding his creditors does not affect validity of deed as between parties thereto.

6. Deeds ☞8—Vendor, after conveying valid title, cannot subsequently convey such title to another as would entitle such other to maintain action to quiet title against prior grantee.

After grantor has made valid transfer of title to another, he cannot subsequently convey such title to one not a bona fide purchaser for value without notice, as would entitle latter to maintain action to quiet title against prior grantee.

7. Deeds ☞19—Where validity of completely executed conveyance transferring title was not made dependent on performance of future conditions, grantee's failure to perform promise to pay balance of purchase price is not legal grounds for nullification.

Where validity of completely executed conveyance, transferring title for valuable consideration, was not by its terms made dependent on performance of future conditions, failure of grantee to perform promise made by him in regard to payment of balance of purchase price would not serve as legal grounds for nullification of conveyance.

8. Pleading ☞354(2)—Trial ☞89—Refusal, in action to quiet title, to strike out answers and testimony of one in possession made party defendant, held not erroneous (Code Civ. Proc. § 389).

Where, in action to quiet title, one in actual possession of property was made party defendant, held, that under Code Civ. Proc. § 389, court did not err in refusing to strike out answers and testimony of such defendant, as his interest in property was necessary element to be considered.

9. Judgment ☞106(2)—Default judgment on supplemental complaint against defendant, made prior to time defendant was substituted as party defendant, and without his having been served with copy thereof, held properly denied (Code Civ. Proc. § 585).

Request for default judgment on supplemental complaint against defendant, made prior to time he was substituted as party defendant, and without such defendant having been served with copy thereof, held properly denied, in view of Code Civ. Proc. § 585.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action to quiet title by Thomas P. Weldon against E. W. Lawrence and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Fred A. Shaeffer, of Santa Maria, for appellant.

W. C. Carpenter of Los Angeles, and H. J. Dubin and A. E. Campbell, both of San Luis Obispo, for respondents.

KNIGHT, J. This is an action to quiet title, whereby plaintiff sought to obtain a decree for the cancellation of a deed executed by plaintiff's predecessors in interest, purporting to convey to defendant E. W. Lawrence certain real property situate in the city of San Luis Obispo; also, to declare plaintiff to be the owner and entitled to the possession of the premises described in said deed and to quiet his title thereto against all claims asserted by the defendants under said deed or under a contract of sale executed simultaneously with said deed; also, for damages in the sum of \$200 for the alleged unlawful detention of said premises. The judgment was that plaintiff take nothing by his action and that defendants recover their costs. Plaintiff appeals.

The following facts appear from the record: Dio Sherwin and his wife, Irene Sherwin, were formerly the owners of said property, which was subject to a bank mortgage of \$3,500. On May 16, 1922, they entered into a contract of purchase and sale with defendant E. W. Lawrence, whereby they agreed to sell said property to Lawrence for the sum of \$5,500. Payment of the sum of \$500 was made at the time the contract was signed, and the purchaser agreed to pay an additional \$1,500 in cash on July 1, 1922, and to assume the payment of the principal sum of said bank mortgage. Said contract provided for immediate possession by the purchaser; also, that the seller should furnish a certificate showing clear title at date of sale, and upon payment of the balance of the purchase price would give a good and sufficient deed conveying the property free and clear of all incumbrances. Said contract further provided that if the title proved defective the sum of \$500 should be returned, but that if said certificate showed clear title and final payment was not made according to the agreement, said sum should be forfeited; that time was of the essence of the agreement. Contemporaneously with the execution of said contract of purchase and sale and as part of the same transaction, Sherwin and his wife signed and acknowledged a deed conveying said property to Lawrence. The deed and the contract were prepared by and signed in the presence of W. C. Carpenter, with whom Lawrence was engaged in certain real estate enterprises. The legality of the delivery of said deed to Lawrence is challenged by appellant, but it is undisputed that Lawrence came into possession of said deed in Carpenter's office on the day of its execution and immediately filed the same for record. Shortly after the recordation of said deed, defendant Hodson, for whom the property was purchased by Lawrence, went into possession and moved onto said property a house which he had previously purchased. He has since expended about \$6,000 in making other per-

manent improvements. Final payment on the purchase price was not made by Lawrence on July 1, 1922, the day on which it became due, for the reason, as he claims, that the Sherwins failed to furnish a certificate showing clear title to the property and that in fact the title thereto was not clear. With respect to the matter of title the record shows that on May 18, 1922, two days after said contract and said deed had been executed, a default judgment was entered against the Sherwins in the superior court of San Luis Obispo county for the payment of the sum of \$615.05; and on the following day, May 19, 1922, the mortgagee instituted foreclosure proceedings wherein attorney's fees in the sum of \$350 were demanded. Later, and on July 14, 1922, the sheriff served a writ of execution on Lawrence for the collection of the Sherwin judgment, obedient to which Lawrence paid the sum of \$632.58. On July 19, 1922, the Sherwins executed a second deed to the property by which they attempted to convey title to appellant Weldon, and on July 26, 1922, Weldon commenced this action. Weldon was not a bona fide purchaser for a value, having accepted said deed with full notice of the existence of the former deed and under an agreement with the Sherwins to divide with them the amount of any purchase price which might be received by him upon subsequent sale of the property. The trial court found in favor of defendants on all contested issues except those arising under a supplemental complaint in which appellant claimed damages for alleged unlawful detention of said property, and as to those issues the court made no findings. The form of judgment rendered was that plaintiff take nothing by his action and that defendants recover their costs.

Appellant does not seek to collect the balance due on the purchase price under the executory terms of said contract of sale; the action being, as he contends, one to quiet title, by which he asks for a decree adjudging him to be the owner in fee simple of said property to the exclusion of all claims made by the defendants. The obvious effect of such a decree, if obtained, would be to forfeit the \$500 paid by Lawrence to the Sherwins and to vest in appellant ownership of the improvements placed on the property by Hodson.

[1] "It is elementary that a plaintiff in an action to quiet title cannot prevail unless he shows title in himself." *Williams v. City of San Pedro, etc., Co.*, 94 P. 234, 153 Cal. 44; *Sears v. Willard*, 130 P. 869, 165 Cal. 12; *Rockey v. Vieux*, 178 P. 712, 179 Cal. 681; *Kilfoil v. Warden*, 189 P. 303, 46 Cal. App. 503. In the instant case the trial court found specifically that it was not true, as alleged in the complaint, that appellant was and is the owner in fee simple of said property, and the first point urged by appellant

for a reversal of the judgment is that the evidence does not support that finding.

[2-4] The determination of the question of ownership depends entirely upon the validity of the Lawrence deed. If that deed be valid, title was thereby conveyed to and vested in Lawrence, and it would follow that the attempted subsequent conveyance of title by the same grantors to appellant, who was not a bona fide purchaser for value without notice, was ineffective as against Lawrence as prior grantee. *Bell v. Pleasant*, 78 P. 957, 145 Cal. 410, 104 Am. St. Rep. 61; *Robinson v. Muir*, 90 P. 521, 151 Cal. 118; *Slaker v. McCormick-Saeltzer Co.*, 177 P. 155, 179 Cal. 387; *Purcell v. Victor Power & Mining Co.*, 156 P. 1009, 29 Cal. App. 504. Appellant's attack upon the Lawrence deed is based on the single ground that there was not a valid delivery thereof and consequently no passing of title. As to the question of delivery, the record shows a sharp conflict in the evidence, both Carpenter and Lawrence having contradicted the testimony given by the Sherwins to the effect that the deed was given to Carpenter as their agent and attorney, with instructions to hold the same until final payment was made on the purchase price. Carpenter testified in this connection that he did not recollect who actually handed the deed to Lawrence, but that he had not done so; that said deed did not come into his possession; that immediately after being signed said deed came into the possession of Lawrence in the presence of the Sherwins with the understanding that it should be recorded at once. The testimony of Lawrence was to the effect that after some discussion with the Sherwins in the presence of Carpenter as to whether or not the deed should be delivered, it was handed to him by the Sherwins with the understanding that it was to be recorded immediately. In that state of the record the trial court's finding that on May 16, 1922, the Sherwins "executed and delivered to said Lawrence their deed conveying said property to said Lawrence, and with the intent and understanding that he should record the same, * * *" is controlling on appeal, the question of delivery of a deed being one of fact to be found from the surrounding circumstances of each transaction (*Neely v. Buster*, 195 P. 736, 50 Cal. App. 695; *Williams v. Kidd*, 151 P. 1, 170 Cal. 631, Ann. Cas. 1916E, 703; *Thielen v. Thielen*, 182 P. 806, 41 Cal. App. 312); and said deed having been delivered, as the trial court found, to the grantee as the present deed of the grantors, it became freed from any condition not expressed in the deed itself, and operated to vest title immediately without reference to the performance of conditions, although such result may have been contrary to the expressed stipulation of the parties (*Mowry v. Heney*, 25 P. 17, 86 Cal.

471; *Lewis v. Brown*, 133 P. 331, 22 Cal. App. 38; 9 Cal. Jur. 165).

"A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made." Civ. Code, § 1056.

[5] Whether or not said deed was made by the Sherwins for the purpose of defrauding their creditors makes little difference. If such was their purpose, the validity of the deed, as between the parties thereto, was not affected because of that fact (*Lawton v. Gordon*, 34 Cal. 36, 91 Am. Dec. 670; *Ybarra v. Lorenzana*, 53 Cal. 197); or if it be assumed that such was not their purpose, the deed was nevertheless valid in view of the finding of the trial court that it was delivered.

[6] We conclude, therefore, that the Sherwins, having made a valid transfer of title to Lawrence under the deed of May 16, 1922, could not subsequently convey such title to appellant as would entitle him to maintain an action to quiet title against the prior grantee; hence the judgment of the trial court that appellant take nothing by his action must be sustained.

[7] A number of other legal questions have been presented by the appeal, arising from contentions made by the respective parties as to the alleged performance and nonperformance of certain conditions imposed by the contract of purchase and sale. We do not find it necessary, however, to inquire into or pass upon those questions. As previously stated, the action was brought not for the enforcement of an executory contract, but to quiet appellant's title, appellant seeking to nullify a completely executed conveyance transferring title to land, based upon a valuable consideration, to wit, an initial payment of \$500 on the purchase price, the validity of which conveyance was not by its terms made dependent upon performance of future conditions. If, therefore, it be assumed that Lawrence did fail to perform the promises made by him in regard to the payment of the balance of the purchase price, such failure would not serve as legal grounds for the nullification of said conveyance. *Tillaux v. Tillaux*, 47 P. 691, 115 Cal. 663. It may be conceded, as appellant asserts, that "the Lawrences cannot have the property and the money both." But the Lawrences are not attempting to maintain that inconsistent position. In their answer they allege that they are still ready, able, and willing to pay the full amount of the purchase price as required by said contract, less the amount paid to the sheriff in obedience to said execution. Obviously, after having accepted and asserted title under said deed, they would not be allowed to repudiate their written obligation to pay for said property.

It would therefore seem that the belief expressed by appellant as to the effect and operation of the judgment entered herein, is not well founded.

[8] It was not error for the trial court to refuse to strike out the answers and the testimony of Hodson. The latter was made a party defendant on stipulation of appellant, and was in the actual possession of the property at the time of the commencement of the action and had erected valuable improvements thereon. Up to the time of the decision of the trial court that appellant was not the owner of the land, Hodson's interest in the property was a necessary element in the case to be considered, and the evidence offered for the purpose of showing the circumstances upon which that interest was based and the extent of it was pertinent to the issues of the case. Code Civ. Proc. § 389; *Birch v. Cooper*, 69 P. 420, 136 Cal. 636.

[9] Appellant's request for a default judgment against defendant Hodson upon the supplemental complaint was properly denied. The record discloses that said supplemental complaint was filed long before Hodson was made a party to the action, and that the request for his default was made prior to the time he was substituted as a party defendant to said supplemental complaint, and without having been served with a copy thereof. Code Civ. Proc. § 585.

Findings upon the question of damages claimed under the supplemental complaint were not essential, in view of the fact that it was held that appellant was not the owner of the premises or entitled to the possession thereof.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

76 Cal. App. 618

In re KNIGHT'S ESTATE.

CROCKER NAT. BANK OF SAN FRANCISCO v. KNIGHT.
(Civ. 5405.)

(District Court of Appeal, First District, Division 2, California. Feb. 24, 1926.)

Homestead §150(1)—Setting apart of probate homestead to widow held not an abuse of discretion, where creditor was not injured, and widow had paid with her own property debts of estate exceeding value of homestead, which could not be partitioned without impairing its value.

Setting apart of probate homestead for widow out of estate of deceased husband held not an abuse of discretion, where creditor was not injured thereby, and widow had used own property to pay debts of deceased exceeding value of homestead, which could not be partitioned without materially impairing its value.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of George A. Knight, deceased. Petition by Frances Hale Knight, executrix of the will of George A. Knight, deceased, to set apart to her a probate homestead, opposed by the Crocker National Bank, a creditor of the estate. From an order setting apart a probate homestead, creditor appeals. Affirmed.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for appellant.

Chas. J. Heggerty, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal from an order of the superior court of the city and county of San Francisco, setting apart to Frances Hale Knight, as a probate homestead, certain real property out of the estate of her deceased husband, George A. Knight.

George A. Knight died in 1916, leaving a widow, Frances Hale Knight, respondent here, and two adult sons. Frances Hale Knight was appointed executrix of his will. As such executrix she sold some of the property of the estate, and then petitioned the court to set apart to her as a probate homestead 680 acres of land in Mendocino county. This application was resisted by the Crocker National Bank of San Francisco, a creditor of the estate and appellant here, on the ground that the estate was insolvent.

The only question involved is as to whether or not the trial court abused its discretion under the peculiar facts of this case. We think it did not. When the respondent herein applied to the court to set apart the property in question as a homestead for her, the appellant objected to this order being made. It did not contend that the property should be divided or that only a part thereof should be set apart to respondent or that the property was of a character that it could be divided without greatly impairing the value per acre. The appellant merely appeared opposing the granting of the homestead, and prayed that respondent's petition should be denied. A hearing was had and testimony offered which supports the following findings of the court:

"That the property consists of about 6 hundred acres of agricultural, tillable, and grazing land, lying in one connected body and not in separate parcels, except that the state highway runs through a portion of it; that there is a house and barns upon the property, and it is in every way suitable for a home for petitioner; that it was community property of petitioner and her husband; that the property was inventoried and appraised together with two other parcels which have since been sold by the executrix at the sum of \$26,000; and that since then the executrix of the will of the decedent has sold the said two other parcels of

the real property described in said inventory and appraisement for over \$22,000; leaving the property sought to be set aside as a homestead unsold in said estate; that the value of said property is approximately \$15,000; that the property remaining in said estate is of the value of approximately \$1,100; that the property asked as a homestead cannot be partitioned, cut up, or divided without material injury, so as to select and set apart the portion thereof containing the said dwelling house and barns and a reasonable portion and quantity thereof as a homestead to and for the use of the petitioner, without materially impairing the value of both the said portion thereof that would and should be partitioned as a homestead and also the value of the portion thereof that would remain, and that the portion of said real property that would remain after partitioning the same as aforesaid, would not be of any practical or material value for any use or for sale, and would be practically valueless for any use or for sale; and that said real property cannot, and should not, be partitioned or cut up; and that any remainder of said property that would be left upon any partition thereof could not be sold for any material sum, and would not be of any material benefit or advantage to apply to the payment of any creditor or obligation of said estate; that the petitioner, during her administration of said estate as executrix, has sold and disposed of her own real and personal property, and has paid the proceeds thereof, to the amount of exceeding \$29,000 of her own property to and for the payment of claims against and indebtedness and obligations of the decedent and of said estate, and has never been repaid said sum, and she is entitled to reimbursement from the assets and property of said estate in the said sum and amount of exceeding \$29,000, and that there is not now remaining in said estate any assets or property thereof sufficient to repay and reimburse the said petitioner for the said sum and amount of exceeding \$29,000 so advanced, paid, and applied by her out of her own property to and for the payment of said claims against said decedent, and that the rights of none of the creditors of said decedent will be injured or affected by an order setting apart all of said property as a homestead."

It also appears from the record that the original claim of the appellant against the estate was something over \$25,000 and interest, and that it has been paid over \$18,000 of this amount by the executrix out of her own property; that, if the property in controversy be considered as an asset of the estate at a valuation of \$15,000, nevertheless, the proportion of the assets to the liabilities is such that the pro rata share of the appellant would be less than it has already received upon its debt and it would receive nothing more. There also remains unpaid over \$7,000 of claims superior to appellant's, such as unpaid family allowances, commissions of executrix, attorney's compensation, etc. Appellant is not injured, therefore, by the exercise of the discretionary power of the court in setting apart this homestead to

the widow. It is further to be emphasized that the point urged by appellant, i. e., that a portion only of the property should have been set apart to the widow, was not presented to the trial court. Appellant made no request that the property be divided but objected to the setting apart of a homestead.

In view of these facts and the findings of the trial court, we think that under the peculiar circumstances there was no abuse of discretion by the trial court.

The orders appealed from are affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

78 Cal. App. 610

WILLIAMS v. BELLING. (Civ. 5213.)

(District Court of Appeal, First District, Division 1, California. Feb. 24, 1926. Hearing Denied by Supreme Court April 22, 1926.)

1. Exchange of property $\Leftrightarrow$ 6—Lease and chattel mortgage securing it, concurrently executed, constituted one contract, and objection to mortgage was in effect an objection to the lease (Civ. Code, § 1642).

Lease and chattel mortgage securing same, which were concurrently executed, held to constitute one contract under Civ. Code, § 1642, and a valid objection to the validity of the mortgage was in effect an objection to the lease, within terms of memorandum for exchange of properties providing it was subject to approval of lease.

2. Landlord and tenant $\Leftrightarrow$ 184(1)—Recital in mortgage securing lease that it was concurrently executed with lease for purpose of securing rents authorized inference that mortgagors were lessees named in lease and had agreed to pay rent therein reserved.

Where mortgage recited that it was concurrently executed with lease for purpose of securing payments of rents to become due, it may reasonably be inferred therefrom that mortgagors were lessees named in lease, and had agreed to pay rent reserved therein.

3. Evidence $\Leftrightarrow$ 70.

It is to be presumed, though presumptions are disputable, that lease and mortgage securing it were truly dated (Code Civ. Proc. § 1963, subd. 23), and were executed and delivered on day of date.

4. Landlord and tenant $\Leftrightarrow$ 71.

Fact term was to commence on future date did not prevent lease from operating as present demise.

5. Landlord and tenant $\Leftrightarrow$ 184(1)—Mortgage reciting its concurrent execution with lease for purpose of securing rents authorized inference it was intention of parties mortgage should take immediate effect as security for performance of promise to pay rent, though term did not begin until later.

Where mortgage recited its concurrent execution with lease for purpose of securing the payment of rent, it may be fairly inferred that

it was the intention of the parties that mortgage should take immediate effect as security for the promise to pay rent, including installment becoming due on first day of term, even though such day was in the future.

6. Chattel mortgages — 150(2), 192 — Fourteen days' delay between delivery of mortgage and its recordation, if not excusable, rendered mortgage void as to creditors and incumbrancers whose claims were created during interval (Civ. Code § 2957).

Where it appeared from record that fourteen days had elapsed between delivery of mortgage and its recordation, such delay, though not affecting mortgage's validity between parties, would, if not excusable, rendered the mortgage void as to creditors and incumbrancers whose claims were created during the interval, in view of Civ. Code, § 2957.

7. Vendor and purchaser — 136 — Condition of title satisfactory to vendee is complied with by tender of title to which there is no reasonable objection, but such title should be fairly deducible from record.

A condition that title to real estate, subject to an agreement to convey, shall be satisfactory to vendee, is complied with by tender of title to which there is no reasonable objection, but such title should be fairly deducible from record, without reference to extrinsic evidence, and vendee cannot be required to accept title which he cannot by record show to be valid if attacked.

8. Exchange of property — 6 — Defendant agreeing to exchange property, subject to his approval of lease, held justified in refusal to continue, where validity of mortgage securing lease required reference to extrinsic evidence.

Where mortgage securing lease was not recorded for fourteen days after its execution, thereby rendering it subject to claims created during interval, and necessitating resort to other evidence than the records to support its validity, defendant who had agreed to exchange property subject to his approval of such lease was therefore acting in good faith and justified in not proceeding with the exchange, and could not be held liable for brokerage commission.

9. Exchange of property — 8(4) — Where exchange agreement was subject to approval of lease secured by mortgage, burden of proving that mortgage, which on the records was open to objection, was in fact valid, was upon party asserting fact.

Where agreement to exchange was subject to approval of lease secured by chattel mortgage, and such mortgage was subject to reasonable objection under the public records, the burden of proving that such mortgage was in fact valid rested on parties asserting its validity.

10. Exchange of property — 3(1) — It was competent for parties to exchange agreement to agree that no obligation to proceed should accrue if lease secured by mortgage constituting a material part thereof should be found reasonably subject to objections.

It was competent for parties to exchange agreement to agree that there should be no

obligation to proceed if a certain lease secured by mortgage, which mortgage constituted material part of lease, should be found reasonably subject to objections.

11. Exchange of property — 6 — Under memorandum agreement for exchange of property subject to approval of certain lease by defendant, held it was intention of parties that no obligation to proceed should accrue, where reasonable grounds of objection to mortgage securing such lease appeared.

Where memorandum agreement for exchange of property provided it should not be binding until defendant had inspected and approved certain leases, it was intention of the parties that, upon disapproval of mortgage which secured such leases in good faith, upon reasonable grounds of objections to its sufficiency appearing, no obligation on part of defendant should arise.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action by Fred R. Williams against Isaac Belling. From a judgment for the defendant, plaintiff appeals. Affirmed.

Grant & Zimdars, of San Francisco, and Frank G. Warren, of Stockton, for appellant.

Roscoe D. Jones, of Oakland (Isidoro A. Cereghino, of Oakland, of counsel), for respondent.

CASHIN, J. An appeal from a judgment denying the right of appellant to recover commissions and special damages.

Respondent, who was the owner of certain real property in the city of Stockton, signed and delivered to appellant, a real estate broker, a memorandum in writing in terms authorizing the latter to effect an exchange thereof for property of like character in the city of Oakland. Both properties were described in the memorandum which further provided for the payment to appellant of a commission in the sum of \$1,000.

The major portion of the building upon the Oakland property was then being used for hotel purposes; the lower floor thereof being divided into two storerooms. The memorandum contained the following provisions, the effect of which is here in question:

"It is hereby understood and agreed that there exists a lease on said hotel extending over a period of seven (7) years from July, 1922, for a monthly rental of \$700, secured by a chattel mortgage on furniture. * * * This agreement shall not be binding upon the undersigned until he has inspected and approved said leases,"

—the leases referred to being that of the hotel, a lease of one of the storerooms then in force, and a lease to be procured of the other storeroom mentioned. It was further stipulated therein that appellant should complete the exchange within 30 days from its date.

It appears from the evidence that appellant

thereafter procured from one R. D. Cashatt, who held a contract for the purchase of the Oakland property, an agreement in writing authorizing the former to effect an exchange thereof for that owned by respondent, and providing for the payment of a commission for the service in the sum of \$6,000; it being alleged that the agreement to pay the latter commission had been made before the delivery of the memorandum by respondent, and that the latter had knowledge thereof. Appellant's claim for special damages was based upon the loss of this commission.

It appears that the lease of the hotel, with the chattel mortgage securing payment of the rents therein provided, were submitted by respondent to his attorney, on whose advice he refused to approve or accept the mortgage and the lease, upon the ground of the invalidity of the mortgage as against the creditors, if any, of the mortgagors.

The trial court found that the refusal to approve was in good faith, and, without expressly finding the mortgage to be invalid, found that the memorandum was signed and delivered to appellant in reliance upon his representations that the mortgage was good and sufficient and in proper legal form; that, although such representations were not made for the purpose of deceiving or misleading respondent, they were not warranted by the information possessed by appellant, were false, and fraudulent, and were believed by respondent, who was thereby induced to sign and deliver the instrument; that such delivery was made and accepted upon the condition and express understanding that, if the leases were unsatisfactory to the latter, he should in nowise be bound thereby; that at the time of the delivery of the memorandum he had no knowledge of any agreement by Cashatt to pay a commission to appellant; that he had not failed to perform nor repudiated the agreement as alleged, and that appellant had not performed.

It is contended by appellant that there existed no valid objection to the sufficiency of the mortgage, and that respondent was legally bound to be satisfied therewith; and, by the latter, that the period which elapsed between the presumptive date of the instrument and its recordation rendered it invalid as to creditors of the mortgagors, and justified his refusal to approve.

The lease mentioned was not introduced in evidence. The mortgage bears date January 23, 1922, which was also the date of the acknowledgment of the mortgagors and of their affidavits attached thereto. The affidavit of the mortgagee named therein was dated January 31, 1922, and the instrument recorded February 6, 1922. Therein was recited its concurrent execution with the lease for the purpose of securing the payment of the rents to become due thereunder aggregating the sum of \$63,000, payable in install-

ments of \$700 each on the 1st day of each month of the term commencing on February 1, 1922, and the further purpose of securing performance by the mortgagors of each and every term, covenant, agreement, and condition in favor of the mortgagee, including the mortgagors' agreement to perform the conditions and terms of the lease.

[1,2] These instruments constituted one contract (Civ. Code, § 1642), and a valid objection to the mortgage was in effect an objection to the lease within the terms of the memorandum. It was assumed by the parties to the action that both were delivered, and no evidence as to the fact or time of such delivery was offered at the trial. It may be reasonably inferred from the recitals and provisions of the mortgage that the mortgagors were the lessees named in the lease and had agreed to pay the rent therein reserved.

[3-5] It is to be presumed—although the presumptions are disputable—that the instruments were truly dated (section 1963, subd. 23, Code Civ. Proc.), and were executed and delivered on the day they bear date (22 Corp. Jur. 105, 106; 11 Corp. Jur. 488, 489; Chamberlayne on Evidence, § 1055; Wigmore on Evidence, § 2520; *Lauder v. Peoria Agricultural, etc., Society*, 71 Ill. App. 475; *Gibson v. Norway Sav. Bank*, 69 Me. 579). The fact that the term was to commence on a future date, to wit, February 1, 1922, did not prevent the lease from operating as a present demise (35 Corp. Jur. 1198, 1199; *Seibert v. Grace*, 138 Ill. App. 361); and it may fairly be inferred from the circumstances mentioned and the recitals of the mortgage that it was the intention of the parties that the latter instrument should take immediate effect as security for the performance of the promise to pay the rent, including the installment to become due on the 1st day of the term.

By section 2957 of the Civil Code, it is provided that a mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless it is acknowledged or proved, certified, and recorded in like manner as grants of real property; and, in *Ruggles v. Cannedy*, 53 P. 911, 59 P. 827, 127 Cal. 290, 46 L. R. A. 371, it is held that the recordation of a chattel mortgage, having been designed by the statute as a substitute for and the equivalent of the immediate delivery and continued change of possession formerly required in this state should be had immediately or as soon thereafter as practical upon the execution thereof in order to give notice to and bind third parties.

[6] In the instant case it might fairly have been inferred that fourteen days had elapsed between the delivery of the mortgage and its recordation. Such delay, although not affecting its validity between the parties (*Summerville v. Kelliher*, 77 P. 889, 144 Cal. 155),

would, if not shown to be excusable, render the mortgage void as to creditors and incumbrancers whose claims were created during the interval (*Ruggles v. Cannedy*, supra; *Old Settlers' Investment Co. v. White*, 110 P. 922, 158 Cal. 236; Civ. Code, § 2957; *In re Hansen* [D. C.] 268 F. 904).

[7] A condition that the title to real estate, which is the subject to an agreement to convey, shall be satisfactory to the vendee is complied with by the tender of a title to which there is no reasonable objection. *Winter v. Stock*, 29 Cal. 408, 89 Am. Dec. 57; *Dillinger v. Ogden*, 90 A. 446, 244 Pa. 20, Ann. Cas. 1915C, 533. It is the rule that such title should be fairly deducible from the record without reference to extrinsic evidence, and that the vendee cannot be required to accept that which he cannot by the record show to be valid if attacked. *Crim v. Umbsen*, 103 P. 178, 155 Cal. 697, 132 Am. St. Rep. 127; *Benson v. Shotwell*, 25 P. 249, 681, 87 Cal. 49.

[8] The above rules apply in principle to the instant case, in which the facts reasonably created an apprehension of the necessity for supporting the validity of the mortgage by proof not shown by the public records and dependent upon extrinsic evidence.

[9] Whether there were creditors of the mortgagors in a position to attack the mortgage does not appear from the record: but, if it be assumed that respondent would be obliged to accept a mortgage shown by the public records to be reasonably subject to objection, but which in fact created a valid lien, the burden of proving the fact rested upon appellant. *Simmons v. Zimmerman*, 79 P. 451, 144 Cal. 256, 1 Ann. Cas. 850.

An offer was made by the latter to procure the execution to respondent of a new mortgage upon the same property for the same purpose and, presumably, though the record does not show the fact, by the same mortgagors, which offer was not accepted, for the reason, as testified by the attorney for respondent, that, under the terms of the memorandum, there appearing reasonable grounds for not approving the lease in question, respondent was not bound to proceed.

[10] As stated, the memorandum provided that it should not be binding upon respondent until he had inspected and approved the leases. That it was competent for the parties to agree that no obligation to proceed should accrue if the lease, of which the mortgage was a material part, should be found reasonably subject to objections as to its sufficiency is well settled. *Elliott on Contracts*, § 1868; *First Nat. Bank of Waurika v. Clay*, 177 P. 115, 117, 74 Okl. 112; 13 Corp. Jur. 564; *Rogers v. Maloney*, 165 P. 357, 85 Or. 61.

[11] The trial court, in construing the writing, by implication concluded the intention of the parties to have been that, upon the disapproval of the mortgage in good faith, rea-

sonable grounds of objection to its sufficiency appearing, no obligation on the part of respondent should arise; and this conclusion, aside from the finding as to the understanding and condition upon which the memorandum was delivered and accepted, is supported by the language of the provision mentioned.

The evidence was sufficient to support the finding of good faith and the implied conclusion that the refusal to accept the lease and mortgage was reasonably justified, and, the effect thereof upon the obligation of respondent to proceed being as stated, sustains the legal conclusions and judgment of the trial court.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

76 Cal. App. 670

HOEFT v. HOTCHKISS. (Civ. 3059.)

(District Court of Appeal, Third District, California. Feb. 27, 1926.)

1. Reference ⇨103(1)—Failure of movant to set aside judgment and referee's report for want of notice of hearing to make affidavit that she could produce evidence not heard, or that findings were erroneous, held to warrant denial of motion.

Failure of one moving to set aside judgment and report of referee, on ground that no notice of hearing before referee was given, to make affidavit that she could introduce any evidence not heard by referee, or that any finding by referee or court was erroneous, warrants denial of motion.

2. Reference ⇨103(1).

Failure to raise objection of want of notice of hearing before referee prior to entry of judgment held to warrant denial of motion to set aside judgment and referee's report.

Appeal from Superior Court, Nevada County; George H. Thompson, Judge.

Action by Elenore E. Hoeft against A. M. Hotchkiss. From order denying plaintiff's motion to set aside judgment and referee's report, she appeals. Affirmed.

Chas. W. Kitts, of San Francisco, for appellant.

W. E. Wright, of Nevada City, for respondent.

FINCH, P. J. [1, 2] This is an appeal from the order of the trial court herein "denying plaintiff's motion to set aside the judgment and decree and the referee's report." The record consists of the final decree in the action and the motion to vacate, together with affidavits introduced at the hearing of the motion and the order denying the same. It appears that an "interlocutory judgment and decree" was entered, and F. R. Hull appointed to take an account; that he took such

account and reported his findings to the court; and that thereafter the court "recast and re-stated" the account in many particulars and entered judgment upon the findings as so corrected.

Appellant contends that the motion should have been granted on the ground that she had no notice of the hearing before the referee. She introduced affidavits stating that neither she nor her attorney were notified of such hearing. She resided in Nevada City at the time of the hearing, and her attorney had his office in San Francisco. The referee made affidavit that he duly mailed notices of the hearing to the plaintiff and to her attorney six days before the time set for such hearing. Regardless of other questions, the motion was properly denied on two grounds: First, it is not stated in plaintiff's affidavits that she could have produced any evidence which was not introduced at the hearing before the referee and considered by him or that any finding made by the referee or by the court is erroneous. Second, it does not appear but that plaintiff and her attorney were fully informed of the filing of the referee's report and of its contents in ample time to have raised the objections which are now made prior to the entry of judgment. She should have made objection at that time to the adoption by the court of the referee's report. *Doudell v. Shoo*, 129 P. 478, 20 Cal. App. 424.

The order is affirmed.

We concur: PULLEN, Justice pro tem.; PLUMMER, J.

76 Cal. App. 481

CARP v. SUPERIOR COURT IN AND FOR HUMBOLDT COUNTY. (Civ. 3089.)

(District Court of Appeal, Third District, California. Feb. 8, 1926.)

1. New trial ☞109.

Statutory motion for a new trial is not the exclusive procedure by which new trial may be obtained.

2. Divorce ☞167—Denial of wife's motion to set aside interlocutory divorce decree is not bar to her suit in equity to set decree aside for extrinsic fraud (Code Civ. Proc. § 473).

That wife's motion to set aside interlocutory divorce decree under Code Civ. Proc. § 473 was denied, is not bar to her suit in equity to set decree aside on the ground of extrinsic fraud.

3. Appeal and error ☞477—Court may enjoin enforcement of its own judgment pending determination of appeal therefrom, to maintain status quo of subject-matter.

Court, in a proper case, may enjoin enforcement of its own judgment pending determination of an appeal therefrom, so as to maintain status quo of subject-matter in litigation.

4. Divorce ☞156—As respects right to final decree while interlocutory decree is under attack for fraud, it is public policy of state of California to prevent remarriage of divorced persons during time allowed for appeal, and thereafter, if appeal be taken, until right to divorce is finally determined.

As respects right to final decree while interlocutory decree is under attack for fraud, it is public policy of state of California, as shown by history of divorce legislation, to prevent remarriage of divorced persons during time allowed for appeal, and thereafter, if an appeal be taken, until right to divorce is finally determined; state having a well-recognized interest in matter.

5. Divorce ☞156—Court held to have discretion to deny husband's application for final decree of divorce until determination of wife's pending suit in equity to set aside interlocutory decree for fraud (Civ. Code, § 132).

Where husband's application under Civ. Code, § 132, for final decree of divorce was made while wife's suit in equity to set aside interlocutory decree for fraud was pending, held, that court had discretion to deny husband's application for final decree of divorce until final determination of wife's suit.

Original application for writ of mandate by August Carp, prayed to be directed to the Superior Court in and for Humboldt County Hon. George D. Murray, Judge, to compel respondent to enter final decree of divorce in action prosecuted by petitioner against his wife, Hilma Carp. Writ denied.

J. F. Coonan, of Eureka, for petitioner.

Henry L. Ford and J. Logan Beamer, both of Eureka, for respondents.

FINCH, P. J. This is an original application, made upon notice given by petitioner to respondents, for a writ of mandate to compel the respondent court to enter a final decree of divorce in an action prosecuted by the petitioner against his wife, Hilma Carp. The wife did not appear in that action, and an interlocutory decree of divorce was entered in favor of the husband on the 15th day of February, 1923. The wife did not appeal or move for a new trial. Within due time she moved the court to set aside the interlocutory decree "on the ground of accident, surprise, excusable neglect, and that no service of the summons had been made on said Hilma Carp." The motion was denied June 8, 1923. January 25, 1924, the wife commenced a suit in equity to set aside the interlocutory decree on the ground that the husband had fraudulently prevented her from appearing in the divorce action and making a defense. On the 30th day of October, 1925, judgment was entered therein against the wife. November 3, 1925, the wife made a motion for a new trial in that action, and on the 28th of that month the motion was denied. November 30th she duly appealed from the judgment therein, and the appeal is still pend-

ing. November 17, 1925, the husband served notice of motion for a final decree of divorce. The wife filed a verified "answer" to the motion, in which she stated that if her motion for a new trial of the action to set aside the interlocutory decree "is denied she will immediately appeal from said judgment in the said cause of Hilma Carp v. August Carp to the Supreme Court of the State of California." November 23, 1925, the husband's motion for a final decree of divorce was denied "without prejudice to renew the same." The petition herein was filed December 17, 1925.

[1, 2] Section 132 of the Civil Code provides:

"When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce, * * * but if any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has been finally disposed of, nor then, if the motion has been granted or judgment reversed."

Petitioner contends that, under the facts stated, it was the mandatory duty of the court to enter a final decree of divorce. The primary purpose of the action to set aside the interlocutory decree was to obtain a new trial of the action for divorce. The statutory motion for a new trial is not the exclusive procedure by which a new trial may be obtained. *San Joaquin, etc., Irr. Co. v. Stevinson*, 166 P. 338, 175 Cal. 607, 611. The fact that the wife's motion to set aside the interlocutory decree, under the provisions of section 473 of the Code of Civil Procedure, was denied, is not a bar to her suit in equity to set the decree aside on the ground of extrinsic fraud. *Estudillo v. Security Loan, etc., Co.*, 87 P. 19, 149 Cal. 556, 562; *Bacon v. Bacon*, 89 P. 317, 150 Cal. 477, 484; *Lake v. Bonyne*, 118 P. 535, 161 Cal. 120, 131. Persuasive reasons, some of which will be stated in another connection, could be advanced to show that the term "motion for a new trial," as used in section 132 of the Civil Code, is not restricted to the statutory motion for a new trial, but was intended to include any pending proceeding to obtain a new trial. It is not necessary, however, to so hold in order to sustain the action of the trial court.

[3] Actions in equity to set aside judgments obtained by extrinsic fraud are not novel. It is not unusual in such an action to enjoin the enforcement of the judgment sought to be vacated, pending the determination of the charge of fraud. In a proper case a court may enjoin the enforcement of its own judgment pending the determination of an appeal therefrom "so as to maintain the status quo of the subject-matter of the litigation." *Tulare Irrigation District v. Superior Court* (Cal. Sup.) 242 P. 725, and cases therein cited.

[4] It is the public policy of the state, as shown by the history of divorce legislation, to prevent the remarriage of a divorced person during the time allowed for appeal, and thereafter, if an appeal be taken, until his right to a divorce is finally determined. The state has a well-recognized interest in the matter.

"While an action to obtain a decree dissolving the relation of husband and wife is nominally an action between two parties, the state, because of its interest in maintaining the same, unless good cause for its dissolution exists, is an interested party. It has been said by eminent writers upon the subject that such an action is really a triangular proceeding, in which the husband and the wife and the state are parties." *Deyoe v. Superior Court*, 74 P. 28, 140 Cal. 476, 482, 98 Am. St. Rep. 73.

Upon the entry of a final decree of divorce, either party may enter into another marriage, maybe with a person who is without knowledge of the pendency of a proceeding to set the decree aside. The positions which such innocent person and the children born of the second marriage will occupy, in the event of the decree being vacated, are matters of grave public concern. As said in the dissenting opinion of Mr. Justice Temple in *Estate of Wood*, 69 P. 900, 137 Cal. 129, 139:

"There are * * * special reasons why it (the decree) should not take effect so that the parties can remarry, except with each other, so long as the judgment is subject to review and to be reversed. * * * It would transpire that the new spouse, in case of a marriage, would have been taken on condition. Any civilized people would desire to avoid such possibilities."

The case of *Olson v. Superior Court*, 165 P. 706, 175 Cal. 250, 1 A. L. R. 1589, was an application for a writ of mandate to compel the entry of a final decree of divorce. After the entry of the interlocutory decree, a reconciliation was effected and the parties resumed the relations of husband and wife. The court said:

"While in every proper case a trial court will, and if necessary by mandate will be compelled to, enter such a final decree, it would be a gross reproach to our jurisprudence to hold that our law ever contemplated that such a decree could be forced upon a blameless and nonconsenting wife after such a reconciliation. Our law demands no such thing. It never designed to make itself an instrument of such frauds."

[5] The wife has alleged, in her action to set the decree aside, that it was obtained by the husband's fraud. That action is still pending and may be determined finally in favor of the wife. To hold that the provisions of section 132 require the entry of a final decree under such circumstances would be to make the law an instrument of fraud. The action for a divorce and the suit to set aside the interlocutory decree were both pending

in the same court. The court certainly had the discretion, at least, to deny the application for a final decree in the divorce action until the final determination of the other action in which the validity of the interlocutory decree was assailed. If, as has been shown, a court may, in a proper case, restrain the enforcement of its judgment pending an appeal therefrom, where mere property rights are in question, no sound reason can be given for compelling a court to enter a final decree of divorce in a case where the interlocutory decree is under attack in a pending action for fraud, and where the issues involve questions of great public concern.

The petition is denied, and the order of the trial court is affirmed.

We concur: HART, J.; PLUMMER, J.

76 Cal. App. 648

PEOPLE v. SICA. (Cr. 1283.)

(District Court of Appeal, First District, Division 1, California. Feb. 27, 1926.)

1. Homicide $\S$ 255(2)—Evidence held sufficient to support conviction for involuntary manslaughter, where deceased was killed by accidental discharge of shotgun pointed at him as a joke (Pen. Code, $\S$ 192).

Evidence held sufficient to support conviction for involuntary manslaughter under Pen. Code, $\S$ 192, where deceased was killed by accidental discharge of shotgun pointed at deceased as a joke.

2. Homicide $\S$ 62—Killing held not killing while in commission of unlawful act, where gun was not pointed at deceased in "anger" (Pen. Code, $\S$ 417).

Killing by accidental discharge of gun pointed at deceased was not killing while in commission of unlawful act not amounting to felony, under Pen. Code, $\S$ 417, prohibiting display of deadly weapon in rude, angry, and threatening manner, where accused and deceased were not angry; "anger" being interchangeable with "passion."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Anger.]

3. Homicide $\S$ 309(1)—Defendant may be found guilty of manslaughter on two different theories, and jury may be instructed on as many theories as are logically deducible from testimony.

Defendant may be found guilty of manslaughter on two different theories, and jury may be instructed on as many theories as are logically deducible from testimony.

4. Criminal law $\S$ 814(3).

No instruction should be given jury which is not predicated on some theory logically deducible from some portion of testimony.

5. Criminal law $\S$ 1186(4)—Where case was submitted to jury on two theories, one of which was not sound, appellate court will reverse if it cannot determine on which theory conviction was based (Const. art. 6, $\S$ 4½).

Where case is submitted to jury on two theories, one of which was not sound, and appellate court cannot determine on which theory conviction was based, judgment will be reversed, notwithstanding Const. art. 6, $\S$ 4½.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Angelo Sica was convicted of manslaughter, and he appeals. Reversed.

Carl E. Lindsay and Lindsay & Gearhart, all of Fresno, for appellant.

U. S. Webb, Atty. Gen., and L. B. Browne, of San Francisco, for the People.

KNIGHT, J. On October 23, 1924, Norval M. Hyde, 21 years of age, was killed by the accidental discharge of a shotgun in the hands of the defendant, Angelo Sica, 17 years of age, while the latter was pointing the gun, in play, at Hyde. Sica was informed against by the district attorney for the crime of manslaughter, and upon trial was convicted, the jury recommending leniency. After denying a plea for probation, the trial court sentenced Sica to imprisonment in the state prison at San Quentin. Sica has appealed, and for a reversal of judgment urges two principal grounds—first, insufficiency of evidence; and, secondly, errors of the trial court in the matter of giving instructions to the jury, which he claims deprived him of a fair trial.

The circumstances leading up to and attending the death of Hyde, as shown by the evidence, were as follows: Hyde and a young man named Farlinger were employed on certain premises near Fresno operated as a gun club, and lived in a tent on the property. Hyde and Sica were friends. About a week previous to the fatal shooting Sica had called on Hyde at the gun club's property and was invited by Hyde to visit him again. On the day of the accident, Sica and three boy companions went for a ride in an automobile belonging to one of the boys, and, being in the vicinity of the gun club, went over to see Hyde, arriving at the gun club about 5 o'clock in the afternoon. As they drove in, Farlinger was working in a ditch near by, and Hyde came riding up on horseback from the field. After an exchange of greetings all around, Hyde and Sica shaking hands in a friendly manner, the boys proceeded to chop an old log lying on the ground into firewood, and then engaged in target practice with a revolver which one of Sica's companions had brought with him. During the target practice Sica went into the tent, and brought out a double-barreled hammerless shotgun and two cartridges, inserting the cartridges in the gun on his way out of the tent. After load-

ing the gun, he pointed it at the fence and other objects, whereupon the other boys warned him to "be careful with that gun" and to "look out for that gun, it is loaded—accidents happen." Notwithstanding these admonitions, Sica pointed the gun at Hyde, who was still astride the horse, 15 or 20 feet distant. As Sica pointed the gun at Hyde, one of the boys again warned him to be careful, and Hyde laughingly said to Sica, according to the testimony of Farlinger and another boy named Vaccaro, "Don't point that gun at me, you bastard, or I'll pull this on you," or words to that effect, exhibiting the pistol with which he and the others had been shooting at the target. A few seconds later the gun was accidentally discharged, the load striking Hyde in the left side of the back, and he fell from the horse. Sica, dropping the gun, exclaimed, "God, what did I do!" and rushed to Hyde's assistance. The boys lifted Hyde into the automobile and hurried him to the hospital, but he died before arriving there. According to Vaccaro's testimony, Sica, at the time the gun was discharged, was holding it with the butt to his shoulder, pointing it at Hyde, although not aiming it at him. L. Saladino, another boy, testified in regard to this point as follows:

"I looked around again and saw Angelo pointing the gun at Hyde, and Hyde said: 'Look out, you bastard, don't shoot me, or I will pull this on you.' So when he says that, Angelo Sica turned the gun away and then put it up again in a position like this, towards his waistline, and held it there a matter of a few seconds, and then put it up a little higher, and they were joking and laughing again, him and Hyde, and he said: 'Don't point that gun at me. What the hell is the matter with you, you damn fool?' And Angelo Sica was laughing and I looked around to see the well they were drilling, and heard a report, and I turned around and saw Hyde fall off the horse."

Sica's statement, taken by a deputy district attorney on the night following the accident, and afterwards introduced in evidence at the trial as part of the people's case, was in substantial accord with the versions given by his companions. Although he could give no accurate account of the exact cause for the discharge of the gun, he stated that he was pointing it at Hyde, and when he turned his head temporarily to look toward the other boys it was discharged; that he was grasping the stock of the gun "where you hold your fingers," and that he thought he was holding it "on the rim." The evidence further shows that Sica was not familiar with the use of a shotgun, never having handled or discharged one before.

[1] The contention of appellant that the evidence is insufficient to sustain a conviction of manslaughter is based in part upon the proposition that the gun was accidentally and not willfully discharged, and that consequently appellant was guilty of no crime. It

is argued in support thereof that the evidence, taken as a whole, shows that the death of Hyde was the result of misadventure; that it was a case of a number of boys playing with firearms, and that unfortunately one of the firearms, being at the time in the hands of the appellant, was accidentally discharged; that the firing of the gun was not a voluntary act on his part at all; and that therefore appellant was not criminally responsible. The contention cannot be sustained.

Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds: (1) Voluntary—upon a sudden quarrel or heat of passion. (2) Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection (Pen. Code, § 192); and it has been held in this state, as in others, that, where the death of a human being results from playing or skylarking with, or the reckless handling of firearms, it is involuntary manslaughter, the killing being the result of the commission of a lawful act which might produce death, without due caution and circumspection. *People v. Searle*, 164 P. 819, 33 Cal. App. 228. Upon this branch of the case we believe the jury was properly instructed. *People v. Wilson*, 226 P. 5, 193 Cal. 512.

[2] The cause was submitted to the jury, however, not on the one theory of involuntary manslaughter, but, under instructions of the court, upon the additional theory that the death of Hyde was brought about by appellant while the latter was engaged in the commission of an unlawful act not amounting to a felony; and appellant contends that the giving of instructions upon said second theory constituted prejudicial error, for the reason that there was no evidence before the jury upon which such theory could be based.

When the prosecution rested its case, counsel for appellant, in the absence of the jury, moved that the court advise the jury to acquit. At the conclusion of the argument on the motion, the court stated, "Well, another phase of it, gentlemen, I think we have a statute there to the effect that any one who exhibits a deadly weapon in a rude and threatening manner in the presence of two or more witnesses is guilty of a misdemeanor," to which counsel for the prosecution responded, "Section 417 of the Penal Code"; and, after some further discussion as to the meaning of the words "rude" and "threatening," the court denied the motion. Appellant offered no evidence, but upon this branch of the case proposed an instruction, which, after setting forth the Code definition of manslaughter, read:

"You are instructed that there is no evidence in this case which justifies the conviction of the defendant of voluntary manslaughter, *nor is there any evidence in the case which justifies*

his conviction of involuntary manslaughter because of the commission of an unlawful act not amounting to felony. It is for you to determine from all the evidence in the case whether the prosecution has proved beyond a reasonable doubt and to a moral certainty that the death of Norval M. Hyde was caused by the defendant in the commission of a lawful act which might produce death in an unlawful manner, or without due caution and circumspection. Unless you are satisfied beyond a reasonable doubt that such proof has been made, you must acquit the defendant." (Italics ours.)

The trial court gave to the jury that part of the proposed instruction embodying the Code definition of manslaughter, but refused to give those portions just quoted.

In lieu of instructing the jury as requested in the italicized portion of said proposed instruction, the court gave the following instruction:

"You are further instructed that every person who, not in necessary self-defense, in the presence of two or more persons, draws or exhibits any deadly weapon in a rude, angry, and threatening manner, or who, in any manner, unlawfully used the same, in any fight or quarrel, is guilty of a misdemeanor."

See Pen. Code, § 417.

This instruction was followed by one to the effect that if the jury was satisfied beyond a reasonable doubt that "the defendant, Angelo Sica, *was committing an unlawful act, not amounting to a felony, or doing a lawful act in an unlawful manner, or doing a lawful act without due caution and circumspection, and while doing such unlawful act, or doing such lawful act in an unlawful manner, or without due caution and circumspection, said defendant Angelo Sica shot Norval Hyde, * * ** inflicting injuries upon him from which he died, the jury should find the appellant guilty of manslaughter as charged in the information. (Italic ours.)

[3, 4] It is doubtless true that a defendant may be found guilty of manslaughter on two different theories (People v. Hubbard, 220 P. 315, 64 Cal. App. 27), and a jury may be instructed on as many theories as are logically deducible from the testimony (People v. Byrnes, 30 Cal. 206; People v. Quimby, 92 P. 493, 6 Cal. App. 482); but there is no evidence whatever in the instant case of a fight or quarrel, nor is there any proof from which the inference might be reasonably and logically deduced that said weapon was exhibited in an "angry" manner, conceding that the manner of its use was both rude and threatening. Anger is defined to mean a strong passion or emotion or displeasure or antagonism excited by real or supposed injuries or insults to one's self or others by the intent to do such injury, resentment, wrath, rage, fury, passion, ire, gall, choler, indignation, spleen. "Anger" and "passion" are interchangeable, and mean practically the same thing. Morris v. Territory, 99 P. 760, 768, 101 P. 111, 1 Okl.

Cr. 617, quoting Webster's Dictionary. Anger is not ordinarily classed as mental suffering. The Standard Dictionary defines it as "violent and vindictive passion or emotion caused by injury or insult real or imagined." Fort Worth & R. G. Ry. Co. v. Jones, 85 S. W. 37, 38 Tex. Civ. App. 129. The testimony given by all of the witnesses to the shooting was that Hyde and Sica were laughing and joking up to the time the shot was fired; and all of the circumstances attending the tragedy prove beyond question that preceding it the boys were in an amiable and friendly mood. The word "angry" as used in said section 417 is not synonymous in its meaning with either of the other two adjectives employed therein, and, the three being used conjunctively, the distinctive elements represented by the three words must be present before the act becomes unlawful. It will therefore be seen that, without the element of anger being present in the use of said weapon by appellant, the whole theory that the death of young Hyde was caused by appellant while in the commission of an unlawful act not amounting to a felony, must fall; and therefore the giving of instructions authorizing a verdict of guilty on that theory and the refusal to give appellant's instruction in negation thereof constituted error.

"Instructions are always to be given with reference to the facts proved before the jury." People v. Byrnes, supra, 9 Cal. Jur. 321.

"No instruction should be given to a jury which is not predicated upon some theory logically deducible from at least some portion of the testimony. Such instructions are only calculated to confuse and mislead the jury, and ought not to be given." People v. Sanchez, 24 Cal. 28, 8 Cal. Jur. 321.

In People v. Devine, 30 P. 378, 95 Cal. 227, it is said:

"In some cases an inapplicable instruction can do no harm, but when it is liable to mislead a jury, to the prejudice of one of the parties, it becomes as grave an error as though it were not 'correct as an abstract proposition of law.'"

In People v. Roberts, 82 P. 624, 1 Cal. App. 447, the court quotes approvingly from Blashfield on Instructions to Juries, wherein the author says:

"The giving of an instruction not supported by the evidence is sufficient ground for reversal, where it appears that such instruction misled, or might have misled, the jury, to the prejudice of the party complaining. * * *

Under the present state of the law, "instructions which are calculated to mislead the jury under the circumstances of the case are erroneous and require a reversal, if they result in a miscarriage of justice" (8 Cal. Jur. 628); and in the recent case of People v. Hoffman (Cal. Sup.) 232 P. 974, wherein the accused was charged with murder, in considering an instruction given for the people in-

volving a theory of self-defense, the court said:

"There is no evidence to support any such theory, and the instruction was calculated to confuse the jury."

This was one of several grounds upon which the judgment was reversed.

[5] In the instant case it cannot be determined upon which of the two theories the jury founded its verdict. If founded upon the theory of the inapplicable instruction, the verdict is not supported by the evidence, and in that event appellant was not fairly convicted and the verdict amounts to a miscarriage of justice. In the case of *People v. MacPhee*, 146 P. 522, 26 Cal. App. 218, after pointing out error in the admission of testimony, it was said:

"After a most careful consideration of the entire cause including the evidence, but without the presence of the actual witnesses before us, we are unable to determine whether the defendants would or would not have been convicted by the jury had this erroneously admitted testimony been withdrawn from their consideration. This being so, we do not feel that section 4½ of article VI of the Constitution can be given application to uphold the judgment in the case at bar."

The same rule of reversal was followed in *People v. Columbus*, 194 P. 288, 49 Cal. App. 761. A like situation confronts us in the instant case. We have examined the entire record, and are unable to determine whether the defendant would or would not have been convicted by the jury had the instruction on the erroneous theory not been given. In this state of the record the judgment cannot be sustained.

The judgment and order appealed from are therefore reversed.

We concur: TYLER, P. J.; CASHIN, J.

76 Cal. App. 629

HASMAN v. ELK GROVE UNION HIGH SCHOOL et al. (Civ. 3051.)

(District Court of Appeal, Third District, California. Feb. 24, 1926. Hearing Denied by Supreme Court April 22, 1926.)

1. Deeds ☞162—Condition that property be used to "maintain" school does not require perpetual maintenance of school; "permanent."

Condition in deed that property shall be used to "maintain" a school on property conveyed does not necessarily mean to keep it up perpetually, as "permanent" ordinarily implies greater continuity than "maintain."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Maintain; Permanency—Permanent.]

2. Deeds ☞155—Condition subsequent that property be used to maintain school or revert to grantor is to be strictly construed to avoid forfeiture (Civ. Code, §§ 1069, 1442).

Condition subsequent in deed that property be used to maintain school thereon; otherwise, to revert to grantor or heirs, is to be strictly construed to avoid forfeiture, in view of Civ. Code, §§ 1069, 1442.

3. Deeds ☞162—Building and conducting of school for 29 years on premises conveyed for such use is a permanent use avoiding forfeiture on abandonment of use.

Under deed to trustees of school district, requiring use of property for school; otherwise, to revert to grantor, building of school on property in good faith and without intention at time of changing location, and conducting school for 29 years until change was necessary, is a permanent use avoiding forfeiture, though use was subsequently abandoned.

4. Deeds ☞155.

Mere provision in deed that property is conveyed for a particular purpose does not create a condition subsequent.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Lillian Hasman, administratrix of the estate of J. H. Kerr (also known as Joseph H. Kerr), deceased, against the Elk Grove Union High School, and S. R. Gage and others, as trustees of said High School and individually to recover certain real property and to quiet title thereto. Judgment for defendants, and plaintiff appeals. Affirmed.

Charles J. Hasman and R. L. Shinn, both of Sacramento, for appellant.

C. E. McLaughlin and C. P. McLaughlin, both of Sacramento, for respondents.

FINCH, P. J. This action was brought by the administratrix of the estate of Joseph H. Kerr, deceased, for the recovery of certain real property and to quiet title thereto in the estate. The defendant high school was given judgment, and the plaintiff has appealed therefrom. October 11, 1893, Joseph H. Kerr conveyed the land in dispute to the trustees of the school. The parts of the deed material to the questions raised by the appeal are as follows:

"The said party of the first part, for and in consideration of the sum of one dollar, * * * has remised, released and forever quitclaimed, and by these presents does remise, release and forever quitclaim unto the said parties of the second part and to their successors, all those certain lots, pieces or parcels of land, situate, lying and being in the town of Elk Grove, * * * described as follows, to wit: Lots number twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine and thirty of J. H. Kerr Addition to the town of Elk Grove. * * * Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertain-

ing and the reversion and reversions, remainders and remainders, rents, issues and profits thereof. * * * To have and to hold all and singular the said premises, together with the appurtenances, unto the said parties of the second part and to their successors forever, provided the same shall be used for the purpose of maintaining thereon a high school; otherwise, the above described property shall revert to and become the property of the party of the first part, his heirs, or assigns."

Upon the execution of the deed the high school went into possession of the property, erected buildings thereon, and continuously thereafter maintained a high school upon the premises until September 29, 1922, and during that period of time no other property was used for high school purposes. In the month of December, 1920, at an election duly called to determine the question of changing the location of the high school to another site, which was a half mile distant from the old site, a majority of the electors voted in favor of the change. Thereafter buildings were erected on the new site and since September 29, 1922, the main activities of the high school have been conducted there, but the buildings on the old site continued to be used by classes in agriculture and "during stormy weather the athletic classes and work have been conducted" therein.

Appellant contends that—

"The following conditions are clearly shown to exist in the provisions of the deed: First, For a continuous 'maintaining' of a high school upon said property; second, for the reversion of the property to the grantor, his heirs, or assigns, should the maintaining of a high school upon said property cease."

[1] To maintain a school does not necessarily mean to keep it up perpetually. In *Whalen v. Baltimore & O. R. Co.*, 76 A. 166, 112 Md. 187, the defendant had agreed "to construct and maintain a turnout and siding" at a certain point on its main road. The turnout and siding were maintained for many years and then discontinued. The court said:

"We cannot yield our assent to the contention of the appellant that the word 'maintain' ordinarily means to maintain indefinitely or forever. Its meaning in that respect depends upon the context in which it appears and the subject-matter to which it relates."

The word "permanent" ordinarily implies greater continuity than the word "maintain." In *Texas & Pacific R. Co. v. City of Marshall*, 10 S. Ct. 846, 136 U. S. 393, 34 L. Ed. 385, the agreement involved provided:

"In consideration of the donation of the said sum of three hundred thousand dollars and said sixty-six acres of land, the said Texas & Pacific Railway Company will permanently establish its eastern terminus and Texas office at the city of Marshall, and will also establish and construct at said city the main machine shops and car works of said railway company."

The railway company complied with the terms of its agreement for about 8 years and then "moved various parts of its machine shops and its Texas office to other cities." The court said:

"The contract on the part of the railroad company is satisfied and performed when it establishes and keeps a depot, and sets in operation car works and machine shops, and keeps them going for 8 years, and until the interests of the railroad company and the public demand the removal of some or all of these subjects of the contract to some other place. This was the establishment at that point of the things contracted for in the agreement. It was the fair meaning of the words 'permanent establishment,' as there was no intention at the time of removing or abandoning them. The word 'permanent' does not mean forever, or lasting forever, or existing forever. The language used is to be considered according to its nature and its relation to the subject-matter of the contract, and we think that these things were permanently established by the railway company at Marshall."

In *Lord v. Goldberg*, 22 P. 1126, 1128, 81 Cal. 596, 601 (15 Am. St. Rep. 82) in construing a contract of "permanent" employment, it is said:

"It is clear that plaintiffs' employment was not intended to be for life, or for any fixed or certain period. It was to be 'permanent,' but that only meant that it was to continue indefinitely, and until one or the other of the parties should wish, for some good reason, to sever the relation."

[2] The contracts considered in the foregoing cases were not of such character as to require a strict interpretation thereof against any of the parties thereto, but in this case the rule of strict interpretation is applicable to the condition subsequent contained in the deed.

"A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." Civ. Code, § 1442.

"A grant is to be interpreted in favor of the grantee." Civ. Code, § 1069.

"The established rule is that where the right to a forfeiture is created by contract or by law 'it has always been considered that it was necessary to restrain it to the most technical limits of the terms and conditions upon which the right is to be exercised.'" *Downing v. Cutting Packing Co.*, 190 P. 455, 457, 183 Cal. 91, 95.

"No provision in a deed relied on to create a condition subsequent will be so interpreted if the language of the provision will bear any other reasonable construction." *Victoria Hospital Ass'n v. All Persons*, 147 P. 124, 126, 169 Cal. 455, 459.

"When such a condition is shown to have been created, the rule of construction is that of strictness against the grantor and in favor of the holder of the estate." *Fitzgerald v. County of Modoc*, 129 P. 794, 164 Cal. 493, 495 (44 L. R. A. [N. S.] 1229).

"There must be language used which is so clear as to leave no doubt that the grantor intended that an estate upon condition subsequent should be created—language which ex

proprio vigore imports such a condition." *Hawley v. Kafitz*, 83 P. 248, 249, 148 Cal. 393, 395 (3 L. R. A. [N. S.] 896, 113 Am. St. Rep. 315).

"The burden is upon the party claiming the forfeiture to show that such was the unmistakable intention of the instrument. If the agreement can be reasonably interpreted so as to avoid the forfeiture, it is our duty to do so." *Quatman v. McCray*, 60 P. 855, 856, 128 Cal. 285, 289.

[3] The deed involved in this case can be reasonably interpreted so as to avoid a forfeiture, even without applying the rule of strict construction discussed in the foregoing decisions. In compliance with the literal terms of the deed, the property was "used for the purpose of maintaining thereon a high school," and the deed does not provide for a reversion upon the discontinuance of such use, but only upon failure to so use it. Adapting the language of the opinion in *Texas & Pacific R. Co. v. City of Marshall*, supra, the condition of the deed was satisfied when the high school district, in good faith, and without any intention at the time of changing the location of the school, erected buildings on the property and conducted a high school therein for 29 years, and until the interests of the school demanded a change of location. Such use of the property was a permanent use under the authorities herein cited.

"If, by a condition that certain buildings or a certain structure shall be permanently located upon the granted land, it is meant simply that this land shall in good faith be selected as the site of such buildings or structure, and that the same shall be erected upon the granted land, the condition is fulfilled by the erection of the buildings or structure upon the land, and the use of it for a time for the purpose intended, though the use of it for this purpose is subsequently abandoned." *Jones on The Law of Real Property in Conveyancing*, § 687.

See, also, *Crane v. Hyde Park*, 135 Mass. 147; *Maddox v. Adair* (Tex. Civ. App.) 66 S. W. 811; *Jeffersonville, Madison & Indianapolis R. R. Co. v. Barbour*, 89 Ind. 375. Had it been the intention of Kerr that the property should revert upon the discontinuance of its use for high school purposes, it would have been so easy to have so stated, in plain and simple language, that it must be inferred from the terms actually employed that such was not his intention. In the following cases, relied on by appellant, the language used in the instruments there considered was so plain and certain as to require no interpretation. In *Parsons v. Smilie*, 32 P. 702, 97 Cal. 647, the condition was that the grantee should maintain on the premises "a good lumber yard for a period of not less than 5 years." In *Papst v. Hamilton*, 66 P. 10, 133 Cal. 631, the land was conveyed "upon the conditions, * * * that the premises shall be used solely for the purpose of erecting, fur-

nishing, keeping, and maintaining thereon an academic or collegiate school * * * and for a residence or residences thereon for the professors or teachers and students of the said institution while engaged in their duties therein, and for no other purpose whatever." In *Firth v. Marovich*, 116 P. 729, 160 Cal. 257, Ann. Cas. 1912D, 1190, the deed provided for the forfeiture of title upon the breach of certain building restrictions contained therein. In *Johnston v. City of Los Angeles*, 168 P. 1047, 176 Cal. 479, the land in question was conveyed for specified uses and the deed provided that—

"In case the party of the second part shall cease to use the said premises for the said purposes, * * * then and in that case the said premises * * * shall revert to and become the property of the said party of the first part, his heirs, executors, administrators or assigns."

[4] A mere provision in a deed that the property is conveyed for a particular purpose does not create a condition subsequent. *Fitzgerald v. County of Modoc*, 129 P. 794, 164 Cal. 493, 44 L. R. A. (N. S.) 1229.

In view of the conclusion reached upon the main issue in the case, it is unnecessary to determine whether the use which the district is now making of the property constitutes a use "for the purpose of maintaining thereon a high school." The following cases, however, lend support to respondents' contentions in that regard: *Reclamation District v. Van Loben Sels*, 78 P. 638, 145 Cal. 181, and *Behlow v. Southern Pacific R. R. Co.*, 62 P. 295, 130 Cal. 16.

The judgment is affirmed.

We concur: PULLEN, Justice pro tem.; PLUMMER, J.

76 Cal. App. 597

PEOPLE v. COSPER. (Cr. 1268.)

(District Court of Appeal, First District, Division 2, California. Feb. 23, 1926.)

1. Criminal law ⇨1159(3).

Verdict cannot be disturbed if there is competent evidence sufficient to prove charge, notwithstanding that evidence is conflicting.

2. Physicians and surgeons ⇨6(10)—Evidence as to treatment of patient during childbirth held sufficient to support charge of violation of Medical Practice Act (Medical Practice Act 1913, p. 734, § 17, as amended by St. 1915, p. 199, § 13, and St. 1917, p. 114, § 11).

In prosecution for violating Medical Practice Act 1913, § 17, as amended by St. 1915, p. 199, § 13, and St. 1917, p. 114, § 11, proscribing the practice of any system or mode of treating the sick by one not holding a valid certificate, evidence that defendant gave treatments to patient during childbirth, held sufficient to support conviction.

3. Physicians and surgeons ⇐6(1)—Accused held not within emergency exception of Medical Practice Act in giving treatments to patient during childbirth (Medical Practice Act 1913, p. 734, § 17, as amended by St. 1915, p. 199, § 13, and St. 1917, p. 114, § 11, and Act 1913, § 22).

Defendant, charged with violating Medical Practice Act 1913, § 17, as amended by St. 1915, p. 199, § 13, and St. 1917, p. 114, § 11, in practicing without valid certificate, held not within emergency exception of said act (section 22) in giving treatments to patient during childbirth; suggestion of emergency being refuted by evidence that arrangements for treatment had been made several days before defendant was called, and from fact that 20 hours elapsed between time of commencement of treatment and birth of child.

4. Physicians and surgeons ⇐6(1) — Record held to show use of prayer by accused was mere subterfuge to escape prohibitory sections of Medical Practice Act (Medical Practice Act 1913, p. 734, § 17, as amended by St. 1915, p. 199, § 13, and St. 1917, p. 114, § 11, and Act 1913, § 22).

Defendant, practicing without valid certificate, in violation of Medical Practice Act 1913, § 17, as amended by St. 1915, p. 199, § 13, and St. 1917, p. 114, § 11, held not within exception in Medical Practice Act, § 22, providing provision of act should not apply to treatment by prayer; record showing without doubt that use of prayer by defendant was mere subterfuge to escape such provisions.

5. Physicians and surgeons ⇐6(11)—Requested instructions relating to employment of assistant under duly licensed practitioner held properly refused, evidence not raising such issues (Medical Practice Act 1913, p. 734, § 17, as amended by St. 1915, p. 199, § 13, and St. 1917, p. 114, § 11).

In prosecution for violation of Medical Practice Act 1913, § 17, as amended by St. 1915, p. 199, § 13, and St. 1917, p. 114, § 11, practicing without valid certificate, requested instructions relating to employment of an assistant under duly licensed practitioner held properly refused; such issues not being raised, as uncontroverted evidence showed defendant and not assistant was actor in giving treatment.

Appeal from Superior Court, Contra Costa County; H. V. Alvarado, Judge.

Wilbert L. Cosper was convicted of violating the Medical Practice Act, and he appeals. Affirmed.

T. D. Johnston, of Martinez, and F. L. Butterway, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

NOURSE, J. The appellant was tried and convicted upon an information charging him with a violation of section 17 of the Medical Practice Act (St. 1913, p. 734, as amended by St. 1915, p. 199, § 13, and St. 1917, p. 114, § 11), proscribing the willful practice of any system or mode of treating the sick and af-

fllicted by one who does not hold a valid certificate therefor. The appellant has appealed upon a typewritten record from the judgment following the verdict of guilty and from the order denying his motion for a new trial.

[1, 2] The chief ground urged on the appeal is that the evidence is insufficient to support the verdict of guilty. The evidence covering the actions and methods used by the appellant at the time complained of is in conflict, and it is therefore not necessary to do more than to refer to the rule that the verdict cannot be disturbed if there is competent evidence sufficient to prove the charge contained in the information notwithstanding the conflict. It is in evidence that the appellant was the organizer and a member of a corporation known as the Christian Philosophical Institute, which was organized for the purpose of teaching students to treat by prayer the sick and afflicted. A few days prior to August 28, 1924, arrangements were made by the appellant to treat Anna Dietrich during the period of her confinement, and as a part of these arrangements it was agreed that the appellant would treat her without fee, and that he might bring to her home a number of his students for the purpose of giving them instruction in the treatment of cases of that character. At 5 o'clock a. m. of August 28, 1924, the appellant and his students gathered at the home of the patient and immediately thereafter the appellant made a physical examination of his patient and gave her instructions as to the character of exercises which she should perform in order to aid the birth of her child. During this time the appellant's students were engaged with him in going through certain exercises which were a part of the method of treatment taught by the institute, and during the period between the time of labor the students retired to the dining room and either engaged in silent prayer or in dancing and other forms of amusement. This treatment continued from 5 o'clock of the morning of August 28th until 2 o'clock of the following morning, when the patient and her husband insisted upon having medical treatment, and she was removed to a maternity hospital, where the child was born at 7 o'clock of that morning. At about 7 o'clock a. m. of August 28th a Dr. Leatherwood, who was duly licensed to practice osteopathy, came to the premises on the call of the appellant and remained with the patient for several hours, and during this time the appellant worked with the doctor and under his direction in the manipulation of the body of the patient. It was conceded that the appellant did not at any of the times referred to have a certificate entitling him to practice any system or mode of treating the sick or afflicted in this state. The evidence recited, without going into further detail, is sufficient to support the charge in

the information of a violation of section 17 of the Medical Practice Act.

[3] It is urged on the part of the appellant that the case was an emergency treatment, and that it therefore comes within the exception found in section 22 of the Medical Practice Act, which provides that "nothing in this act shall be construed to prohibit service in case of emergency." The suggestion of an emergency in this particular is refuted by the uncontroverted evidence that arrangements had been made for the treatment by the appellant of this particular patient several days before the date he was called, and from the further fact that approximately 20 hours elapsed between the time when he commenced his treatment and the time of the birth of the child. During that time ample opportunity was afforded to secure a regularly licensed physician.

[4] It is also urged that the appellant is entitled to relief from the exception contained in section 22 of the Medical Practice Act, to the effect that the provisions of the act shall not "prohibit or apply to, any kind of treatment by prayer." An examination of the record in this case shows without the slightest doubt that the use of prayer by the appellant in the treatment of his patient in this case was a mere subterfuge to escape the prohibitory provisions of the Medical Act.

[5] The appellant suggests that the trial court erred in refusing to give his proposed instructions Nos. 4 and 5, which related to the employment of an assistant under a duly licensed practitioner and to the question of emergency treatments. We have seen that these issues were not before the jury, because the uncontroverted evidence was that the appellant was the actor and not an assistant in the treatment rendered, and that there were no circumstances under which the question of an emergency could arise. We find no prejudicial error in the record.

Judgment and order affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

76 Cal. App. 569

ROCCA v. TUOLUMNE COUNTY ELECTRIC POWER & LIGHT CO.
(Civ. 3052.)

(District Court of Appeal, Third District, California. Feb. 19, 1926. Hearing Denied by Supreme Court, April 19, 1926.)

1. Electricity ⚡14(2)—Electric company held not relieved from duty of protecting high-tension wires beside highway against limb of tree, though tree was on private property.

Electric company, maintaining high-tension wires beside highway, was not relieved from

liability for failure to protect wires against limb of a tree, falling on them and causing them to sag, because tree was on private property of another.

2. Electricity ⚡16(3).

Electric company is not relieved from liability for injury by wires broken by storm, unless storm could not reasonably have been anticipated.

3. Electricity ⚡19(3)—Injury to traveler on highway by contact with electric wire held to raise presumption of negligence in maintaining wire.

Where person, while traveling along a public highway, is injured by coming in contact with a highly charged electric wire, belonging to a power company, which is down across public highway, there is a presumption of negligence on part of company maintaining wire.

4. Electricity ⚡19(8)—Negligence in maintaining electric wire, injuring traveler on highway, held for jury.

In action for death of traveler on public highway, electrocuted by wire of power company, caused to sag by limb of tree falling on it, question of power company's negligence in not properly maintaining wires and guarding same against dangers reasonably to be apprehended held for jury.

5. Trial ⚡296(3)—Any error in instruction not requiring finding that dangers could have been apprehended by electric company held not prejudicial, in view of other instructions (Const. art. 6, § 4½).

Any error in instruction authorizing recovery for death due to negligence of electric power company in construction and maintenance of its electric power lines, in that instruction did not require finding that dangers impending could have been reasonably apprehended or safeguarded against, held not prejudicial, within Const. art. 6, § 4½, in view of other instructions.

6. Death ⚡99(5)—\$12,000 damages to mother for death of adult son held not excessive.

Damages of \$12,000 for death of plaintiff's adult son, who lived with plaintiff, and managed her property, plaintiff's life expectancy being 10 years, held not excessive.

7. Appeal and error ⚡1004(1).

Appellate court can set aside a verdict of jury on grounds of damages allowed being excessive only when it appears that improper causes have led to verdict.

Appeal from Superior Court, Tuolumne County; J. A. Smith, Judge.

Action by Jay L. Rocca, administrator of the estate of Lige William Rocca, deceased, against the Tuolumne County Electric Power & Light Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Edwin L. Forster and R. P. Henshall, both of San Francisco, for appellant.

Jacobs & Jacobs, of Stockton, for respondent.

PLUMMER, J. The plaintiff, as the administrator of Lige William Rocca, deceased, prosecutes this action under the provisions of section 377, Code of Civil Procedure, in the interest of Marguerite Rocca, mother of the deceased. Plaintiff had judgment in the sum of \$12,000. A motion for a new trial being denied, defendant appeals to this court from said judgment.

After setting forth some preliminary matters, the complaint alleges that the defendant is a corporation organized for furnishing electricity for lighting and power purposes, and was maintaining a line of wires, poles, etc., for carrying and conveying electricity from Jamestown to Quartz Mountain and thence to Stent, in the county of Tuolumne, and was so doing on the 30th day of January, 1922. It is further alleged that said company maintained an electric power line along a public highway at a point where a certain other road used by the public intersected or connected with said public highway; that said road so intersecting said public highway is known as and called the App Mine road; that said App Mine road was, at the time in question, and for many years prior thereto had been, generally used and traveled by the public. The complaint then sets forth that on or about the 30th day of January, 1922, and while the defendant was in the possession and control of said electrical power line, it was so negligent and careless in maintaining and using the same that said wire was allowed to sag to within about 3 feet of the ground where it passed over the App Mine road; that on the morning of the 30th of January, 1922, the deceased, while walking along said App Mine road, came in contact with said wire without any negligence on his part, and was immediately electrocuted. Damages are then alleged in the sum of \$15,000.

The answer of the defendant admits the maintenance of the power line, the death of the deceased as caused by coming in contact therewith, and then alleges that during the night of January 29 and 30, 1922, an unusual storm prevailed over the country where the power line of the defendant was maintained, and that, owing to the unusual severity of the storm, a limb was broken from a tree standing near the said power line; that said limb fell upon one of the wires maintained by the company, and thereby caused the same to sag within a few feet of the ground as herein stated. The answer further alleges that the deceased was negligent by passing along said road at an early and unseasonable hour, and, further, that the defendant did not know, and had no means of knowing, that said limb had by reason of the storm been blown from said trees onto the wires belonging to the defendant.

The testimony set forth in the transcript shows that the deceased and another person had passed along said App Mine road on the

evening of January 29, 1922; that at the junction of the App Mine road the deceased and a friend named Hawke had alighted from an automobile in which they were traveling, and had gone by way of the App Mine road to visit a family by the name of Stephens; that said Hawke remained at the Stephens home until about 2 o'clock that night, when he left and passed down the App Mine road to the public highway with which said road connects; that the deceased remained at the Stephens home until between 4 and 5 o'clock in the morning, when he left said home, and started down the App Mine road to meet his brother, at a point where the App Mine road intersects the public highway. It appears that the deceased and the brother of the deceased had made a previous appointment to meet at the point indicated at about the hour of 5 o'clock on the morning of January 30, 1922. When the brother reached the appointed place on the morning of January 30, 1922, he found the deceased lying dead under the power wire herein referred to; that the power wire was about 3 feet above the body of the deceased, the wire being held down by the limb of the tree hereinbefore referred to, which limb was resting upon the wire near one of the poles on which the wire was strung, and at a point where the limb of the tree rested upon the wire the wire was pressed down to within about 6 inches of the ground.

The county road to which we have referred runs from Sonora by Jamestown; thence to the villages of Quartz and Stent. The App Mine road connecting therewith has been traveled by the public for a period of some 40 years. The defendant maintained two power wires along the county road over and above the point where the App Mine road connects therewith. These wires were strung over the App Mine road on poles 245.5 feet apart. These wires ran along the west side of the county road at a distance therefrom where they cross over the App Mine road of about 17 feet. The nearest pole southerly from the App Mine road was distant 94 feet. The nearest pole to the north of the App Mine road was distant about 151 feet. It appears from the testimony also that a telephone company maintained its wires along a line drawn between the power lines maintained by the defendant over the App Mine road and the trees from which the limb was broken, as heretofore stated. The wires of the power line were higher than the telephone wires by some 4 feet. The power line wires at the pole immediately south of the App Mine road, called pole B, were carried to a height of some 30 feet. At pole C to the north the wires were at an elevation of only 22 feet. It also appears from the testimony that the Pacific Gas & Electric Company maintained electric power lines over the App Mine road a short distance away, and that the poles of the Pacific Gas & Electric Com-

pany, where its lines were carried over the App Mine road, were 108 feet apart. It also appears that old stumps of poles formerly used by the defendant in maintaining its line indicated that the span over the App Mine road was at one time only 148 feet. It further appears from the testimony that, during all of the period of time the defendant has maintained its electric power lines herein referred to, a certain pine tree has stood 33 feet distant from the power lines belonging to the defendant and a short distance northerly from the pole B, carrying the power wires over the App Mine road. In other words, the tree was between the poles carrying the span of wires over the App Mine road. It further appears that this tree, which was to the west of the power lines, leaned towards the east, so that a line dropped from where the limb was broken from said tree would reach the ground a trifle over 8 feet nearer the power line than the base of the tree. At a point from 45 to 48 feet above the ground, a limb 10 or 12 inches in diameter where it joined the tree, extended out in an easterly direction, at an angle of about 45 degrees. This limb was from 35 to 40 feet in length, and overhung the power lines belonging to the defendant, but was some distance above the power line. The pole of the power line near the pine tree is called in the testimony "pole B." The next pole to the south thereof is called "pole A," and was distant from pole B 257 feet. The pole to the north of the App Mine road is called in the testimony "pole C," and, as hereinbefore stated, is distant from pole B 245½ feet. The next pole of the power line north of pole C is called in the testimony "pole D," and is distant from pole C 260 feet. The next pole north of pole D is called "pole E," and is distant from pole D 199½ feet. The power wires of the Pacific Gas & Electric Company over the same corresponding territory, but, on the opposite side of the pine tree, have the following spans: 113 feet, 95½ feet, 162½ feet, and 98 feet. The two wires maintained by the defendant were strung on cross-arms and tied to insulators thereon about 4 feet apart. The wires of the defendant power company were 3 or 4 feet higher than the highest wire of the telephone company. The branches of the limb of the tree caught the east wire of the defendant company, and pressed it to the ground as hereinbefore stated, leaving the butt end of the limb resting upon the west wire maintained by the power company, and drawing it down to within some 12 or 14 feet of the ground. The pine tree is 27 inches in diameter and some 83 feet in height. The ground upon which the pine tree stood was elevated a slight distance above the ground where pole B was located. The point where the limb broken from the tree pressed the east wire of the power line to the ground was about 19½ feet north of pole B. All the testimony shows that the

night in question was very dark. On the part of the appellant, considerable testimony was introduced to the effect that it was an unprecedentedly stormy and windy night. On the part of the plaintiff, considerable testimony was introduced to the effect that, although it was a stormy night, the storm was not unusual in its violence, and was only such a storm as frequently occurs in the mountainous regions where the power lines were maintained. In this particular, the appellant claims that the death of the deceased was brought about by inevitable casualty, and was the result of causes not to be reasonably apprehended or reasonably guarded against. The testimony shows that the scar on the pine tree where the limb was broken away showed an old break of about one-third of the surface thereof on the upper portion and a clean fresh break on the remainder. The testimony in the transcript shows that employees of the company knew of the circumstances of the pine tree and limb in question, but there is no evidence in the transcript indicating whether the old crack in the limb where it joined the parent tree was visible from the ground, or could have been discovered by an inspection of the limb, nor is there any evidence in the transcript that any inspection or examination was ever made of the tree prior to the accident in question by any one connected with the company or otherwise.

The testimony further shows that the deceased was unmarried and about 29 years of age; that the deceased and his mother lived on a ranch near Algerine, in the county of Tuolumne; that this ranch comprised some 600 acres in area; that the deceased had lived upon the ranch with his parents for a number of years preceding the World War; that during the World War the deceased was in the army and away from home; that upon his return in 1919 he worked for a while in a bakery near Sonora; that in November, 1920, the deceased returned to the ranch, and remained there until the date of his death; that in July, 1921, the father of the deceased died, and, after the death of the father of the deceased, the deceased for about 14 months, and up to the date of his death, took charge of the ranch; that the deceased was familiar with farming operations, and looked after the ranch in an excellent manner; that during the 14 months the deceased was in charge of the ranch in question the mother of the deceased depended exclusively upon him for the management of her affairs; that during the time the deceased was in charge of the ranch the proceeds thereof were deposited in a bank in Sonora; that the deceased drew from the money deposited in bank and used for his own purposes the sum of about \$30 a month; that at the time of the death of the deceased there was in the bank to the credit of the mother, as proceeds of the operation of the ranch, the sum of \$1,200, accumulated during

the period of the deceased's management. There was also testimony introduced to the effect that during the busy season ranch hands were paid from \$4 to \$5 per day; that the compensation of the foreman of a ranch was from \$100 to \$130 per month. At the time of the trial the mother of the deceased was 67 years of age. The deceased was in good health, able-bodied, industrious, considerate of his mother, with whom he resided. The mother of the deceased had two sons, the deceased, unmarried, and a married son, named John J. Rocca. There were several sisters, all married but one. The testimony does not show that the son ever contributed any actual cash to the support of his mother, nor what the arrangement, if any, existed between the mother and the deceased relative to his management of the ranch. It simply sets forth that he was in charge of the 600-acre ranch, upon which grain and hay, garden products and fruit were produced, poultry raised, and a limited number of cattle and hogs, and the amount of money usually paid for like services rendered by others. The life tables show an expectancy on the part of the mother of 10 years, dating from the day of the trial.

As grounds for reversal of the judgment in this case, the appellant urges: (1) That the complaint fails to state a cause of action, in that it contains no allegation that the mother was dependent upon her son for support, and that there is no allegation as to damages, save and except the general statement that the plaintiff was injured in the sum of \$15,000; (2) that the death of Lige William Rocca was the result of inevitable casualty, and not of any negligence on the part of the defendant, and that the deceased himself was guilty of contributory negligence; (3) erroneous instructions given to the jury by the court, and, finally, that the judgment is excessive. The appellant also moved for a nonsuit on the ground that the testimony did not show any negligence on its part. We do not find anything of merit in the appellant's contention that the complaint does not state a cause of action. The questions presented by appellant's motion for a nonsuit may be treated generally in considering the question of negligence, if any, shown in this case.

The testimony shows that there is no mechanical appliance that will indicate the mere fact of a sagging wire; that there are mechanical appliances which indicate the circumstance of a broken wire, or of a wire becoming grounded; that appliances of this character were used by the defendant company; and that, had the wire in question broken and reached the ground, the company would have been advised thereof immediately. The testimony further shows that the accident in question occurred some time between 2:30 a. m. and 5 a. m., of January 30, 1922, and at an hour when the App Mine road is seldom frequented, and at a time when it is

reasonable to infer that the lines of the company were not usually being inspected. Whether the storm in question was of that severity which would have induced an ordinarily prudent person to inspect the power line carrying a highly dangerous voltage to ascertain if any damages were being done thereto does not appear to have been directly presented one way or the other in the trial of this case. It may be here stated that the power line causing the death of the deceased carried 2,300 volts of electricity.

The question of negligence in this case depends upon a combination of factors: (1) Was the leaning position of the pine tree referred to herein and the overhanging limb which broke away therefrom and fell upon the power lines maintained by the defendant so near the power lines belonging to the defendant and in such a position as to induce an ordinarily prudent person to take precautions against injury resulting from damage that might be inflicted upon the tree by the usual winter storms, reasonably to be anticipated in the mountainous country where the lines were maintained? (2) Also, could the cracked condition of the limb, as shown by the scar after the limb had been wrenched away from the parent tree, have been discovered had any reasonable effort been made to ascertain the condition thereof? (3) Also, whether the distance between the poles on which the wires were strung was so excessive as to permit the bringing down to the earth of a line swung on a crossarm about 30 feet in height to within 6 inches of the ground at a point only 19 feet from the base of the pole? (4) Also, considering the leaning position of the trees and the overhanging limb, would or would not ordinary care and precaution have suggested to the defendant the advisability and reasonable necessity of erecting a pole between pole B and the App Mine road, so that, if the tree or a limb thereof did fall upon the power lines, it would fall upon a span not swung across the App Mine road? The testimony shows that the spans in the line maintained by the Pacific Gas & Electric Company in the same neighborhood were very much shorter in length. The voltage carried by the Pacific Gas & Electric Company does not appear in the transcript. Much stress is laid upon the fact by the appellant that the broken limb was carried over the telephone wires which were between the tree and the power lines belonging to the defendant. The telephone lines, however, were much lower, and, owing to the leaning position of the tree would tend to carry the limb over the telephone wires, even though the storm was not of unusual severity.

In the argument of this case our attention has been called to a number of cases. We will review the same, so far as pertinent, and also some cases not cited in the brief. In *Curtis on the Law of Electricity*, § 497, it is said generally:

"Electric companies, not being insurers against accidents from their appliances, are not liable for injuries resulting from an act of God or inevitable accident. The basis of the company's liability is its negligence; but the sagging of wire, under the doctrine of *res ipsa loquitur*, is generally held to make a *prima facie* case of negligence which requires the company to give evidence that the sagging was not the result of its negligence. * * * If the sagging of its wire is occasioned by a cause for which it is not responsible, and it detects the trouble with promptness, and immediately pursues the proper steps to remedy the situation, it is not chargeable for an injury to another by reason of the sagging of the wire. * * * Whenever electric or other wires are maintained in such a location that it may be reasonably anticipated that the sagging thereof will cause injury, the one maintaining the wire must use due care to prevent the sagging thereof. Due or commensurate care in the case of high-tension electric currents means a very high degree of diligence. If a wire strung along or across a highway is negligently permitted to sag so that a traveler is injured thereby as a general proposition, the company maintaining the wire is liable for the resultant damages."

[1-3] The pine tree referred to herein stands upon private property, but the argument based upon that fact by appellant is untenable, and does not relieve the company from liability for failure to protect its wires or take the ordinary precautions which the circumstances demanded. In *Hagerstown & Frederick Railway Company v. State of Maryland*, for use of *Bruce A. Weaver*, 115 A. 783, 139 Md. 507, 19 A. L. R. 797, the law on this question is thus stated:

"An electric company maintaining high-tension wires beside a highway is not relieved from the duty of protecting the wires against the decayed limb of a tree which overhangs them, by the fact that they are on its own property, and the tree is on private property of another, if the fall of the limb is likely to break the wires and endanger persons passing along the highway."

In this case the poles belonging to the company were just inside and adjacent to a wire fence on the west side of the highway. The road or highway was about 30 feet wide, and standing just inside the fence on the opposite side of the road was a weeping willow tree from 5 to 6 feet in diameter. A larger limb of this tree extended out over the highway. This limb broke away and fell one evening, and, in its fall, struck and broke one of the transmission wires belonging to the company. This wire came in contact with the wire fence just referred to, and a minor child of the respondent touched this wire fence and was killed. The court, in considering the facts thus presented, declared the law as we have stated, and said further:

"The obligation of such companies to exercise proper care is not determined by their right to construct and maintain their lines, but rests upon their duty to protect others while in the lawful exercise of their rights. As we have

said, there was evidence tending to show that the appellant, by the exercise of proper care, could have known that the tree was decayed, and that the limb that gave way would probably fall and break its wire, and that it did nothing either to protect its wires or to protect the public from injury that might be caused by a fallen wire. To hold that the appellant was relieved from all obligation or duty to the public simply because the tree stood on private property would deprive those lawfully and properly using the highway of the protection they were entitled to. * * * The appellant's line was on its private right of way where the appellant had a right to construct and maintain it. But it was also along a public highway, where the public and the little child that was killed had a right to be, and the company was therefore required, in maintaining its line, to exercise that high degree of care commensurate with the danger to which it exposed those using the highway. If the proximity of its line to the decayed tree rendered the highway unsafe for the use of the public, it was the duty of the appellant either to have the limb removed, or to exercise proper care to protect its wires, and, if the injury complained of was the result of its failure to discharge that duty, it should be held liable."

In *Boyd v. Portland General Electric Company*, 66 P. 576, 40 Or. 126, 57 L. R. A. 619, a case having to do with a wire broken by storm, the court said:

"An electric-light company is not relieved from liability for injuries by wires broken by a storm, unless it was one which could not reasonably have been anticipated."

In *Warren v. City Electric Railway Co.*, 104 N. W. 613, 141 Mich. 298, where a telephone wire received a dangerous current from a trolley wire by being pressed down onto a trolley wire by a limb of a tree which was broken down by a severe storm, the court, in considering the subject of inevitable accident, and the claim that the wire was not properly constructed, used this language:

"In this connection it is urged that the proximate cause of the injury was not the want of insulation, nor the failure to guard the span wire, but it was the breaking of the tree. It is generally the case that an accident is the result of concurring causes. If the rain and snow never fell and the wind never blew, wires would be less likely to fall and break. * * * All of these were things to be anticipated and guarded against. If this was not done to the extent that a prudent man would do it, there was a failure of duty, which might be a concurring cause of the accident, making defendant liable."

In *Spires v. Middlesex & Monmouth Electric Light, Heat & Power Co.*, 57 A. 424, 70 N. J. Law, 355, where a wire was broken by a falling limb from a tree, the court considered the question of the duty of the company to guard against such occurrences and to protect its wires from such possibilities, and discussed the question in this manner:

"We think the finding of the jury that the company was negligent was justified by the facts shown. The wire which was broken crossed the

highway diagonally at the place where the accident happened. The parting of the wire was caused by the falling upon it of a heavy limb which had broken from a tree which stood some feet away. In view of the dangerous nature of a wire charged with a powerful electric current, corporations using public highways for wires that are so charged should exercise a high degree of care to keep the wires where travelers will not be likely to come in contact with them. The likelihood of such a wire being broken by the falling of the limb of a tree upon it is much lessened by a guard wire stretched over it and running parallel with it, and juries are justified, in proper cases, in holding that such a safeguard is due to the public, and that its absence speaks negligence."

In the case at bar the erection of another pole on the south line of the App Mine road would have given a span of wire adjacent to the leaning tree and underneath the overhanging bough, which would have absolutely protected the public in the use of the App Mine road. The failure to take any such precautions in the light of the circumstances presented by the tree and overhanging limb are matters of fact going to the question of negligence proper for the jury to consider; also the fact that the spans between the poles were of such great distance and the wire so loosely hung that it could be pressed to the ground so near to a supporting pole. In *Heidt v. So. Tele. & Telegraph Co.*, 50 S. E. 361, 122 Ga. 474, a case having to do with the falling of a tree by a violent storm, the facts showing that it was one which could not have been reasonably guarded against, the court stated the law applicable, following the rule hereinbefore laid down, to wit:

"The electric light company, in the construction of its line, was bound to adopt all reasonable precautions for the protection of the public, to prevent casualties which might be reasonably anticipated. This obligation would require it to anticipate the influence of the ordinary storms customary to the locality. But if the falling of the electrically charged wire was caused by a storm of unusual severity, which could not have been reasonably foreseen and its consequences guarded against, the company would not be liable, if it was not otherwise negligent."

The telephone company and the power company were made defendants in that action. The telephone company was held liable for not having properly guarded its wires, and the power company held not liable on the theory that defendant (power company) had taken all reasonable precautions, and the storm was not one common to the locality where the wires were erected. In *Rowe v. New York & N. J. Tel. Co.*, 48 A. 523, 66 N. J. Law, 19, a telephone wire swung above a power wire was blown down during a violent squall, and injury occasioned to a boy walking along the sidewalk where said wire reached the ground. Both companies were held liable, notwithstanding the storm, by reason of the fact that neither company had tak-

en precautions to guard the wires from coming in contact. In the case of *Smith v. San Joaquin, etc., Power Corp.*, 211 P. 843, 59 Cal. App. 647, the recital of facts shows that an electric power line strung along the side of a public highway was broken by the leaves of a large palm tree blown against the wire during the storm, and the court said:

"The defendant pleaded in its answer, and thereafter offered to prove, facts showing or tending to show that the wire which the plaintiff touched was properly in place the night before, that a wind arose, and the leaves of a large palm were blown over against the wire and broke it, and that such facts constituted an act of God. If the facts stated constituted an act of God the defendant should have been permitted to show the same as a defense. However, the respondent contends that the alleged facts do not show an act of God within the proper meaning of that rule. (*Fay v. Pacific Improvement Co.* [26 P. 1099, 28 P. 943], 93 Cal. 253 [16 L. R. A. 188, 27 Am. St. Rep. 198].) In this behalf he contends that if the palm tree stood in such a position as to endanger the defendant's wire that the defendant should have properly protected its wire therefrom and, in failing to do so, the omission was an act of neglect on the part of the defendant, and not an act of God. This contention is supported by the authorities. *Chidester v. Consolidated Ditch Co.*, 59 Cal. 197."

This case applies the rule of *res ipsa loquitur*. In *Diller v. Northern Cal. Power Co.*, 123 P. 359, 162 Cal. 531, Ann. Cas. 1913D, 908, the rule of *res ipsa loquitur* is applied, and it is there said:

"The fact that a person, while traveling along a public highway, was injured by coming in contact with a highly charged electric wire belonging to an electric light and power company, which was down across the public highway at the point where the accident occurred, raises a presumption of negligence on the part of the company maintaining the wire."

Numerous cases are cited in that case, and, we think, definitely establish the rule as applicable to the case at bar. That the evidence does not show any previous breaking of a limb from the pine tree in question is wholly immaterial. The question is, Could it have been reasonably anticipated? or, as said in 19 Cal. Jur. 563:

"But merely because a particular accident has not happened before does not render it of that class which may not 'reasonably be anticipated,' for if, in the conduct of a certain business, it should be known that unusual or uncommon danger must necessarily coexist with certain conditions, responsibility attaches for a failure to control such conditions. And where injury could reasonably have been anticipated, it is not a prerequisite to liability that the wrongdoer should be able to anticipate the precise form of the consequential injury. Whether an injury should have been anticipated by defendant as the result of his negligent act depends upon the facts and circumstances of each particular case, and is ordinarily for the jury to determine."

See, also, *Teale v. S. P. Co.*, 129 P. 949, 20 Cal. App. 570, where this rule is held to apply, even though no previous accident had occurred.

The law applicable to cases involving circumstances which we are here considering is clearly set forth in the case of *Fairbairn v. American River Electric Co.*, 148 P. 788, 170 Cal. 115, from which we quote the following:

"The companies are not insurers of the safety of the public against all dangers arising from the lawful placing in the street of appliances pertaining to the business carried on by them, but they are bound to know the danger which may naturally be caused by such use of the streets, and to guard against them by the exercise of all the foresight and caution which can be reasonably expected of prudent men, under the circumstances." 1 *Joyce on Electricity*, § 438; *Denver v. Sherret*, 88 F. 233, 31 C. C. A. 499. "The degree of care required of such companies, under the rule that they must exercise reasonable care, varies according to the facts and circumstances of the case, having in view the serious results which may ensue as a consequence of negligence." 1 *Joyce on Electricity*, § 438a. The standard to be attained is that of ordinary and reasonable care, and this means such care as a reasonably careful and prudent person, having in view the dangers to be avoided and the likelihood of injury therefrom, would exercise, under the circumstances, in order to prevent injury. Where death may be caused by an agency lawfully in use, ordinary care requires that every means known, or that with reasonable inquiry would be known, must be used to prevent it."

The verdict of the jury necessarily included the finding upon conflicting testimony that the storm was not unusual, and, therefore, one that should have been reasonably apprehended, and that finding is conclusive upon appeal.

[4] We think that the foregoing résumé of the testimony and law applicable to this case shows that the denial of the defendant's motion for a nonsuit was proper; that the question of negligence on the part of the defendant in not properly maintaining its wires and guarding the same against dangers reasonably to be apprehended was one properly to be submitted to the jury; that the rule of *res ipsa loquitur* applies; and that the cases of *Kleebauer v. Western Fuse & Explosives Co.*, 71 P. 617, 138 Cal. 497, 60 L. R. A. 377, 94 Am. St. Rep. 62, and *Puckhaber v. S. P. Co.*, 64 P. 480, 132 Cal. 363, have no application, as they do not involve safeguarding against impending dangers.

[5] At the request of the plaintiff, the court instructed the jury as follows:

"If you believe that the defendant so constructed and maintained its electric pole lines and power wires that a pine tree was permitted to be and remain sufficiently near said power line that a limb from said tree extended over and above said power wires of said defendant, and that said limb, under weather conditions that were not unusual for said season of the year

in said locality, fell upon the electric power line of said defendant, and placed said line sufficiently near the ground as to cause said power line at the point where the same crossed the App Mine road to reach a point sufficiently near the ground that the deceased Lige William Rocca, in walking along said road without negligence or fault upon his part, walked against or came in contact with said wire, and as a result thereof was killed, and that the killing of said deceased was due to the negligence of said defendant in the manner and place of the construction and maintenance of its electric power lines, when considered with reference to said tree and overhanging limb, then I instruct you that the defendant would be liable in damages to the plaintiff herein."

Taken by itself, it may be seriously questioned whether this instruction sets forth the law correctly. It is certain that it does not set it forth in very clear language. There is nothing in the instruction relating to whether the dangers impending could have been reasonably apprehended or safeguarded against, but, read in connection with instructions immediately following, the ambiguity and error, if any, involved in said instruction are corrected and cleared up, as the jury is immediately advised in the following language:

"The jury is instructed that the defendant is charged with the duty of so placing its wires and keeping and maintaining them, with reference to adjacent trees and limbs, as to protect said wires in reasonable safety against the danger of being broken or disturbed by falling limbs under ordinary seasonable weather conditions in the locality where said wires were maintained; and said defendant is charged with the duty of keeping in mind and protecting its power lines in reasonable safety against, the ordinary consequences that may result to adjacent trees or overhanging limbs from the ordinary seasonable weather conditions in the locality—including rain, snow, heat, cold and wind."

The jury was also instructed that they were to take into consideration all the circumstances and facts which we have hereinbefore set forth, which gave them a full idea of what they were to pass upon. At the request of the defendant, the court gave a number of instructions, among which we find the following:

"If you find from the evidence, and believe, that said storm and wind was the sole cause of the breaking of said limb off said tree, and said limb was sufficient in weight to cause said wire being sagged to or within about 3 feet of the ground at the point where the body of Lige Rocca was found, and if you should further find from the evidence that defendant was not negligent in the construction or maintenance of its power line, then I charge you that your verdict should be in favor of defendant."

"I further charge you that before a verdict for any sum can be found against defendant you must find from a preponderance of the evidence that the death of Lige Rocca was caused by the negligence of the defendant in not properly having constructed said line of power wire leading from Jamestown to Stent, or by the negligence

of defendant in not having on January 30, 1922, properly maintained said wire at a point where a road leading from the App Mine intersects the highway leading from Jamestown to Stent."

In view of these instructions, and others which were given at the request of the defendant, which fully presented to the jury all questions of negligence on the part of the defendant, the dangers to be apprehended and the conditions surrounding the maintenance of the wire and whether the storm was a usual one occurring in that locality, or was of unprecedented violence and of a degree and force not to be reasonably apprehended, we cannot conclude any prejudicial error was committed by the court, and, therefore, section 4½ of article 6 of the Constitution must be held as applicable.

[6] It is finally insisted that the verdict is excessive; that section 377 of the Code of Civil Procedure, as applied to this case, does not permit the jury to take into consideration the pecuniary value and, therefore, the pecuniary loss of the comfort, society, and protection afforded the mother by her son. In this contention, however, the appellant is not borne out by the facts. The evidence shows that the mother, a widow, and a son were living together upon the mother's ranch; that the son had taken charge of the ranch; and that the mother consulted with the son in the management of her properties, and depended upon the son for his management, control and operation of the ranch properties, and, as well, was enjoying his society, comfort, and protection at her home. It is not a case where an adult child is living away from home and is not contributing anything in the way of society, comfort, and protection to a parent. The life expectancy of the mother in this case, as shown by the tables, is about 10 years, and, while there does not appear anything in mere dollars and cents as to the contributions made by the son to the support of his mother, it does appear that he was managing the ranch in question, and apparently showing a profit in the management thereof. Whether the son was entitled to draw down and expend for his own uses and purposes more than \$30 a month is not shown by the testimony. The value of the son's services, however, may be reasonably inferred from the testimony as to the ordinary wages paid for like services. This is not all, however, that the jury was entitled to consider, because, in the management of the ranch property, skill, knowledge of conditions, and industry are important factors, and especially the interest in the property, its care, and development are highly important. These were factors entering into the profit reasonably to be expected by the mother in having her properties looked after by one who was capable, industrious, and interested. In considering the value of these factors, and arriving at a just conclusion

thereof, we are of the opinion that the jury would arrive at as nearly an accurate approximation of the damages suffered as could be determined by any court. Of course, it cannot be said that the son would live with the mother and manage the ranch and afford all the profitable matters, which we have herein set forth, during the entire period of her life expectancy; neither could it be said that he would not do so. In considering these probabilities, the Supreme Court, in *Parsons v. Easton*, 195 P. 419, 184 Cal. 764, said:

"In the absence of anything to the contrary, the presumption would be that the benefit to the parents from the son, if any, would have continued during her survivorship [referring to the mother] the same as during the lives of both of them. Hence, it is proper to consider the value in money of the benefits which, from all the circumstances of the case, the parents might be reasonably expected to derive from the son during their expectancy of joint life and for the remainder of the mother's life expectancy, assuming that the son's life would have continued for that period."

From this it follows that, if the pecuniary value of the son to the mother in the management of her property was the sum of \$1,200 per year, and her life expectancy was 10 years, her loss in dollars has been the sum of \$12,000. To be sure, this is not considering the present worth of the sum involved paid annually in installments of \$1,200. Here, however, another element enters into the case, and that is the pecuniary value, and hence the pecuniary loss of the society, comfort, and protection. Our attention has not been called to any rule by which such damages may be mathematically calculated. Such damages must be determined by the enlightened judgment either of the jury or the court, and, as we have said, we know of no rule which indicates that the judgment of the court is more likely to be accurate in such matters than the determination of the jury.

[7] Again, an appellate court is entitled to interfere and set aside a verdict of a jury on the grounds of the damages allowed being excessive, only when it appears that improper causes have led to the verdict. The language of this court, speaking through Presiding Justice Chipman, in *Slaughter v. Goldberg, Bowen & Co.*, 147 P. 90, 26 Cal. App. 318, states the rule and refers to the cases considering the same. We quote therefrom the following: "There is no evidence aside from the amount of the damages, from which it can be inferred that the jury were actuated in the slightest degree by passion, prejudice, or by corrupt motives. The amount in itself is not such as 'to suggest at first blush, passion, prejudice, or corruption on the part of the jury.' (*Hale v. San Bernardino, etc., Co.* [106 Pac. 84], 156 Cal. 715; *Bond v. United Railroads* [113 P. 366], 159 Cal. 270, 286 [48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50].) This

subject has been so frequently discussed by our appellate courts and under so many different conditions of facts that it would be difficult to throw any additional light upon it. We can discover no rule of law which would warrant our holding the verdict in the present case to be excessive and we content ourselves with referring to some of the cases, in addition to the two above cited, which we think fully justify our conclusion: *Redfield v. Oakland Con. Co.* [42 P. 822, 1063], 110 Cal. 285; *Hillebrand v. Standard Biscuit Co.* [73 P. 163], 139 Cal. 233; *Skelton v. Pacific Lumber, etc., Co.* [74 P. 13], 140 Cal. 507; *Bowen v. Sierra Lumber Co.* [84 P. 1010], 3 Cal. App. 313; *McGrory v. Pacific Elec. Co.* [136 P. 303], 22 Cal. App. 671." This question was before this court in the case of *Eldridge v. Clark & Henery Construction Company*, 243 P. 43. The opinion in that case quotes from *Graham & Waterman on New Trials*, page 451, the following pertinent language: "It is clear that the reason for holding the parties so tenaciously to the damages found by the jury in personal torts, is, that in cases of this class there is no scale by which the damages are to be graduated with certainty. They admit of no other test than the intelligence of a jury, governed by a sense of justice. * * *" This applies to all that part of the judgment in this case which rests upon the rule that damages may be allowed for the pecuniary loss, following the deprivation of society, comfort and protection. Again, if we were to conclude that the judgment is excessive, we have nothing before us upon which to reasonably predicate such a statement. The figures furnished by the appellant, calculated upon the present worth of the damages allowed, cannot be taken as a guide, because the appellant has proceeded upon the theory that the mother has suffered no pecuniary loss on account of being deprived of the society, comfort and protection of the son, or his judgment in the management of the property, or of their relationship being such as to induce her to place confidence in his judgment and to look to him for guidance, comfort and protection. These are valuable items to a woman 67 years of age, who has no other unmarried son to take charge of her property, and is, perforce, required to look elsewhere and possibly to strangers for a ranch manager possessing the necessary qualifications shown to have been possessed by the son. Every man on the jury, having knowledge of the management of ranch properties, appreciates the difficulty of obtaining a competent manager, and is, perhaps, by training better qualified to estimate this loss than either trial or appellate court. A review of the cases upholding and setting aside verdicts on the grounds of being excessive would not serve any useful purpose, and we content ourselves with a statement that no sufficient

reason has been presented to us for setting aside the verdict on any such grounds.

Other objections urged in appellant's brief in relation to instructions, the admission of testimony and the sustaining of objections which we have considered and found untenable are not set forth in this opinion, because it would unduly lengthen the same.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; PULLEN, Justice pro tem.

76 Cal. App. 541

MICHAELIAN v. ELBA LAND CO.
(Civ. 2984.)

(District Court of Appeal, Third District, California. Feb. 18, 1926. Hearing Denied by Supreme Court April 19, 1926.)

1. Pleading $\S$ 403(3)—Failure to allege, in action for breach of contract to sell land, that defendant wrongfully withheld possession held cured by allegation of defendant's cross-complaint and plaintiff's reply thereto.

In action for breach of contract to sell land brought on theory that defendant had wrongfully rescinded contract, if allegation that plaintiff was entitled to possession, and that defendant wrongfully withheld possession was necessary, omission held cured by allegation of defendant's cross-complaint admitting termination of contract for plaintiff's failure to comply therewith and plaintiff's reply admitting such allegation.

2. Vendor and purchaser $\S$ 350.

Evidence held to show that purchaser, during his possession of premises purchased from defendant, took good care of same, thereby precluding termination of contract by vendor on that ground.

3. Vendor and purchaser $\S$ 92—Vendor held not entitled to forfeit contract for sale of land because purchaser failed to do best kind of farming or give best of care (Civ. Code, $\S$ 1442).

Vendor held not entitled, in view of Civ. Code, $\S$ 1442, to terminate contract for sale of land, requiring purchaser to give certain care to premises because purchaser did not always do best kind of farming or give orchards or vineyards very best of care, or was late in his cultivation and pruning in spring of one year, where it was not shown that vines or trees were injured thereby, or that crops were any less, and vendor continued to receive payments.

4. Contracts $\S$ 318—Deeds $\S$ 155—Forfeitures are not favored, and are to be construed liberally in favor of holder of estate (Civ. Code, $\S$ 1442).

Forfeitures are not favored in law, and conditions providing for forfeiture of an estate are to be construed liberally in favor of a holder and strictly against enforcement of forfeiture, in view of Civ. Code, $\S$ 1442.

5. Vendor and purchaser ⇨85—Vendor who declared contract terminated, and filed cross-complaint on that ground, and who had taken possession of premises, held to have rescinded contract, which action was acquiesced in by purchaser bringing suit for breach of contract.

Vendor, who declared contract terminated, and filed cross-complaint, in action by purchaser for damages for breach of contract, asking that contract be terminated, and who had taken possession of premises, and declared contract terminated before suit was commenced, thereby rescinded contract on his part, which action was acquiesced in by purchaser in bringing suit, although rescission by vendor was without right.

6. Vendor and purchaser ⇨350—That purchaser, after eviction from premises, occupied sleeping room in house on premises held not conclusive as to termination of contract.

That purchaser for brief time after eviction from premises occupied a sleeping room in house on premises held not conclusive that vendor had not terminated contract and taken actual possession of premises and exercised complete control thereover.

7. Vendor and purchaser ⇨342—Purchaser, wrongfully dispossessed, might sue for breach of contract, treat contract as terminated, and sue for money paid thereunder, or sue in equity for specific performance and damages from wrongful disseisin and detention of premises.

Where vendor wrongfully dispossessed purchaser, purchaser might sue for damages for breach of contract, treat contract as terminated, and sue for recovery of money expended thereunder, and for reasonable value of services performed in pursuance of contract, and for any special damage which he incurred by such dispossession, or sue in equity for specific performance of contract, and such compensatory damages as wrongful disseisin and detention of premises entailed upon him.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Jacob Michaelian against the Elba Land Company, in which defendant filed a cross-complaint. Judgment for plaintiff, and defendant appeals. Affirmed.

Farnsworth, McClure, Burke & Maddox, of Visalia, G. W. Zartman, of Tulare, and Frank Golden, of San Francisco, for appellant.

D. M. Edwards and J. W. Wright, both of Visalia, and J. C. Thomas, of Oakland, for respondent.

HART, J. The plaintiff brought this action to recover the total sum of \$78,978.24 for the alleged breach by the defendant of a contract for the sale to him (plaintiff) of a certain tract of land, situated in Tulare county, together with certain personal property. The cause was tried by the court, a trial by jury having been waived by the parties, and

plaintiff was awarded judgment in the sum of \$31,098.31, together with interest thereon at the rate of 7 per cent. per annum from the date of said judgment. The defendant appeals from said judgment upon a record made up in pursuance of the provisions of section 953a of the Code of Civil Procedure.

The contract, for the alleged breach of the terms of which by defendant the plaintiff herein seeks relief, was entered into between the parties on the 24th day of June, 1918. The land involved in the agreement of sale is specifically described in said agreement, and growing thereon, at the time said agreement was executed, were fruit trees and a vineyard. Certain portions thereof were devoted to the growing of wheat and other like crops. There were also fuel trees upon the premises. The articles of personal property involved in the sale consisted of certain shares of stock in certain canal companies, and pumping plants, horses, mules, harness, and wagons, plows, harrows, cultivators, and a variety of other mechanical equipments suitable and necessary to the cultivation and care of fruit trees and grapevines. All these articles are specifically enumerated and described in the agreement of sale.

The purchase price of the land and said personal property was \$85,000, payable as follows:

"Two thousand dollars, cash in hand, receipt whereof is hereby acknowledged; \$5,000.00 payable on July 1st, 1919; \$8,000.00 on July 23, 1919, and \$10,000.00 on December 15, 1919."

It was further provided that crops harvested after 1919 were to be marketed "in the name of the first and second parties jointly, at best market price, one-half of the returns from such sales to be paid to said party of the first part (defendant) until the amount received by him, together with payments made during the year 1919, shall equal one-half the purchase price to be paid for the above described property, together with interest at the rate of six per cent. per annum on all deferred payments payable annually." The contract further provided: That second party (plaintiff) shall "have the immediate possession of said premises and personal property," but that title thereto or to the crops harvested shall not pass to second party, "except as hereinafter provided"; that second party shall pay all expenses for caring for said property after June 23, 1919, and that he (second party) "shall pay all taxes and amounts levied on said land or ditch stock for the year 1919, or that may hereafter be levied." The second party further agreed:

"To properly care for all the crops growing on said land, and will hereafter properly care for all vines and trees on said land, and in due and proper season prune the same, properly

plow, cultivate, and irrigate the lands on which the same are growing, in proper season sulphur and spray such trees and vines as may require the same, and in due and proper season harvest the crops thereon, and keep all squirrels poisoned on said land; that he will plant at least 30 acres additional to vines or trees or both, each year for the ensuing three years, and properly care for the same."

Said agreement further provided that, whenever one-half of the purchase price and the interest have been paid on said property, "then the balance of said purchase price shall be evidenced by one or more promissory notes for such balance, bearing interest at the rate of 6½ per cent. per annum, payable annually, and provided that \$10,000 of such principal shall be paid each year for three years after the date of said note, and the balance of said principal to be paid the fourth year." Upon the payment of one-half of the purchase price within three years from December 1, 1919, "then," so the agreement provided, "a deed to said land shall be executed by said party of the first part to the second party, conveying to him the title" to said land, the second party to execute to the first party a first mortgage on said land for the balance of the purchase price. The forfeiture clause of the agreement reads:

"Upon failure to make any payment of purchase price, or interest, as herein specified, or to do and perform each and every of the covenants and conditions herein agreed to be done, and performed by the said party of the second part, then all rights of said party of the second part hereunder shall cease, and this agreement shall become null and void, and all payments theretofore made shall belong to said party of the first part as the consideration for this agreement."

The complaint, which was filed on March 12, 1923, pleads the contract in its entirety, and charges that, on the 5th day of March, 1923, the defendant ousted plaintiff from the possession of the premises; that it "put 20 men on said premises," and, while plaintiff was absent therefrom, "did cause the gate to be locked which closed the said premises, and did thus forcibly eject plaintiff" therefrom; that, until so ousted, plaintiff performed each and every of the covenants and conditions of the contract of sale above referred to. It is alleged that, after taking possession of said premises under said contract, plaintiff improved the property and took proper care thereof, and in doing so expended large sums of money; that he had actual possession of the property for a period of 42 months immediately preceding the date of his wrongful ejection therefrom by defendant, and during all that time gave personal attention and care to the improvement of the premises and the cultivation and development of the orchard, vineyard, and other crops produced upon said property. The total sum for which he sues for the alleged

breach of the agreement by defendant, to wit, the sum of \$78,978.24, which includes interest thereon, is made up of various items of expenditure and payments made on the purchase price, all of which are specified in detail in the complaint.

A general demurrer to the complaint was overruled, and the defendant filed an answer and a cross-complaint. The answer admits the making of the contract as set forth in the complaint, but specifically denies all the other material averments thereof.

In its cross-complaint defendant alleged that plaintiff, after entering upon and into the possession of the premises, failed and neglected to give the required care and attention to the fruit trees and vines then growing on the land, and otherwise violated the terms, covenants, and conditions of the contract, specifically charging that 5 acres, which were planted to prunes and interset with "part Malaga and Thompson grapevines," died because of plaintiff's failure to cultivate and irrigate the same; that a great portion of the prune orchard growing on said premises when plaintiff took possession thereof in pursuance of the said contract of sale plaintiff failed and neglected to cultivate, spray, prune, and irrigate, with the result that "said prune trees died and became valueless"; that "90 acres of said land under said agreement were to be planted to vineyard, and the same were so planted, but on account of plaintiff's neglect to care for the same, a great portion thereof died, so that there is now less than a 50 per cent. stand of vines; that, under said agreement, said plaintiff took possession of all the personal property described therein, and thereafter removed and took for his own use from said premises one revolving harrow, one 2-horse cultivator, one 6-foot disc, one 2-horse scraper, two 2-horse plows, also about 30 tons of raisins, all of which was the property of this defendant." It is likewise alleged that plaintiff "has each year of his possession of the premises failed, neglected, and refused to properly plow, cultivate, and irrigate the lands on which the orchards and vineyards were growing, and by reason thereof the security of defendant for the amount due has deteriorated, and is now insufficient to pay plaintiff the balance due it under said contract"; that plaintiff has repeatedly been requested by the defendant that he (plaintiff) "care for the orchards and vineyards growing upon said premises," but that he has refused to comply with said requests, "and abandoned said orchards and said vineyards; that defendant has performed each and all the covenants and conditions required of it to be done and performed under and pursuant to the terms of said agreement." It is further alleged:

"That under and pursuant to the terms of said agreement, the said plaintiff, Jacob Michaelian, on or about the 24th day of June, 1919, entered into the possession of all of said

real and personal property, and is now in the possession thereof."

The fifth paragraph of the cross-complaint alleges:

"That, pursuant to said agreement, said defendant did, on the 1st day of March, 1923, exercise said right and option to terminate said agreement, and did at the time terminate the same, and does hereby exercise said right and option to terminate said agreement, and does hereby terminate said agreement and declare the same null and void, and said plaintiff did on the 1st day of March, 1923, and at all times since has refused to deliver possession of said real and personal property to defendant."

The agreement of sale was annexed to, and expressly made a part of, the cross-complaint.

The answer of plaintiff to the cross-complaint denies specifically the allegations of the latter pleading to the effect that plaintiff in a number of specified particulars had failed to carry out the agreement on his part, but affirmatively alleges that he performed all the terms of the contract required of him thereby in the manner and at the times specified in said agreement. The charge in the cross-complaint that plaintiff removed from the premises and appropriated to his personal uses other than those mentioned in the contract certain farming implements, and the further charge that he removed from the premises 30 tons of raisins against the consent of defendant and disposed of the same contrary to the terms of the contract are denied and explained. That he abandoned the orchards and the premises, as charged in the cross-complaint, is also denied by plaintiff. There are many others of the averments of the cross-complaint specifically denied by plaintiff's answer thereto, and many affirmative allegations in said answer specifically describing and explaining the manner in which plaintiff performed the terms of the agreement and the obligations cast upon him thereby. These need not be specially recited herein since they involve only a repetition of the averments of the complaint, but with greater detail. Said answer also admits that defendant and cross-complainant, as set forth in his cross-complaint, took charge of the premises on the 1st day of March, 1923, and thus ousted plaintiff of the possession of the land, all of which, plaintiff alleges in his answer, was contrary to, and in violation of, plaintiff's rights under the said agreement of sale, and constituted a breach thereof by defendant. It is alleged in said answer that, by reason of the act of the defendant in so taking charge and possession of the premises, plaintiff was damaged in the sum of \$78,978.24, for which he in said answer prays judgment as for damages.

It is not necessary to present a résumé of the court's findings. It is sufficient to say that they are specific, and in detail embrace conclusions favorable to plaintiff upon all

the vital issues of fact made by the pleadings and brought out through the evidence.

[1] The point first brought to our attention by the appellant is that the complaint failed to state a cause of action upon the essential theory thereof, and that the order overruling the general demurrer thereto involved prejudicial error. The specific contention is that, as the plaintiff's action, as made by his complaint, is one in ejectment, it was necessary, to state such a cause of action, for him to allege, in addition to the allegation that defendant wrongfully ejected or ousted him from the possession of the premises described in the complaint, that he (plaintiff) was entitled to the possession of said property at the time of the commencement of his action, and that, having failed so to state, his complaint is bad for want of facts. The theory upon which plaintiff's action proceeds, or undoubtedly the plaintiff intended so to proceed, was that defendant, by retaking possession of the premises, had wrongfully rescinded the contract of sale. The effect of his action, as framed by his complaint, would be, if sustained, acquiescence in the act of rescission of the contract by defendant. It is true that it is alleged in the complaint that the act by defendant in terminating the contract was in the fact of its retaking possession of the premises and consequently ousting plaintiff therefrom. It is also true that, in actions in ejectment, it must be alleged and proved that the plaintiff is entitled to the possession of the premises from which he alleges he has been wrongfully disseized at the time the action is commenced. But the plaintiff was not seeking to regain possession. What he asked for in his complaint, although in the form of damages, is a return to him of the moneys he paid on the purchase price and otherwise expended by him in the care and improvement of the property while the same was in his possession. Necessarily by the relief thus asked he proceeded upon the theory of rescission of the contract by defendant and acquiescence therein by him. At any rate, he thus, from the very nature of the relief sought by him, of necessity made wrongful rescission by defendant the basis of his cause of action, and, manifestly, he could not, under such circumstances, consistently claim possession of the property and at the same time claim, as he does claim, the right to the restoration to him of all the money he paid on the purchase price thereof and otherwise expended by him in performing its terms. But, if we were required to concede that, to state a cause of action for the relief sought by him, it was, nevertheless, necessary for him to have alleged that he was entitled to, and that the defendant, at the time of the commencement of his action, still wrongfully withheld from him, possession of the property, the defect of his complaint in that regard was cured by the defendant's cross-complaint. Therein, as seen, the de-

fendant alleged and thus admitted that, on or about the 1st day of March, 1923, it elected to exercise its right under the contract to terminate said contract, and that it then did terminate it, for the alleged reason that plaintiff had not performed the terms and conditions thereof. And the plaintiff's admission in his answer to the cross-complaint that defendant, on the date mentioned, terminated the contract rendered the alleged defect in the complaint in the particular mentioned immaterial or wholly without importance. There was then no longer an issue upon that question. In other words, the situation thus presented involved a statement by the defendant that it had terminated and so rescinded the contract, and an admission by plaintiff of that fact, and his acquiescence in said act of rescission, thus leaving for determination only, so far as that fact was concerned, the question whether the defendant was justified in declaring and treating the contract as rescinded. The case went to trial upon the cross-complaint and the answer thereto, and, as was said in *Cohen v. Knox*, 27 P. 215, 216, 90 Cal. 266, 275 (13 L. R. A. 711):

"It would be a vain thing to reverse the judgment, and allow plaintiff to amend his complaint by averring facts already averred in his cross-complaint, and to again, in that form, present issues which have already been raised and determined."

[2] The point that the court's findings are devoid of sufficient support is not well founded. The learned trial judge prepared and filed herein a written opinion in which he reviewed the evidence and stated some of the principles of law pertinent to certain of the questions involved in this controversy, and the same is, in part, reproduced in respondent's brief. The conclusions announced in said opinion upon the facts are in line with the court's findings. We have carefully read the voluminous transcript of the testimony, and thus have been convinced that the conclusions announced in said opinion as to the effect of the evidence touching the several questions of fact arising in the case are fully warranted, and clearly confirm the conclusion that the court's decision, as crystallized in its findings, is abundantly supported by the evidence. We shall, therefore, adopt into this opinion as a part hereof certain portions of the opinion of the trial judge, being also satisfied with the statement therein of certain legal principles applicable to the case as made by the pleadings and proof. It will be noted that payments in installments required by the contract to be made by plaintiff in the year 1919, in which year the contract was executed by the parties, aggregated the sum of \$25,000. It was, and is not, questioned that that sum was paid by plaintiff to defendant according to the exactions of the agreement. In addition to that sum, proceeds the court's opinion:

"The evidence showed that plaintiff had accounted to defendant for the returns from all crops raised, harvested, and sold up to March 1, 1923, and had paid to defendant the one-half of said returns, thereby paying to defendant in all, including said \$25,000, the sum of upwards of \$42,000. After the commencement of this action, plaintiff paid defendant a further sum of upwards \$500, which sum was one-half the proceeds of sale of raisins which were being dried in a dryer at the time of the commencement of this action. In all of principal and interest plaintiff had then paid defendant the sum of \$42,703.19. He had made all the payments required prior to June 24, 1923, under the contract, both of principal and interest.

"The foregoing disposes of defendant's denials as to payments.

"It should be noted that defendant in his cross-complaint does not claim that plaintiff had failed to make the payments required by the contract.

"By the cross-complaint defendant specifically alleges wherein he claims plaintiff failed to perform the contract. In effect the allegations are that he failed to care for, irrigate, prune, spray, or cultivate the peach orchards; that he neglected to cultivate and irrigate five acres of old prune orchard, interset with Malaga and Thompson grapevines; that he failed to cultivate, spray, prune, and irrigate another prune orchard; that he planted 90 acres to vineyard, as required by the contract, but that plaintiff failed to care for them, by reason of which a great portion died, leaving less than 50 per cent. stand of vines; that he removed from the ranch certain farming implements, and 30 tons of raisins, all being the property of defendant.

"It must be here said that all raisins and crops produced were accounted for by plaintiff; defendant recovering his full share of the proceeds thereof. Defendant alleges that the lack of care stated caused the peach trees, the 5 acres of prunes, and vines planted to die and become valueless; that for the same reason a great portion of the other prune orchard died and became valueless.

"On February 28, 1923, defendant placed a crew of men upon the ranch to prune orchards and vineyards. At the trial he claimed that this was done with the consent of the plaintiff, the latter to pay for the work. But it is evident that on March 1, 1923, defendant determined to then cancel the contract and to hold possession of the ranch. That is shown by the allegations of his verified cross-complaint and by the evidence in the case. He excluded plaintiff from any part in the care of the said premises; locked the gate to keep him out of the property; used the house and other buildings for his own purposes. For a short time after said March 1st plaintiff at intervals occupied a room in the house at night, but soon found that he was not to be permitted to carry out his contract, and left the premises. He commenced this action on March 12, 1923. The answer and cross-complaint were filed April 16, 1923.

"Defendant's right in taking possession of the premises and terminating the contract depended on his establishing the allegations of the cross-complaint. He produced many witnesses who testified that the orchards and vineyards had been neglected in the plowing, pruning, and irrigating; some witnesses who testi-

fied that the 90 acres of vines were not properly planted or irrigated. Plaintiff claimed that a large part of the vines planted by him died because of alkali; that some prune trees died of old age; that many fruit trees died because of alkali, some being killed by squirrels. The evidence was very conflicting as to the presence of alkali. Some witnesses for defendant visited and inspected the land, and they testified that there was not sufficient alkali, except in small spots, to prevent the growing of vines or fruit trees. Many of those witnesses were worthy of credit, but their evidence was based on their inspection of the land, and not on any experience in farming the same.

"On the other hand, plaintiff produced several witnesses who resided, and had resided for many years, on lands adjoining or in close proximity to the land in question. They had noted the farming of the land from year to year. They invariably testified that large portions of the land were so impregnated with alkali that its farming had been unsuccessful; that it would not produce soil, and why trees and vines died or did not grow was true. The soil in the two fig orchards is almost wholly alkali. There is a large acreage of alkali soil where the 90 acres of vines were planted. On the alkali the figs are missing. They died, or did not grow. On the good land there is a fair stand of growing, thrifty vines. There is evidence that apricots did not grow because of alkali; also the same as to prunes.

"The land where the alfalfa was planted by plaintiff's predecessors was evidently not properly leveled before planting, leaving portions of it difficult, in some places impossible, of irrigation. Plaintiff testified that much of the alfalfa was dead when he took possession, and that he had intended to plow up the remainder as unprofitable, and properly prepare the land for farming.

"I must conclude that plaintiff during his possession of the premises took good care of the same. While in places young trees and vines died in good soil, still it does not appear that it was from lack of care. Plaintiff gave the premises the care that the ordinary careful farmer does of like premises, and defendant had no substantial cause for complaint.

"In addition to paying defendant \$42,703.19, principal and interest as above stated, plaintiff expended in improvements placed on said land and in caring for the orchards and vineyards at least \$40,000, a large part being expended in the care, cultivation, and irrigation of the land. That constitutes additional evidence that plaintiff gave good care to the property.

"The evidence failed to show that plaintiff had removed any tools or farming implements belonging to defendant.

[3] "Plaintiff probably did not always do the best kind of farming or give the orchards and vineyards the very best of care, but the evidence showed that he did all the work in the ordinary manner and time of the farmers in his neighborhood. No complaint was made by defendant concerning lack of care until just prior to his taking possession of the land. Meantime it continued to receive payments on the purchase price. Plaintiff had occupied the place nearly four years, and during that time the proceeds from crops had continually increased, those of 1922 being nearly double those of 1919, and the crops were from the or-

chards and vineyards on the place, when plaintiff took possession. In some respects he went beyond what was required by the contract. For instance, the contract provided that he should plant 30 acres to fruit each year for three years. He leveled and planted 90 acres the first year, and planted quite a large additional acreage during his possession. The fact, if true, that he was late in his cultivation and pruning in the spring of 1923 did not warrant defendant in terminating the contract. He had pruned late each year. Defendant completed the pruning in March, and it was not shown by the evidence that the vines or trees were injured or that the crops of 1923 were any less because of the late time of pruning or cultivation, or at all. Section 1442 of the Civil Code provides: 'A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created.'

[4] "Forfeitures are not favored in law, and conditions providing for the forfeitures of an estate are to be construed liberally in favor of the holder of the estate, and strictly against the enforcement of the forfeiture.' Behlow v. S. P. Co., 62 P. 295, 130 Cal. 19; Farley v. Vaughn, 11 Cal. 237; Randol v. Scott, 42 P. 976, 110 Cal. 590; Knarston v. Manhattan L. Ins. Co., 56 P. 773, 124 Cal. 74.

"It must be held that defendant was not entitled to terminate it except for plaintiff's acquiescence, as hereinafter stated. Plaintiff is entitled to recover, as follows:

Payment on the contract (purchase price)	
the sum of.....	\$42,703 69
For leveling land.....	6,300 00
For pumping plant.....	1,000 00
For grape stakes.....	820 00
For building ditch.....	400 00
For lowering and cementing well.....	170 00
For electric line to pumping plant.....	512 00
For dry-house	61 50
For material for building.....	54 65
For digging well.....	167 45

\$52,189 69

He should be allowed interest on the \$25,000.00 paid in 1919, which his counsel calculated in their brief at 6 per cent., being 4,875 00

Making \$57,064 69

From that sum should be deducted as for the stipulated rental value of the land while plaintiff was in possession..... 25,965 88

Leaving plaintiff \$31,098 81

" * * * The amounts allowed for leveling land, pumping plant, grape stakes, building ditch, lowering and cementing well, the electric line, dry-house building material, etc., are allowed because of the evidence that such expenses incurred were reasonable, and they must therefore have added as value to the property the amount expended.

" * * * There is a large acreage of planted vines, planted and cared for by plaintiff, growing on the property, also of fruit trees. They no doubt added value to the property. * * *"

[5] There was an attempt on the part of defendant to show that there was in 1922, and continuing to and through 1923, a decline in the market prices of grapes and deciduous fruits and that it was for that reason that plaintiff had ceased giving the orchards and vineyards the care required by

the contract, and which was necessary to the profitable cultivation of the fruit and grapes; the inference sought to be deduced from that fact being that plaintiff was thus endeavoring to free himself from the obligations of the contract, and at the same time secure a return to him of the moneys paid by him on the purchase price and otherwise expended in developing the property. The evidence showed that the very best and most profitable crop that had been grown on the premises while plaintiff was in charge thereof was gathered in the year 1922, a fact which tended to negative the theory or claim of defendant that plaintiff failed in 1922 or at any time to carry out the requirements of the contract as to the care and attention requisite to the successful prosecution of the fruit and grape-growing business on the premises. The trial court found, and the trial judge stated in his opinion, that plaintiff neither purposely nor negligently failed to perform the contract as to the care which was to be given to the trees and vines, etc., and also stated, what obviously was true, that the plaintiff was not responsible for any decrease in the value of the property; that a decline in the value of grapes and deciduous fruits prevailed at the time referred to throughout the entire state. The opinion of the trial judge proceeds:

"Defendant declared the contract terminated, and filed cross-complaint in the action asking that it be adjudged terminated, etc. He had taken possession of the premises, and declared the contract terminated before suit was commenced. His actions constituted a rescission of the contract on his part, and thereafter plaintiff, by bringing the suit for damages, acquiesced in the rescission, although rescission on defendant's part was without right.

"Judgment is awarded that plaintiff recover from defendant as damages the sum of \$31,098.81 and costs, and that the contract be and is terminated by acquiescence of the parties. *Merrill v. Merrill*, 35 P. 768, 37 P. 392, 103 Cal. 287; *Glock v. Howard*, 55 P. 713, 123 Cal. 15, 43 L. R. A. 199, 69 Am. St. Rep. 17; *Heilig v. Parlin*, 66 P. 186, 134 Cal. 99."

It may be added to what is stated in the foregoing opinion of the trial judge that plaintiff testified that, when he took possession of the premises under the contract, he was told by the defendant's president, Frank Giannini, who is an experienced orchardist and vineyardist in the vicinity of the land in question here, that the proper time to spray fruit was in the month of March of each year; that he had always done that work in that month; and that, just prior to the receipt by him of a written notice, dated February 27, 1923, and signed by defendant, by its secretary, notifying him that he had failed to attend to the trees and the vines as required by the contract, and as was necessary for maintaining the thriftiness of the trees and vines, he was endeavoring to employ the nec-

essary help for spraying the trees and vines in the month of March, 1923.

It is also well to note that the witness Liggett, who resided, and had resided, in the neighborhood of the premises described in the complaint and cross-complaint for many years, and was familiar therewith, and who for a time in the year 1922 was employed on said premises as a laborer by plaintiff, testified that, on retaking possession of the premises for defendant, said Frank Giannini employed him (witness), with others, to work on the place; that Giannini locked the gate by means of chains and locks, and instructed witness to keep the gate locked; that Giannini explained that the reason he desired that the gate should be kept locked was to prevent six or seven head of horses and mules then on the premises from escaping from and leaving the ranch. The witness testified that never before, so far as he knew (and he said he had been on the premises frequently), was the gate locked, although generally it was closed. The latter part of the witness' testimony, as well as that of others, and also the admission of Giannini plainly enough showed that there was no necessity for locking the gate for the reason stated by Giannini, and the inference therefrom which the trial court could reasonably have drawn, and which doubtless it did draw, was that the locking of the gate was only the assertion of the repudiation of the contract by defendant and the consequent intention to exclude the plaintiff from further possession of the premises.

[6] The fact that plaintiff for a brief time after his eviction from the premises by defendant occupied a sleeping room in the house on the premises was purely an evidentiary circumstance, but its force as such was destroyed by the decision of the trial court, founded upon sufficient evidence, including the admission of defendant, that the latter terminated the contract and took actual possession of the premises and from that time on exercised complete control of, and dominion over, the property as against the plaintiff, who made no pretense of actual or any possession of the premises after the defendant assumed control thereof.

[7] Lastly, it is not improper to suggest that the plaintiff had his election of one of several remedies for relief against the act of defendant in dispossessing him, viz: (1) He was at liberty to base his action on the contract and sue for damages for its breach by defendant; (2) he could treat the contract as terminated or rescinded, and sue for the recovery of the money that he had paid or expended thereunder, for the reasonable value of services performed in pursuance of the requirements of the contract, and for any special damage to which he may have been subjected by the vendor's wrong in dispossessing him; (3) he could have sued in equity for the specific performance of the contract and

such compensatory relief by way of damages for any damage the wrongful disseisin and the like detention of the premises had entailed upon him. *Hines v. Brode*, 143 P. 729, 168 Cal. 507, 511, 512; *Gray v. Bekins*, 199 P. 767, 186 Cal. 400; 6 Cal. Jur., p. 464, sec. 276.

As before suggested, the plaintiff had the right to treat the defendant's act in retaking possession of the property as an act of rescission, to acquiesce therein, and to ask to be placed as near in statu quo as the circumstances and equities of the case would justify. Thus he proceeded, and thus the trial court by its decree seems equitably to have adjusted and settled the controversy.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action upon contract by the Apex Engineering Company against the North American Oil Consolidated. Judgment for defendant, and plaintiff appeals. Affirmed.

David J. Aaron, of San Francisco, for appellant.

Harry G. McKannay, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal from a judgment for the defendant in an action to recover \$1,750, the agreed purchase price of a certain heat exchanger manufactured by plaintiff for the defendant.

The principle involved upon the appeal is fundamental in the law of contracts. It is presented by the following facts: On May 22, 1924, the representative of the defendant company gave to the representative of the plaintiff company an order for one "Heat exchanger consisting of material as per letter of December 12, 1923," at a price of \$1,750. This was termed an "emergency order" and contained the direction: "Please prepay freight and include in invoice." The heat exchanger was to be made up. On the reverse side of the order it was stated:

"It is understood that this emergency order is entirely exhausted by the delivery of goods of one date and one invoice. * * * All goods delivered under this order must be receipted for on this order by person taking delivery and duplicate of this order sent at once to our purchasing department at Field Office, Taft, Cal., same to be followed by invoice (in triplicate) which shall cover all goods delivered under this order and none other."

This order was received from the defendant company by the president of the plaintiff company. The next day, upon his arrival at Los Angeles at the offices of the plaintiff company, he sent an acknowledgment of this order on behalf of his company, together with an invoice calling for "first payment on 1 Apex heat exchanger unit @ \$1,750.00—\$583.33." The terms in the acknowledgment of order were stated to be "one-third with order. Bal. net 30 days 2% 10 days." Upon the date of the plaintiff's acknowledgment of order and invoice above mentioned (May 23, 1924), plaintiff also sent defendant a letter, which read, in part, as follows:

"We are attaching hereto our formal acknowledgment of your order No. 1525 which was given to the writer yesterday. We have entered our shop orders for this equipment and have been promised shipment of same on or before Saturday, June 14.

"The writer neglected to call your attention to the terms which we mentioned in our letter to Mr. Simons of December 12th which covers the payment of one-third with order, balance

76 Cal. App. 683

APEX ENGINEERING CO. v. NORTH AMERICAN OIL CONSOLIDATED.
(Civ. 5366.)

(District Court of Appeal, First District, Division 2, California. March 1, 1926.)

1. Sales —23(4)—Acknowledgment of order accompanied by new condition as to terms of payment held not acceptance, but mere counter offer, which on rejection did not create contract.

Order for heat exchanger, requesting prepayment of freight and inclusion in invoice, was mere offer of contract, and acknowledgment of order with addition of conditions requiring immediate cash payment was not an acceptance, but mere counter offer which on rejection by buyer created no contract.

2. Contracts —23.

Where offeree makes counter offer, including new conditions, original offer is no longer open to acceptance, even though not expressly withdrawn.

net cash thirty (30) days from date of invoice, with two per cent. (2%) discount for payment of balance within ten (10) days from date of invoice. We trust you will pardon our oversight in not calling this to your attention at that time, and, if convenient, we will appreciate receiving your check covering this first payment as soon as possible."

At this point it may be well to inject an explanation of the "letter to Mr. Simons" mentioned above and the statement in the emergency order that the heat exchanger was to consist of "material as per letter of December 12, 1923." Both statements refer to the same letter which had been written to an officer and employee of the Consolidated Mutual Oil Company. The plant of this company was acquired later by the defendant company, at which time Mr. Simons turned over the letter to the defendant company. The letter consists of several pages and describes numerous articles of equipment for an absorption plant and quotes prices therefor. These articles are absorption tower, steam still, heat exchangers, oil to oil, and several others. Each article mentioned is described under a separate heading, and following these various paragraphs is a paragraph relating to terms. The testimony in the record and the correspondence between the parties offered in evidence all go to show that the parties in their negotiations leading to the giving of the order involved here considered only the portion of the letter which described and quoted price for "heat exchangers, oil to oil," and that no mention was made of the portion of the letter relating to terms and no understanding was reached that the terms of payment for the heat exchanger were to be the unusual ones mentioned in this letter to a third party and attempted to be included in the order from the defendant by the acceptance, acknowledgment, and invoice of the plaintiff.

The record shows that when the acknowledgment, invoice, and letter of May 23, 1924, were received at the office of the defendant, Mr. Kierulff, who was handling the transaction for it, was away from Taft, and that he did not return for about a week. Upon his return he wrote the plaintiff company as follows, under date of June 3, 1924:

"Referring to your letter of May 23, 1924, in which you ask for one-third cash with order, we beg to say that we have canceled our order No. 1525 for heat exchange unit on account of unsatisfactory terms."

Although it does not appear to be material, so far as the legal obligation of the defendant is concerned, it may be pertinent, nevertheless, upon the equities of the situation, to state that the record discloses that this action in canceling the order because of a variance in the terms of the acceptance by plaintiff was not an arbitrary and unreasonable one; that the order was an emergency

order, and that the heat exchanger was needed without delay; that there was no authority in any one attached to the Taft office of the defendant company to sign a check of the company for the amount required for the advance payment; that Mr. Kierulff stated that it would have required about a week to get this check from the San Francisco office, and he wished to avoid this delay and inconvenience in securing the heat exchanger. He therefore placed his order elsewhere at the time he wrote to the plaintiff canceling the unaccepted order given to it.

Thereafter, there ensued some correspondence between the parties in which the plaintiff endeavored to have the defendant continue the order on the books under its usual terms, admitting that the plaintiff was at fault in not mentioning the unusual terms at the time the order was given, and stating that the work of building the heat exchanger was then about half completed. In reply to this letter, defendant referred to the change in terms and insisted that the order had been canceled. The plaintiff, however, shipped the equipment, and when defendant would not accept it this action was brought.

[1, 2] We think the correspondence between the parties after the cancellation of the order was immaterial. Defendant objected to its introduction, and its inclusion in the record adds no legal force to the position of either party. The outstanding fact is that the defendant made an offer; that the plaintiff accepted it only with the addition of important new conditions, which was not a valid acceptance. Consequently, there was no contract between the parties. The fixed rule of law would preclude the defendant from thereafter accepting the offer as made, even if it had not been expressly withdrawn. But the defendant removed all doubt by withdrawing its unaccepted offer. The transaction amounted to an offer by the defendant, nonacceptance by the plaintiff, a counter offer by plaintiff, which was rejected by the defendant.

If citation of authority be required for so elementary a legal proposition, it is available in the case of *Niles v. Hancock*, 73 P. 840, 140 Cal. 157, wherein it is said:

"While, unless expressly revoked, an offer will ordinarily remain open for a reasonable time, a rejection of the offer relieves the party making it from liability on that offer, and dispenses with the necessity of further revocation; and where an offer has once been rejected, the party rejecting cannot afterwards, at his option, accept the rejected offer, and thus convert the same into an agreement by acceptance. The consent of the party making the original offer must be again manifested, before there can be any contract. This is of course elementary. It is well settled that a proposal to accept, or acceptance of, an offer, on terms varying from those proposed, is a rejection of the offer, and puts an end to it. (See *Wristen v. Bowles* [22 P. 1136] 82 Cal. 87; *Meux v. Hogue* [27 P. 744] 91 Cal. 448;

3 Am. & Eng. Ency, of Law 853, and cases there cited.) A qualified acceptance is a new proposal. (Civ. Code, § 1585.) A party who submits a counter proposition instead of accepting an offer cannot abandon the substitute and accept the original offer without the other party's consent. (Fox v. Turner, 1 Ill. App. 153; Ortman v. Weaver [C. C.] 11 F. 358; Arthur v. Gordon [C. C.] 37 F. 558; Hyde v. Wrench, 3 Beav. 334.) The facts in the cases of Arthur v. Gordon [C. C.] 37 F. 558, and Hyde v. Wrench, 3 Beav. 334, were in this respect practically the same as those in the case at bar, and in each case it was held that the counter proposition of the purchaser to buy for a smaller sum than that specified in the original offer was a rejection of such original offer, and that a subsequent acceptance of the original offer was unavailing."

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

76 Cal. App. 712

GRISSIM v. BLUMENTHAL & CO., Inc.
(Civ. 5235.)

(District Court of Appeal, First District, Division 2, California. March 2, 1926.)

1. Automobiles ⇨197(2)—Real estate company's employee, who went to another city to get his automobile, held not within employment, so as to make employer liable to person injured.

Employee of real estate and insurance company, who went from his place of employment at Los Angeles to San Francisco, during a holiday, to get his automobile and other property, without being directed to transact and without transacting any business there, held not performing duties within his employment, so as to make his employer liable to a person injured by him during his return.

2. Evidence ⇨241(1)—Testimony as to conversations between plaintiff and one who defendant stated would represent him and between plaintiff's nurse and the same person held admissible.

Testimony as to conversations had between plaintiff and one whom defendant had told plaintiff would represent him, and between plaintiff's nurse and such person, held admissible in action for injuries.

3. Evidence ⇨242(2)—Testimony as to conversations between employee of defendant and plaintiff, and between employee and plaintiff's nurse, held error, when employee was not authorized to represent employer, though representing another defendant.

Testimony as to conversations had between employee of defendant and plaintiff, and between such employee and plaintiff's nurse, held inadmissible against employer, when record did not show employee was expressly or impliedly authorized to represent employer in

such matter, though he represented another defendant.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action for damages for personal injuries by Daisy Grissim against A. C. Blumenthal & Company, Inc., and another. Judgment for plaintiff, and A. C. Blumenthal & Company, Inc., appeals. Reversed.

S. Laz Lansburgh and S. Joseph Theisen, both of San Francisco, for appellant.

Sterling Carr and Carr & Guiler, all of San Francisco, for respondent.

STURTEVANT, J. On the 1st day of December, 1922, the plaintiff was walking westerly on the south side of Market street and was in the act of crossing Third street. At the same time the defendant Clyde A. Griffin was driving an automobile southerly on Third street. As he attempted to pass the plaintiff his right front wheel hit the left foot of the plaintiff. Thereafter she commenced an action to recover damages for the injury sustained in the accident.

In her complaint she made Clyde A. Griffin one of the defendants, and A. C. Blumenthal & Co., a corporation, another defendant. The corporation was joined on the theory that at the time of the accident Clyde A. Griffin was an employee of the corporation and was engaged in the performance of his duties as such employee. Both defendants answered; a trial was had before the trial court sitting without a jury. The trial court made findings of fact against both defendants, and ordered a judgment entered thereon. From that judgment the defendant corporation has appealed under section 953a, Code of Civil Procedure.

[1] The appellant makes the point that it was not liable because the record does not show that at the time of the accident Griffin was in the discharge or performance of any duties within his employment as an employee of the appellant. We think that the point is well made. The evidence presents no conflict on the subject. For some time prior to the above date the appellant was engaged in the real estate and insurance business and maintained an office in the city of Los Angeles. Mr. Griffin had been a resident of San Francisco, but had been employed by the appellant in its Los Angeles office. For a few weeks prior to the date of the accident he had been residing in Los Angeles, but came to San Francisco for the Thanksgiving holiday and for the purpose of getting his automobile and some other personal property and driving the automobile to Los Angeles. When he had finished his visit and was in the act of driving to Los Angeles the accident occurred. Mr. Griffin testified that at the time he left Los Angeles he had not been directed to transact

any piece of business for his employer while he was on the trip. He further testified that while in San Francisco he did not transact any business for his employer, and did not attempt to do so, but that he made a friendly call on the employees of the San Francisco office. Mr. Blumenthal testified that he did not know that Mr. Griffin was going to San Francisco and did not know that he had gone until after Mr. Griffin returned to Los Angeles, and that he had not directed Mr. Griffin to perform any business for the appellant nor to obtain in the San Francisco office and take to the Los Angeles office any papers or other property. Under these circumstances the plaintiff did not make out a case as against the appellant. *Kish v. California State Automobile Ass'n*, 212 P. 27, 190 Cal. 246, 248.

The respondent calls to our attention the fact that at the time of the accident Mr. Griffin handed to the plaintiff his business card which had printed on it his Los Angeles address, "Secretary A. C. Blumenthal & Co." She also calls to our attention that at the same time he gave her the telephone address of Mr. Sheppard, and that thereafter she and her agents had certain conversations with Mr. Sheppard; also that Mr. Griffin had the authority to transact business for his employer in any part of the state, and therefore that he held a roving commission. However, the record is clear that on his trip to San Francisco he did nothing under his roving commission, and that he did nothing as secretary of the defendant corporation. Mr. Sheppard was in charge of the insurance department in the San Francisco office. Mr. Griffin had at various times placed his automobile insurance through the instrumentalities of the San Francisco office and allowed Mr. Sheppard to hold his policy of insurance. At the time of the accident he believed that he was covered with collision insurance, and for that reason he directed the plaintiff to communicate with Mr. Sheppard. However, when the insurance policy was examined it was found that it did not cover collision insurance. All reference to Mr. Sheppard thereupon became immaterial.

[2, 3] The plaintiff had offered in evidence several conversations between Mr. Sheppard and the plaintiff or between Mr. Sheppard and the plaintiff's nurse. The appellant objected. The objection was properly overruled, because the defendant Griffin had given to the plaintiff Mr. Sheppard's name and had stated to the plaintiff that Mr. Sheppard would represent him when Mr. Griffin was out of town. The record discloses that Mr. Sheppard occupies some position in the San Francisco office of the defendant A. C. Blumenthal & Co., but the record does not disclose that Mr. Sheppard was expressly authorized to represent his employer in transacting any business with the plaintiff, nor does the record show that Mr. Sheppard's po-

sition was such that he had the implied authority from his employer to take up such business matters. Therefore it is clear that, although the testimony referred to was admissible, it was not admissible as against the defendant Blumenthal & Co.

The judgment against the appellant is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

77 Cal. App. 29

PEOPLE v. EPHRAIM. (Cr. 1280.)

(District Court of Appeal, First District, Division 2, California. March 10, 1926. Rehearing Denied April 5, 1926. Hearing Denied by Supreme Court May 5, 1926.)

1. Embezzlement ⚡5—On interposing defense to charge of embezzlement that money was retained because of indebtedness, accused must prove that money was appropriated openly and avowedly under claim made in good faith, but need not prove that claim was valid (Pen. Code, § 511).

In prosecution for embezzlement while acting as agent, accused, on interposing defense of being entitled to retain sum because of indebtedness, must prove, under Pen. Code, § 511, that money was appropriated openly and avowedly under claim made in good faith, but need not prove that claim was a valid one on which she might recover in law.

2. Embezzlement ⚡10—Prosecution must prove, under charge of embezzlement while acting as agent, that money was appropriated while such relation existed, and was appropriated for use of accused.

In prosecution for embezzlement while acting as agent, prosecution must prove that money was appropriated by accused while such relation existed, and also was appropriated for her own use.

3. Embezzlement ⚡38—Question of profits made by accused in real estate transaction with complaining witness before alleged embezzlement held outside of issues.

In prosecution for embezzlement of funds while acting as agent in attempt to secure settlement of contract for purchase of real estate, question of profits previously made by accused out of property exchanged by complaining witness for such contract held entirely outside of issues of the case.

4. Embezzlement ⚡44(5)—To support charge of fraudulent appropriation of money while in capacity of agent, proof of confidential relation up to and including time of alleged embezzlement must be introduced (Pen. Code, § 508).

Where accused was charged, under Pen. Code, § 508, with fraudulent appropriation of money while in capacity of agent of complaining witness, prosecution must prove that confi-

dential relation continued up to and including time of alleged embezzlement.

5. Embezzlement $\S$ 44(5)—Date of alleged fraudulent appropriation must be proven, where termination of confidential relation was in doubt, so as to determine whether appropriation occurred during continuance of confidential relation.

Though ordinarily prosecution need not allege or prove exact date of offense, yet, where confidential relation is alleged to have arisen between parties through which money embezzled was lawfully received, and termination of relation was in doubt, date of alleged fraudulent appropriation must be proven to determine whether appropriation occurred during continuance of confidential relation.

6. Embezzlement $\S$ 44(5)—Evidence held not to show that money was fraudulently appropriated during existence of confidential relation, but that it was appropriated openly and avowedly after termination of relation.

In prosecution for embezzlement, *held*, that evidence failed to show that money was fraudulently appropriated during existence of confidential relation between parties, but rather to show that appropriation was made openly and avowedly after termination of confidential relation.

7. Embezzlement $\S$ 11(1)—Ordinarily, demand for property alleged to have been fraudulently appropriated by agent is not necessary, but is necessary where money is received by agent for special purpose and retained with consent of principal.

Ordinarily, it is not necessary to prove demand for property alleged to have been fraudulently appropriated by agent; but, where money is received by agent for special purpose and retained by him with consent of principal, demand is necessary in order to establish fraudulent intent to appropriate money.

8. Criminal law $\S$ 728(5)—Request for instruction is not necessary, where misconduct on part of state occurs with such frequency to lead jury to believe district attorney has damaging facts in his possession.

Though, ordinarily, request for instruction is necessary where error would be obviated by instruction to disregard it, such rule is not applicable, where misconduct on part of state in prosecution for embezzlement occurs with such frequency that jury is led to believe district attorney, as sworn officer of court, has in his possession facts so damaging that defendant must insist on their being withheld.

9. Criminal law $\S$ 706—Conduct of state's attorney in embezzlement prosecution in examination of witnesses and argument held such as to have prevented fair trial.

In prosecution for embezzlement, conduct of district attorney in bringing out reputation of accused and of former husband and facts of transaction having no relation to embezzlement charge, and in arguing such matters, and making statements contrary to evidence, *held* such as to have prevented fair trial.

On Petition for Rehearing.

10. Criminal law $\S$ 1159(3).

Matter of conflict in evidence is not important factor, where reversal is not on ground of insufficiency of evidence.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Alberta F. Ephraim was convicted of embezzlement, and she appeals. Reversed.

Thos. T. Califro, John D. Harloe, Julian H. Biddle, and Robert C. Young, all of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Chas. A. Wetmore, Jr., Deputy Atty. Gen., for the People.

NOURSE, J. The defendant was tried and convicted upon an information charging her with the crime of embezzlement. She has appealed from the judgment following the conviction and also from the orders denying her motion for a new trial and an arrest of judgment. The information charged that on or about the 29th day of October, 1924, by virtue of her employment as clerk, agent, and servant of J. Carero, the defendant came into possession of the sum of \$275, the property of the said Carero, and that while in possession thereof on the said 29th day of October, 1924, she did unlawfully, fraudulently, and feloniously convert, embezzle, and appropriate the said property to her own use.

From the evidence in the record we find that on October 30, 1924, the defendant received from the complaining witness through J. E. King, the duly authorized agent of the complaining witness, the sum of \$275 to be used by her, if possible, to arrange with the Panama Pacific Land Company for the dismissal of an action which that company had brought against the complaining witness and his wife to recover possession of certain premises on Durant avenue in the city of Oakland which had been under process of purchase on an installment contract by the Careros and upon which contract they were several months in default. Upon the receipt of the money she went to the offices of the Panama Pacific Land Company in San Francisco accompanied by Mrs. Carero, the wife of the complaining witness, and there endeavored to obtain a dismissal of the action and a restoration of the Careros in their contract. The company refused to grant either request, but agreed to accept the defendant as a purchaser under the contract. On their return from San Francisco the defendant and Mrs. Carero went to Fruitvale to look at a home which the defendant proposed that the Careros purchase in lieu of their Durant avenue home. At this time the defendant proposed to Mrs. Carero that if they would purchase the Fruitvale home she would apply the sum of \$275 on the first payment, with the understanding that the Careros should assign to

her their interest in the Durant avenue home to enable the defendant to save some of the equity therein, the proceeds thereof to be divided between the defendant and the Careros. These negotiations were carried on between the defendant and the Careros for two or three days until, on about the 2d day of November, the complaining witness notified the defendant that he would not assign his contract in the Durant avenue home, but would stand his loss and would not take up the purchase of the home in Fruitvale. The negotiations for the purchase of the Fruitvale home having been terminated and the relations between the parties having become strained, the defendant assigned to a third party a claim against the Careros in the sum of \$298, and suit was immediately commenced to recover the same. Attachment was levied upon application of the assignee and the sum of \$275 in the hands of the defendant was thereupon turned over to the court to await the determination of those proceedings. This all occurred about the 6th day of November, 1924. Thereafter, and on November 9th, the complaining witness assigned to his counsel all his right, title, and interest in the sum of \$275, and this assignee appeared in the justice's court in the proceeding above mentioned and filed what is known as a third party claim demanding the payment of the money over to him. On the following day, November 10th, the complaint which is the basis of this prosecution was filed and a warrant issued charging the defendant with the embezzlement of the sum mentioned. The civil proceedings mentioned were terminated when, after the arrest of the defendant on the charge of embezzlement, her assignee caused a dismissal of the action to be filed. The money in suit was thereafter received by counsel for the Careros in settlement of claims which he asserted against them. Thereafter the defendant herein appeared before the justice's court and urged a motion to set aside the dismissal on the grounds that the entry thereof by her assignee was without her consent; but this motion was denied upon the ground that she was not a proper party in the proceeding.

The foregoing are really all the essential facts pertinent to the case at issue, but because of the peculiar method in which the case was tried it is necessary to go further and state the transactions in which the parties had been involved prior to the one in which the charge of embezzlement arose. The Careros owned and resided in a small home in San Leandro, and a brother of Mrs. Carero, one Joe King, owned the rear portion of the premises upon which the Careros resided. He persuaded them to exchange their right in the premises for a contract to purchase the premises located on Durant avenue and for this purpose entered into a written agreement with them wherein they recited that the value of their San Leandro prop-

erty was \$2,300, and that the value of the Durant avenue property was \$6,500, and that the former should be taken in part payment for the latter, leaving a balance to be paid by them of \$4,200 at the rate of \$35 a month. As a part of the same transaction King, the agent, agreed to "throw in" his property adjoining the property of the Careros in San Leandro and had the Careros deed to him all their interest in the portion of the San Leandro property. As a part of the same written agreement the Careros covenanted to transfer this entire property free and clear of incumbrances, but when they learned some time later that the defendant was interested in the exchange they refused to perform this part of their agreement. The appellant was not known to the Careros at any stage of the proceedings, the complaining witness testifying:

"He never met her (the defendant) until this deal—until we were in the house. About two months after we were in the house the time I knew she was the one that made that trade, otherwise she would never have got the house."

All these negotiations had been carried on by King, who was Mrs. Carero's brother, and who was also the former husband of the defendant. He had previously been convicted of the crime of embezzlement and served a term in the state penitentiary. It is necessary to bear these facts in mind because of the repeated assertions of counsel for respondent, and of the district attorney who prosecuted the case in the trial court, that the defendant misrepresented various features of this exchange to the Careros or withheld certain information from them, and through her misrepresentations and fraud gained a profit thereby. The undisputed facts show that the Careros dealt with their own agent, King, and that they had never at any time disputed the fairness of the exchange, the complaining witness having testified on numerous occasions that the exchange was fair enough to him; that the full value of the San Leandro property was \$2,300; and that he was satisfied with the value of \$6,500 placed upon the Durant avenue place.

As a part of this transaction the Careros made their deed of their portion of the San Leandro property to King, the Kinseys, who were the original purchasers of the Durant avenue home, assigned their contract to the defendant, and she arranged with the Panama Pacific Land Company, the original vendor of the Durant avenue place, to turn over this contract directly to the Careros. Thereafter King deeded to the defendant the two pieces of property in San Leandro, the one owned by the Careros and the one owned by himself, after having placed upon the entire tract a mortgage for \$1,500 with which the Carero mortgage of \$816 was liquidated and taxes and other liens were paid. Thereafter a second mortgage of \$650 was placed against

the property upon security given by the defendant and the promise that improvements on the premises would be made. For this second loan a bonus of \$175 was paid. The sum of \$1,975 which was thus received by the defendant on the security of the San Leandro property was expended in clearing the existing mortgages and liens upon the property, used to make the improvements required as a condition of the new mortgages and to pay the Kinseys for their contract upon the Durant avenue property. All this required an outlay by the defendant in excess of the amount which she received in loans upon the San Leandro property.

Subsequent to the consummation of this exchange, the Careros delivered small sums of money to their agent King, with the understanding that he should pay to the Panama Pacific Land Company the monthly installments of \$35, supplementing what he had received from them from his own funds in lieu of board and lodging which he received from them. Some of these payments were made by King, and others were neglected, and, finally, notice was given to the Careros by the land company that they were in default and demand was made upon them for payment. When the Careros were three months in default upon their payments, the defendant voluntarily paid to the land company the sum of \$223 covering installments, taxes, and other expenses. Two months later, the Careros were notified that they were again in default and borrowed money from their counsel to make payments. These conditions continued for almost the entire period of the occupancy of the premises by the Careros until, in October, 1924, they were notified that no further accommodations would be given them by the land company and suit was thereupon instituted to recover possession of the property. The matter was in this state when, on October 30th, the defendant, at the request of the Careros, went with Mrs. Carero to endeavor to arrange for a dismissal of the proceedings upon the payment of the sum of \$275. They were notified, however, that the company would not accept that payment.

[1, 2] To the charge in the information that she had embezzled the sum of \$275 while acting as the clerk, agent, and servant of the complaining witness, the defendant interposed the defense that she was entitled to retain the sum because of the indebtedness running to her. This was the real issue before the jury, and it was incumbent upon the appellant to prove that she had appropriated the money openly and avowedly and under a claim made in good faith, but it was not necessary for her to prove that her claim was a valid one upon which she might recover in law. Section 511, Pen. Code; *People v. Lapique*, 52 P. 40, 120 Cal. 25, 26. At the same time it was necessary for the prosecution to prove under this information that the money had been appropriated by the appel-

lant while the relation of clerk, agent, or servant existed and also that the money was appropriated by the appellant for her own use.

[3] An examination of the entire record discloses that she was not tried upon the issues so framed, but that she was compelled to defend the acts of her former husband, an ex-convict, who was the trusted agent and employee of the complaining witness, and that she was also compelled to defend the reputation of her present husband, as well as her own reputation as a real estate broker in the county in which she was tried. As the trial progressed, the real issue forced upon the appellant by the state was whether she had, by false representations, obtained an unfair advantage over the complaining witness and his wife in the real estate transaction, which had occurred about one year prior to the time of the trial. Whatever may be the true facts regarding the exchange of these properties in January, 1924, the undisputed evidence shows that the complaining witness and his wife entered into the new premises with full knowledge of all the circumstances and with complete satisfaction in their part of the exchange. No complaint was made by them that the exchange was unfair to them until effort was made by the district attorney to put them in this position during the course of the trial. They stipulated in writing that the value of the property which they turned in was \$2,300 and that the value of the property which they took on Durant avenue was \$6,500. The trouble came when their trusted agent, King, neglected to make the monthly payments and thus caused them to be in default in the installments upon their new home. It was therefore entirely outside the issues of this case as to what, if any, profit the appellant derived out of the San Leandro property after it had been transferred to her by King. Though the evidence is unmistakable that the loans which she had obtained upon this property were based on other security and that the failure of Carero to abide by his contract to transfer the property free from incumbrances cut her profit on the entire transaction to less than what would ordinarily be allowed to a real estate broker, nevertheless, the jury was frequently told by the district attorney in his argument that she had obtained \$2,300 in cash from this property and that she was still indebted to the Careros in that amount.

[4, 5] Appellant was charged under section 508, Penal Code, with the fraudulent appropriation of the money to her own use while in the capacity of an agent of the complaining witness. To support the charge it was necessary for the prosecution to prove that the confidential relation continued up to and including the time of the alleged embezzlement. The information charged that the appellant received the money "on or about the

29th day of October" and that she did, "on said 29th day of October," fraudulently and feloniously appropriate it to her own use. In the absence of a special demurrer for indefiniteness, the information was sufficient (*People v. Schroeder*, 185 P. 507, 43 Cal. App. 623, 625), but the attack is made that the evidence is insufficient to support the charge. Ordinarily, it is not necessary for the prosecution to allege or prove the exact date upon which an offense is alleged to have been committed, but there are, of course, exceptions to this rule. Where, as is the case here, a confidential relation is alleged to have arisen between the parties through which the money was lawfully received and the termination of that confidential relation is in doubt, it is necessary to prove the date of the alleged fraudulent appropriation in order to determine whether such appropriation occurred during the continuance of the confidential relation. Though it is alleged in the information that the money was received and appropriated on October 29th, the undisputed facts demonstrate that this was not the case. It is conceded that the money was not received until October 30th, and the date of the alleged misappropriation is left entirely to conjecture. There is no dispute as to these facts: That the appellant received the money on October 30th, for a special purpose, which she was unable to accomplish; that she returned to the complaining witness and notified him of her unsuccessful efforts; that the complaining witness then asked her for the return of the money and that she persuaded him to allow her to keep it for the time being pending negotiations for the purchase of another piece of property for the benefit of the complaining witness; that he assented to this arrangement and made no further demand upon her for the return of the money; that thereafter she was cited to appear before the district attorney, who demanded of her that she return the money before a certain date under penalty of prosecution for embezzlement. The prosecution failed to establish the time when this latter demand was made. The only testimony on this subject is that of the deputy district attorney as follows:

"I think the first conversation was had some time possibly the first part of November, latter part of October, 1924. * * * Well, we had another conference, I believe; at any rate, it was continued then for a short time."

[6] From the entire record it stands without contradiction that the original agency terminated on the day on which it was created, October 30, 1924; that, upon the termination of that agency, demand was made for the return of the money, and that the complaining witness consented to appellant's request that she retain it for another purpose; that some time thereafter, probably November 2d, the complaining witness noti-

fied the appellant that he would not go through with the suggested purchase of another piece of property, but did not demand of her the return of the money; that thereafter and on November 6th, the appellant assigned her claim against the Careros in the sum of \$298 for money claimed to have been paid for their benefit and her assignee commenced action against them and attached the sum of \$275, which she held in her possession; that from that day forward the money which she was charged to have embezzled was in the possession of the court by virtue of the attachment which was issued in the civil suit; that when demand was finally made by the district attorney that she pay this money to Carero she insisted that the money was due her in satisfaction of her claim against the Careros and upon that ground refused to make restitution. There is, therefore, a failure of proof that the money was fraudulently appropriated during the existence of a confidential relation between the parties, but, on the contrary, the only proof is that the appropriation was made openly and avowedly under a claim of right after the confidential relation had terminated.

[7] It is argued that the prosecution failed to prove a sufficient demand for the return of the money before the information was filed. Ordinarily, it is not necessary to prove a demand for property alleged to have been fraudulently appropriated by an agent (*People v. Ward*, 66 P. 372, 134 Cal. 301, 304) particularly "where other evidence clearly shows an appropriation by an employee of his employer's funds, with intent to do so fraudulently and feloniously" (*People v. Royce*, 39 P. 524, 525, 106 Cal. 173, 178). But where money is received by an agent for a special purpose, and after the termination of the agency it is retained by him with the consent of the principal, a demand is necessary in order to establish the essential element of the crime—the fraudulent intent of the agent to appropriate it to his own use. It is said in 10 Cal. Jur. p. 265:

"Where the time for the payment of the money is indefinite or has not expired, evidence of a demand therefor and of a refusal to return it or pay it over may be necessary to establish the fact of conversion. In such case the mere neglect to return, in the absence of a demand, has never been admitted as proof of conversion."

The defense upon which the appellant relied was that she held the money openly and avowedly and in good faith in payment for moneys which she had advanced to the complaining witness. Section 511, Pen. Code. In support of this issue it was shown that she had voluntarily advanced for the benefit of the complaining witness the sum of \$223 in payment of installments and other charges upon their contract for the purchase of the Durant avenue home and she endeavored to show that she had satisfied an attachment

against an automobile owned by the complaining witness, but was prevented from making this showing by the ruling of the trial judge on objection of the prosecution. This evidence was offered not for the purpose of showing that her claim against the Careros was tenable, as under the section of the Penal Code cited it was not necessary to prove that. It was offered merely to show that she held the money openly and avowedly under her claim against the Careros and that there was, therefore, no intention on her part to fraudulently appropriate the money to her own use. Thus, so far as the evidence is concerned, the appellant held the money in her possession with the full consent of the owner until November 6th, when she deposited it with the officer of the law to await the determination of ownership in the civil suit. Before taking this action she had consulted with two deputies in the district attorney's office of the city and county of San Francisco and one deputy in the office of the Attorney General of the state, and was acting upon their advice. In this respect the case is on a line with *People v. Lapique*, 52 P. 40, 120 Cal. 25, 26; *People v. Moss*, 99 N. Y. S. 138, 113 App. Div. 329, 333, 343; *People v. Moss*, 80 N. E. 383, 187 N. Y. 410, 425, 11 L. R. A. (N. S.) 528, 10 Ann. Cas. 309. See, also, *Lindgren v. United States*, 260 F. 772, 777, 171 C. C. A. 498, and *State v. Litschke*, 40 P. 167, 27 Or. 189. We are unable to conceive what better evidence of good faith could be asked than where a party, openly claiming a right to the money in dispute, deposits it with the duly constituted officers of the court to await the judicial determination of the legal title thereto through the regular mode of legal procedure in a civil suit.

Aside from all the foregoing considerations the outstanding objection made by the appellant is that she was not accorded a fair and impartial trial. As said in *People v. Becker*, 104 N. E. 396, 409, 210 N. Y. 274, 311:

"The fundamental demand of our law is that the accused shall have a fair trial, and that if that right has been infringed, not in respect to mere technicalities, but in substantial matters, and however undesignedly, he shall have another opportunity to meet his accuser and establish his innocence."

In *People v. Wolf*, 76 N. E. 592, 594, 183 N. Y. 464, 472:

"A fair trial is a legal trial, or one conducted in all material things in substantial conformity to law."

Throughout the presentation of the people's case the assistant district attorney by leading and grossly improper questions brought before the jury a large mass of irrelevant and incompetent testimony much of which was pure hearsay, having no possible relation to the issues at trial, but all of which was highly prejudicial to the appellant.

Many of these questions were asked in such a way that the witnesses were able to give their answers before counsel for appellant was able to object. Time and again the appellant's counsel protested against this conduct and at his request the trial court would strike out the answer and hear his objection. Though in many cases the objection was sustained and the answer stricken from the record, the objectionable matter was always before the jury. As we have heretofore pointed out, the appellant was being tried on the charge of embezzling a certain sum of money during the early part of November, 1924. The great bulk of the testimony, however, was directed to a real estate transaction in which she was engaged with the complaining witness and his wife and their agent, Joe King, during the month of January of the same year. Over repeated objections of appellant's counsel these witnesses were permitted to testify to ex parte conversations had between the complaining witness and his wife and Joe King regarding matters which did not have the slightest connection with the issue at trial. This hearsay testimony was brought in for the purpose of showing the bad reputation of the appellant growing out of her operations as a real estate broker, as well as to show the bad reputation of King with whom she was charged to have acted in conspiracy to defraud the complaining witness in the transaction of January, 1924. Though some of this testimony was stricken out upon the objection of appellant, it was all employed by the assistant district attorney in his address to the jury, and we find in that address instances of statements of fact which are not supported by any evidence in the record, but are founded solely upon the suspicions of the prosecutor.

Not only this, but the appellant was charged with all the crimes of her former husband, King, with the bad reputation of her present husband, and with her own bad reputation as an operator in the real estate market. The Careros had not rescinded or repudiated the exchange. They testified in this case that their San Leandro property was worth \$2,300 and that the exchange had been fair to them. Until this case went to trial the appellant had not been charged with fraud or misrepresentation or unfair dealing in connection with that exchange. Notwithstanding this, the assistant district attorney, in his argument to the jury, and the state as well in its brief on file herein, charged the appellant as having conspired with Joe King to defraud the Careros in that transaction, with having misrepresented to them material facts in relation to the properties exchanged, and having unlawfully withheld information in regard thereto. In addition to this, the district attorney charged Joe King with having forged the deed which the Careros made to him of their San Leandro property, with no evidence of any character to support the

charge, and then accused the appellant with having willfully suppressed the deed and refused to offer it in evidence. Again, with all the competent evidence directly contrary, the assistant district attorney deliberately stated to the jury that the appellant was then indebted to the Careros in the sum of \$3,000. These statements must necessarily have impressed the jury to the prejudice of appellant, coming as they did from a sworn officer of the court. The jury was told in so many words that the appellant was a real estate shark who had defrauded the Careros out of their poor home in conspiracy with Joe King, and then the prosecutor launched into an attack upon the criminal record of Joe King, and of the present husband of the appellant, who, he stated, was safely "put away."

[8, 9] On this appeal the respondent does not attempt to defend any of these charges of misconduct, but rests solely on the ground that in each particular case the trial judge was not requested to instruct the jury to disregard them. Though, ordinarily, such a request is necessary "where the error is such that its effect would be obviated by an instruction to the jury to disregard it" (People v. Nakis, 193 P. 92, 96, 184 Cal. 105, 116), the rule is not applicable where the misconduct on the part of the state occurs throughout the examination of witnesses and in the arguments to the jury with such frequency that the jury is led to believe that the district attorney, as the sworn officer of the court, has in his possession facts so damaging to the defendant on trial that the defendant must insist on their being withheld. Such was the case before the Supreme Court in People v. Anthony, 196 P. 47, 50, 185 Cal. 152, 159, where the conviction of the defendant was reversed for misconduct of the district attorney in the examination of witnesses. In that case the Supreme Court say:

"Ordinarily, the prompt sustaining of objections to improper questions, coupled with instructions to the jury to disregard the question, will cure an error of this kind. But where the offense has been repeated in various forms, and where the evidence is so evenly balanced, and the district attorney, after being warned by the court, continues in his course, we must hold that the misconduct was so prejudicial as to entitle the defendant to a new trial."

To the same effect are People v. Kizer, 133 P. 516, 521, 134 P. 346, 22 Cal. App. 10, 20, and People v. Tufts, 139 P. 78, 167 Cal. 266, 274. In the case under review counsel for appellant objected to all the remarks of the

assistant district attorney which he assigns as misconduct and objected to the improper examination of the witnesses until he found that his objections merely emphasized the error in the minds of the jury. We are not able to say from an examination of this record that there has not been a miscarriage of justice; on the other hand, it is patent that the appellant was not given a fair trial upon the charge laid in the information. People v. Glass, 112 P. 281, 158 Cal. 650, 654; State v. Giudice, 153 N. W. 336, 170 Iowa, 731, 751; Ann. Cas. 1917C, 1160; People v. Fielding, 53 N. E. 497, 158 N. Y. 542, 546, 46 L. R. A. 641, 70 Am. St. Rep. 495.

Judgment and order reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

On Petition for Rehearing.

PER CURIAM. [10] The petition for a rehearing is denied. The petitioner is in error in assuming that the cause was reversed upon a conflict of evidence. The reason for the reversal was that the court was satisfied that from a review of the entire record the defendant had not been accorded a fair trial before the jury. As the cause was to go back for a new trial, we discussed the evidence at some length merely for the purpose of pointing out some of the well-settled rules of law covering the elements of the crime which must be proved. As the Penal Code provides that an appropriation made openly and avowedly and under a claim in good faith is a sufficient defense to a charge of embezzlement, this was the real issue which the defendant brought before the jury. The evidence was without conflict that the appropriation was made openly and avowedly and under an adverse claim. The question of good faith in the claim was clearly one for the jury to determine. It was because of the misconduct on the part of the prosecution that the defendant was prejudiced on the presentation of that issue. If we were in error in our statement of the evidence, this was due to the failure of the state to point to the portions of the typewritten record which were claimed to support the statement of facts made in the brief. If we had reversed the judgment upon the ground that the evidence was insufficient to support it, then the matter of a conflict in the evidence would become an important factor. But this is not important when the evidence is merely referred to for other purposes.

76 Cal. App. 723

In re WEBER'S ESTATE.**WEBER v. HECKER et al.**
(Civ. 5591.)

(District Court of Appeal, First District, Division 2, California. March 3, 1926.)

1. Wills ⚭439, 487(1).

In interpretation of will, it is duty of court to determine, if possible, intent of testator, for which purpose parol evidence is admissible in numerous instances.

2. Executors and administrators ⚭314(12) —Appellate court, without having evidence before it, cannot say that a different construction should have been given to will unless it is case where no evidence was admissible, and will affirm.

Where probate court, after hearing, bases its construction of will upon evidence presented, appellate court, without having the evidence before it, cannot say that a different construction should have been given unless it is a case where no evidence was admissible, and failure to file a judgment roll or bill of exceptions requires an affirmance of the order appealed from.

3. Wills ⚭558(1).

Particular words are not requisite to create a legacy or devise, but it is essential that testator's intention to make gift be shown.

4. Wills ⚭441—Intention of testator is determined from words of will, considering circumstances under which it was made, if there is any uncertainty in its language.

The intention of the testator is determined from the words of the will, considering the circumstances under which it was made, if there is any uncertainty in its language.

5. Wills ⚭470—Will and its entire scheme, property disposed of, persons named as devisees and legatees, and words and context, should be considered in arriving at intention of testator.

In arriving at intention of testator, the will and its entire scheme, property disposed of, the persons named as devisees and legatees, and the words and context, should be considered together, and words used in will should be construed according to their surroundings.

6. Wills ⚭478—A devise or bequest may arise by implication, but probability of intention to make gift must be strong.

A devise or bequest may arise by implication, but the probability of the intention to make the gift must be so strong that an intention contrary to that imputed cannot be supposed to have existed in testator's mind.

7. Wills ⚭478—Testator naming seven persons, and specifying specific amounts of money "to" each, held to intend to leave money to persons designated, though will did not contain dispositive or operative words.

Where will named seven persons and specified amounts of money "to" each, held, that

probability of intention to make the gifts was so strong that a contrary intention could not be supposed to have existed, though dispositive or operative words were not used.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

In the matter of the estate of Emily H. Weber, deceased. From a decree in favor of Alice Hecker and others directing final distribution, Jacob Weber, objector, appeals. Decree affirmed.

Louis F. Laberere and John A. Cronin, both of Los Angeles, for appellant.

Karl L. Ratzner, of Los Angeles, for respondents.

NOURSE, J. This is an appeal on behalf of the surviving husband of Emily H. Weber, deceased, from the decree of final distribution of her estate. The appeal is presented on a printed transcript consisting of the executor's first and final account and petition for distribution, the appellant's objections thereto, the order settling the account and decreeing distribution under the will, and the notice of appeal from the decree. These several documents are accompanied by the certificate of the county clerk that they are true copies of the documents on file in his office.

[1, 2] The appeal apparently was taken under the "old" method, but there is no judgment roll and no bill of exceptions. It appears from the copy of the order appealed from that a hearing was had and evidence taken on appellant's objections, which were then overruled. These objections raised two points—that property of the value of \$153 listed in the account was community property, and that the will did not make a valid disposition of the property of the estate. We have no information regarding the nature of the evidence taken at the hearing. If addressed to the question of the interpretation of the will, it should have been brought up on this appeal in a bill of exceptions. On the interpretation of a will it is the duty of the court to determine, if possible, the intention of the testator. For this purpose there are numerous instances where parol evidence is admissible. Where, therefore, the probate court, after a hearing, bases its construction of the will upon the evidence presented, the appellate court, without having the evidence before it, cannot say that a different construction should have been given, unless it is a case where no evidence was admissible. The failure to file a judgment roll or a bill of exceptions is sufficient to require an affirmance of the order appealed from.

In addition to this, we are satisfied that appellant's claim that the will fails to make disposition of the property is without merit. The will in part reads as follows:

"I, Emily H. Weber, * * * do make, publish and declare this my last will and testament in the manner following, that is to say:

"First. To Alice Hecker * * * \$500. To Sophy Hecker * * * \$5,500 (and to seven others in the same language, but in varying sums).

"Secondly. All clothing, linen, etc., to go to sister-in-law Sophy Hecker."

The final clause named an executor to serve without bonds. The point raised by appellant is that the will does not contain any dispositive or operative word covering the bequests of money enumerated in the first paragraph. Respondents' answer is that there is no uncertainty in any portion of the will; that the use of the words, "To Alice Hecker, \$500," clearly indicates the intention of the testatrix to bequeath Alice Hecker \$500, or that if there be any doubt on this score, the bequest must arise by implication from the context of the will.

[3-6] It would serve no purpose to discuss or analyze the numerous authorities cited by the respective parties. It is sufficient to say that though the cases bear both ways, the final expression of the Supreme Court found in *Estate of Franck*, 210 P. 417, 418, 190 Cal. 28, 31, is conclusive. In that case the court say:

"Particular words are not requisite to create a legacy or devise. It is essential that the intention of the testator to make the gift be shown. (*Estate of Barclay*, 93 P. 1012, 152 Cal. 753, 757). The cardinal rule for the construction of wills is to ascertain the intention of the testator, and this is determined from the words of the will, considering the circumstances under which it was made, if there is any uncertainty in its language. (*Estate of Budd*, 135 P. 1131, 166 Cal. 286, 292; *Estate of Henderson*, 119 P. 496, 161 Cal. 353, 357; *Estate of Mitchell*, 117 P. 774, 160 Cal. 618; *Estate of Carothers*, 119 P. 926, 161 Cal. 588; *Estate of Spreckels*, 123 P. 371, 162 Cal. 559.) The will and its entire scheme, the property disposed of, the persons named as devisees and legatees, the words and the context should be considered together, and words used in the will should be construed according to their surroundings. (*Estate of Koch*, 96 P. 100, 8 Cal. App. 90.) It is equally well settled that a devise or bequest may arise by implication. To warrant the court in so declaring there must be something more than conjecture. The probability of an intention to make the gift implied must appear to be so strong that an intention contrary to that imputed to the testator cannot be supposed to have existed in his mind."

[7] In the case at hand there is no need for conjecture as to the intention of the testatrix. When she separately named seven persons and specified specific amounts of money "to" each, she intended to leave the money designated to the persons named. Thus the probability of an intention to make these gifts is so strong that "an intention con-

trary to that imputed to the testa (trix) cannot be supposed to have existed."

Order affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

76 Cal. App. 672

PALMER et al. v. SHASTA COUNTY.
(Civ. 3053.)

(District Court of Appeal, Third District, California. Feb. 27, 1926. Hearing Denied by Supreme Court April 26, 1926.)

1. Appeal and error $\hookrightarrow$ 1011(1)—Evidence held conflicting on question whether plans for bridge provided for construction joints, and findings are conclusive on appeal.

In action for balance due on contract to construct bridge, evidence held conflicting on question whether plans provided for construction joints, and hence trial court's findings must be accepted by appellate court as conclusive.

2. Appeal and error $\hookrightarrow$ 1011(1)—Evidence on question whether expansion joints in bridge were improperly constructed held controverted and findings conclusive.

In action for balance due on bridge contract, evidence on question whether expansion joints were improperly constructed held controverted, rendering trial court's findings conclusive.

3. Appeal and error $\hookrightarrow$ 1011(1)—Where evidence as to whether quantity of cement used in bridge was deficient was conflicting, finding for plaintiff, supported by substantial testimony, could not be disturbed.

In action for balance due on bridge contract, where evidence on question whether quantity of cement used in construction of bridge was deficient was conflicting, and findings for plaintiff were supported by substantial testimony, they could not be disturbed.

4. Counties $\hookrightarrow$ 198.

Interest against a county on claims for balance due on bridge contract does not begin to run until date of entry of judgment against county.

5. Costs $\hookrightarrow$ 234—Error in allowing interest of \$1,824.66 on judgment for plaintiff held to entitle defendant to costs, though judgment was affirmed in other respects.

Error in allowing interest of \$1,824.66 on judgment for contractor in suit against county for balance due on bridge contract held to entitle county to costs, though judgment was in other respects affirmed.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action on contract for bridge construction by P. A. Palmer and another, doing business under the firm name and style of Palmer & Petersen, against the County of Shasta, in which the defendant filed a counterclaim. Judgment for plaintiffs, and defendant appeals. Affirmed as modified.

Jesse W. Carter, Dist. Atty., of Redding, for appellant.

Knight, Boland, Hutchinson & Christin, of San Francisco, for respondents.

PLUMMER, J. Action by plaintiffs to recover balance alleged to be due upon a contract for the construction of an approach to Anderson free bridge in the county of Shasta, state of California. The plaintiffs had judgment in the sum of \$10,568.04. From this judgment the defendant appeals.

On or about the 10th day of September, 1920, the plaintiffs and defendant entered into a contract for the construction of an approach to the Anderson free bridge in Shasta county. The approach was to consist of a re-enforced concrete bridge 560 feet in length, of fourteen spans. The contract price for the bridge was the sum of \$39,000. At a later date a supplemental contract was entered into, which changed the dates of payment provided for in the original contract, but otherwise leaving the original contract in full force and effect. The plans and specifications were prepared by C. R. Wiegel, county surveyor of Shasta county, and the bridge was constructed under the personal inspection of Mr. Wiegel and his deputy. According to the defendant's interpretation, the bridge was designed as a simple span bridge, of spans 40 feet in length resting upon piers, with expansion joints on the even-numbered piers and construction or stop joints on the odd-numbered piers. There is no controversy as to the expansion joints being provided for in the plans and specifications, or as to the piers where the expansion joints were to be placed and were placed. There is controversy as to whether construction joints were provided for in the plans and specifications. After the work had been finished according to plans and specifications, as interpreted by the plaintiffs, there appeared certain defects in the bridge, to remedy which the defendant expended the sum of some \$12,955. The defendant also filed a counterclaim in which it alleged the expenditure of this sum of money to complete the bridge according to the plans and specifications; that the plaintiffs had not finished the bridge according to contract and plans and specifications; that there was due the plaintiffs for the work performed by them the sum of \$10,464.94; and that by reason of the expenditures made by the defendant, as just alleged, there was a balance due to the county of the sum of \$2,490.53. The amount claimed by the plaintiffs was the sum of \$18,406.22. Upon trial, the court gave judgment for the plaintiffs in the sum first herein mentioned.

It is alleged by the defendant that construction joints were omitted from the fixed piers; that expansion joints were not properly constructed; that the cement used in

the construction of the bridge was deficient in quantity; and that different materials from those provided in the specifications were substituted by the contractors. As to the substitution of materials, it may be here stated that the court found that the specifications called for one-half inch spacing bars and the bars actually used were only three-eighths inch in size; that the difference in value was the sum of \$150, or thereabouts, credit for which was given to the county, and that the substitution in the size of the bars did not in anywise affect the strength of the bridge.

It appears from the record that there are two types of construction used in the erection of concrete bridges such as the approach to the Anderson free bridge. One is called the continuous span and the other is a simple span. A simple span bridge in this instance would be the construction of each span independently—that is, 40 feet at a time—with a construction joint over every alternate pier with an expansion joint between the alternate piers. The construction joint consists simply of placing an abutment at the end of alternate spans and pouring the concrete up to the abutment, letting it set, then removing the abutment and proceed with the pouring of the cement of the next following span. A continuous span bridge is one in which expansion joints are placed over the piers or abutments at the end of alternate spans and over the solid or fixed piers the re-enforcing steel is continuous, including reverse bending moment steel. This steel holds the deck of the bridge rigid and prevents it from cracking. In the simple span the reverse bending moment steel and the re-enforcing steel both end at the expansion joint and also at the opposite end of the span at the so-called fixed pier. It would appear from the testimony that cracks are inevitable in concrete bridge construction, and therefore it is necessary to have the cracks occur on the line across the bridge that will not affect its supporting strength. If the crack occurs at the end of the girder which is near the center of the pier, the supporting strength of the girder is not affected, but, if it occurs at the point where the girder reaches the pier, the crack becomes very material. It is also necessary to have expansion joints sufficiently near together to permit the come and go of the bridge as it may be affected by climatic conditions. Controverting the claims of the defendant, the plaintiffs set forth that construction joints were not provided for in the plans and specifications to be placed over alternate piers; that in fact no construction joints were provided for; that the plans and specifications were defective in their reference to expansion joints and called for the use of material not calculated to function properly; that the defects in the bridge were due to the defects in the plans and specifications

and not in the work performed by the plaintiffs.

The trial court found that the plaintiffs had substantially complied with their contract; had built the bridge according to the plans and specifications; that expansion joints were constructed according to the plans and specifications; that construction joints were not ordered placed over any of the piers. The court also found that the plaintiffs had done extra work in the sum of \$3,149.13, and that the defendant was entitled to credit for materials furnished and for work done in stripping forms and back-filling, etc., in the total sum of \$2,339.09, leaving due the plaintiffs the sum for which judgment was entered herein. The court also gave judgment to the plaintiffs for interest on the amount of the judgment from the 3d day of November, 1921, the date on which the plaintiffs alleged completion of their contract.

[1] Practically no questions of law are involved in this case. The appeal is brought to us upon questions of fact and the allegation that certain findings of the court relating to the points which we have herein stated are not supported by the evidence. It is further argued on the part of the appellant that the findings are in conflict with the uncontradicted evidence, and that the finding, in substance, that the plans and specifications did not call for construction joints over the piers, is against uncontradicted evidence. We do not quite see how this claim can be made, in view of the fact that the findings printed in this case and called to our attention show that upon every material point the finding of the court is based upon conflicting testimony. There is also testimony in the record of a substantial nature which, if believed by the trial court, is sufficient to sustain every finding challenged in this case. We might rest our decision upon the statement that our investigation of the record shows the above fact, and then state the familiar rule that an appellate court will not disturb the judgment of the trial court when the findings of the latter are based upon conflicting testimony, even though the appellate court might be of the opinion that the testimony would have supported a contrary finding or judgment, or even though, as printed in the record, the weight of the testimony appears to be against the finding of the trial court. However, we will set forth enough of the testimony to show that the findings challenged are supported.

First, as to whether the contract provided for construction joints: In the cross-complaint filed by the defendant, as well as in its answer, it is set forth that the plans and specifications provide for fourteen construction joints to be placed in the center of the spans on the approach to said bridge, all of which were omitted. This might seem to be

an error in the matter of pleading were it not for the fact that on the 5th day of June, 1922, C. R. Wiegel, the engineer who drew the plans, in the certificate or letter written to the board of supervisors of the county of Shasta, rejecting the bridge in question, contained the following:

"The plans and specifications call for fourteen construction joints to be placed in the center of spans on said bridge, all of which have been omitted."

Upon the witness stand, Mr. Wiegel testified as follows:

"Q. Is it your opinion that construction joints were omitted from the center of the spans on the approach to the bridge? A. They were. Q. Are they provided for in the plans and specifications? A. They are. Q. Will you turn to Exhibit 2 and show us where? A. On page 4, under the heading, 'Placing Concrete,' paragraph B. 'Joints in the concrete due to stopping work are to be avoided as far as possible, except where indicated on the plans. Such joints when necessary shall be horizontal in wall and columns, and shall be at the tops and bottoms of columns; such joints in girders and slabs shall be vertical and at the center of the span.' Now the last two lines of page 4, under the heading 'Expansion Joints.' 'Expansion joints must be provided at all points indicated on the plans.' Q. Is that all? A. That is all."

All of the witnesses called by the defendant, to whose testimony our attention has been directed, contradict Mr. Wiegel as to the correct interpretation of the plans, and are emphatic that the construction joints should not be placed in the center of the span except in case of absolute necessity, due to the stoppage of work or other unavoidable cause; that the construction joints should be over piers. It is further claimed by the witness Wiegel that he transferred the point for the construction joint from the center of the span to a point directly over the center of the pier—I, e., over piers in 1, 3, 5, 7, 9, and 11—and that he did this during the course of construction. Upon this question there is a great deal of conflicting testimony, which we do not need here to set forth. There is testimony by engineers called on behalf of the defendant that the plans and specifications called for construction joints over the odd-numbered piers just named. This testimony is not, however, uncontroverted, as claimed by the appellant, as a brief summary will sufficiently show. Mr. Huggard, a witness called on behalf of the plaintiffs, testified as follows:

"Q. As a foreman with experience such as you have described, would you read in any part of this Exhibit 2, that a construction joint was provided for in these plans and specifications over the alternate or solid piers? A. No, sir; absolutely not."

Prof. Derleth of the engineering department of the University of California, testified as follows:

"Q. I will ask you to again look at sheet 1 of the specifications and plans, which give the general design of the bridge, and tell us whether a construction joint is provided for on that sheet? A. I see no place on this sheet where construction joints are indicated. Q. You notice a provision for expansion joints, do you? A. Piers 2, 4, 6, 8, 10, 12, and 13 show provision for expansion joints for one span adjacent and fixed end for the other span adjacent to those piers. Q. Will you look now at sheet 2 of those plans and tell us what—whether a construction joint is there provided for? A. I see no reference on sheet 2 to construction joints anywhere."

Mr. Leonard, an expert witness called by the plaintiffs, testified as follows:

"Q. Will you look at the plans and specifications and tell me whether such a construction joint was provided for in these plans and specifications? A. No, I have looked over them and I cannot find that."

This testimony is sufficient to show that the question as to whether the plans and specifications did or did not provide for construction joints was a controverted question before the trial court, and was decided by that court upon conflicting testimony, and hence we must accept such findings as conclusive.

[2] The second objection urged by appellant is based upon the allegation that the expansion joints were not properly constructed and therefore failed to function. Here we have another controverted question. A number of witnesses testified that the expansion joints were built according to the plans and specifications, but that the plans and specifications for the joints were so deficient that the expansion joints could not be reasonably expected to function properly. The sliding plates for the construction joints consisted of galvanized iron plates 10 inches wide and 18 feet in length, laid across the axis of the bridge. Upon these plates the bridge girders rested. The diaphragm wall also extended down to the top of the pier, making the friction surface coincident for the entire 18-foot width of the bridge. It also appears from the testimony that the specifications were conflicting as to the gauge of the galvanized iron plates in one place calling for 14 gauge, 12 inches by 20 feet long. In another place 20 gauge galvanized plates, 20 inches by 18 feet in length, were specified. According to some of the witnesses, the plates were so thin that they would reflect all the unevenness, if any, of the cement and would also crumple up somewhat like a sheet of wrapping paper. It also appears that the county engineer was upon the ground, either in person or by deputy, and inspected the construction of the expansion joints during the period of their erection,

and, so far as we have been able to discover, did not question that the plans and specifications were being followed at the time the expansion joints were being constructed. The testimony of Mr. Leonard, Prof. Derleth, Mr. Huggard, and others was all to the effect that the type of expansion points provided for in the specifications was such that their proper functioning was exceedingly doubtful. These witnesses testified that the galvanized iron plate was too thin; that it should not have extended for the entire 18 feet; that it should have been under the girders only; that expansion joints, such as were called for in this instance would freeze—that is, the friction of the galvanized iron plate would be of such a degree as to prevent the sliding movement of the girders. The testimony also shows that, when the diaphragm wall was removed, the girders began to work; that is, they would come and go with the expansion of the bridge. Considerable testimony was introduced to the effect that phosphor bronze plates should have been used; also roller bearings were better calculated to secure efficiency in expansion joints. Testimony was also introduced to the effect that several other bridges having expansion joints, constructed according to the plans and specifications of the bridge in question, had failed to function properly, and that the use of galvanized iron plates was being discarded.

[3] The final grounds for reversal really urged by appellant is that the quantity of cement used in the construction of the bridge was deficient. Here again we have the same conflict of testimony. A certain number of witnesses, by mathematical calculations and otherwise, testified that the quantity of cement used was deficient to the number of about 1,000 sacks. On the other hand, a number of witnesses testified that the quantity of cement so used was that directed by the county engineer, and was not deficient in quantity. It would serve no useful purpose to set forth this conflicting testimony, and it is sufficient to say that the findings of the court have substantial testimony to support them. The matter of the substitution of steel has been heretofore dealt with.

[4, 5] The objection that the court erred in allowing interest from the 3d day of November, 1921, is well taken. The law is well settled that interest against a county upon claims such as we are here considering does not begin to run until the date of the entry of judgment. Judgment in this case was entered on the 21st day of April, 1924. It thus appears that the court erroneously allowed interest for the period of 2 years 5 months and 18 days, which interest would amount to the sum of \$1,824.66. This part of the judgment must be stricken out, and it is so ordered, and it is further ordered that the al-

lowance of interest date from the entry of judgment, to wit, April 21, 1924. This error in the allowance of interest, as shown by the figures above stated, is not a mere trifling item, and therefore the appellant will be and is hereby allowed its costs on appeal. In all other respects, the judgment should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; PULLEN, Justice pro tem.

76 Cal. App. 688

PEOPLE v. WILSON et al. (Cr. 1196.)

(District Court of Appeal, Second District, Division 2, California, March 1, 1926. Hearing Denied by Supreme Court April 29, 1926.)

1. Criminal law § 622(2)—Refusal of separate trial was not abuse of discretion, notwithstanding admissions tending to implicate both defendants had been made by codefendant.

Refusal of separate trial in joint prosecution for robbery held not abuse of discretion, notwithstanding affidavits that codefendant had made admissions tending to implicate both defendants, which, if offered against such codefendant, would also injure movant.

2. Criminal law § 1134(2)—Abuse of discretion in denying severance must, on appeal, be determined on showing made on demand.

Whether denial of accused's motion for severance was abuse of discretion must, on appeal, be determined on showing made when demand was presented, and not on what afterwards occurred.

3. Criminal law § 372(1)—Evidence is admissible to prove that robberies charged in indictment were but part of general conspiracy to commit a series of robberies.

In prosecution for robberies, evidence that witness and defendants had entered into a general conspiracy to commit a series of robberies, and that offenses for which defendants were put on trial were but a part of the conspiracy, was properly permitted.

4. Criminal law § 372(1)—History of conspiracy to commit chain of robberies is admissible, though evidence covers transactions extending over long period, and shows commission of crimes other than robberies charged.

In prosecution for robberies, testimony being admissible to prove general conspiracy to commit series of robberies of which offenses charged were a part, its history can be shown, though evidence covers many transactions extending over long period, and shows commission of other crimes.

5. Robbery § 24(1)—Evidence held sufficient to show existence of general conspiracy to rob, of which offenses charged were a part.

Evidence held sufficient to show existence of general conspiracy to rob, in furtherance of

which two robberies charged against defendants were perpetrated.

6. Criminal law § 510—Testimony of accomplice must be corroborated by independent evidence connecting defendant with crime to warrant conviction.

To warrant conviction in robbery prosecution on evidence given by an accomplice, his testimony must be corroborated by independent evidence, which tends to connect defendant with commission of the offense.

7. Criminal law § 511(4)—Testimony that defendant resembled robber who rifled witness' pockets was sufficient to connect defendant with robbery, and corroborate accomplice's testimony.

Testimony of witness that he positively recognized defendant's accomplice as robber who pointed gun at him, and that defendant resembled robber who rifled his pockets, whose back and shoulders he had seen, was sufficient to connect defendant with robbery, and to corroborate accomplice's testimony.

8. Criminal law § 339—Identification may be based upon peculiarities other than facial.

Identification of defendant need not be by one who has seen his face, nor be based on facial features, but may be based on other peculiarities.

9. Criminal law § 566—Witnesses' testimony that they believe defendant is person they saw commit the crime is sufficient to sustain conviction.

Testimony of witnesses who decline to positively identify defendant, but testify merely that they believe he is the person whom they saw commit the crime, is sufficient identification to sustain conviction.

10. Criminal law § 1044, 1129(1)—When motion not made to strike out objectionable testimony and asking of question not assigned as error, question of misconduct was not open.

Where defendant made no motion to strike out objectionable testimony given in response to alleged improper questions asked by prosecutor of state's witness, and did not assign his conduct in asking them as error, he could not raise the question of misconduct in appellate court.

11. Robbery § 15—Coconspirator is liable as principal for robbery committed by confederates, in his absence, in furtherance of conspiracy, unless he has previously communicated withdrawal from conspiracy (Pen. Code, § 31, 971).

Where defendant's confederates committed robbery arranged for in furtherance of conspiracy to rob, he is liable as a principal, in view of Pen. Code, §§ 31, 971, notwithstanding his failure to appear at scene of robbery, in absence of communication of his withdrawal from conspiracy prior to commission of the robbery.

12. Robbery ⚡15—In prosecution for robbery, communication of defendant's withdrawal from conspiracy to rob may be by acts or words.

In prosecution for robbery, knowledge of defendant's withdrawal from conspiracy to commit robberies may be brought home to his confederates by acts as well as by words.

13. Robbery ⚡24(1)—Evidence held to warrant finding that defendant's failure to appear at robbery committed by confederates did not indicate withdrawal from conspiracy to rob.

Evidence held to warrant finding that defendant's failure to keep appointment with confederates to commit robbery was not intended by him to be, and was not understood by confederates to be indicative of, withdrawal from enterprise, especially since he participated in subsequent robbery.

14. Criminal law ⚡693, 696(4)—An objection, after question asked and answered, that it was incompetent, irrelevant, and not within issues, was abortive, and properly overruled.

Where, in robbery prosecution, after witness had given conversation he had with defendant after defendant's arrest, objection that it was incompetent, irrelevant, and not within the issues, was not tantamount to motion to strike, and was an abortive objection, and so was properly overruled.

15. Criminal law ⚡696(6)—Motion to strike testimony not made until after cross-examination comes too late to raise question of admissibility.

Where state's witness testified to conversation with defendant after his arrest, motion to strike, not made until close of cross-examination, came too late to raise question of admissibility; it being necessary to make motion at close of direct examination to exclude testimony.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Carey Wilson and Clifford A. McCormick were convicted of robbery, and each appeals. Affirmed.

Wm. J. Clark, of Los Angeles, for appellant Wilson.

Rowen Irwin, of Bakersfield, and Charles A. Barnhart, of Los Angeles, for appellant McCormick.

U. S. Webb, Atty. Gen., and John L. Flynn and H. H. Linney, Deputy Attys. Gen., for the People.

FINLAYSON, P. J. By an indictment containing two counts, Carey Wilson and Clifford McCormick were jointly charged, in each count, with the crime of robbery, committed in the city of Los Angeles. Count 1 charges that on March 17, 1924, the defendants robbed Ben Albins and Joe Bassett of \$45 in money, the property of Albins and Bassett, and of the Sultan Turkish Baths, a corporation. This incident is referred to by the witnesses as the Turkish Baths robbery.

Count 2 charges that on March 25, 1924, the defendants robbed E. C. Fitts of \$18 in money, the personal property of Fitts and of the Los Angeles Railway Company, a corporation. This event is referred to by the witnesses as the La Brea bus robbery. Albins and Bassett were, respectively, the night clerk and porter at the establishment of the Sultan Turkish Baths. Fitts was the driver of one of the busses of the Los Angeles Railway Company.

Before the commencement of the trial Wilson demanded that he be tried separately. In support of this motion Wilson presented affidavits to the effect that his defense and that of his codefendant would be inconsistent with, and contradictory to, each other; that his codefendant, after his arrest, had made statements to the officers which tended to implicate both defendants in the robberies; and that, if these statements were offered against his codefendant, as the district attorney contemplated doing, he (Wilson) would be irretrievably injured. The request for a separate trial was denied. The defendants were found guilty on both counts, and a separate judgment of conviction on each count was rendered against each defendant, each of whom has appealed from the judgments of conviction against him, and likewise from an order denying his motion for a new trial.

The most damaging evidence against defendants was given by a confessed accomplice, one Godfrey Cowdry, testifying as a witness for the people. It was the theory of the prosecution that Cowdry, Wilson, and McCormick had entered into a general conspiracy to commit robberies in the city of Los Angeles—a conspiracy which included, not only the two crimes charged in the indictment, but a number of other robberies. Cowdry, over defendants' objections, was permitted to give testimony with respect to all of the robberies embraced within the purview of the conspiracy to rob. He was permitted to testify to conversations between the trio respecting the other robberies, and also to testify to acts done by them in furtherance of their common design to rob persons generally in and about the city of Los Angeles. The theory of McCormick's defense was that he was a feigned accomplice—that he was a private detective, who, though seeming to participate in the conspiracy, was but seeking to secure evidence which would lead to the arrest and conviction of his two supposed confederates.

As grounds for reversal, the appellant Wilson urges: (1) That the court abused its discretion in denying him a separate trial; (2) that error was committed in permitting Cowdry to give testimony respecting the plans of the three men to commit other robberies; (3) that the evidence is insufficient to support the verdict convicting him of the robbery

charged in the second count; and (4) that the district attorney was guilty of prejudicial misconduct. The points presented by McCormick as grounds for reversal are: (1) That he was entitled to a separate trial upon the showing made by his codefendant, and that the court's failure to order a severance was an abuse of discretion amounting to error; (2) that the evidence is insufficient to support the verdict convicting him of the robbery charged in the first count; and (3) that the court erred in permitting a witness for the people, one Edward T. Dalton, to testify to a certain conversation which the witness had with McCormick in the month of June or July following the robberies.

Appeal of the Defendant Wilson.

[1, 2] The court did not abuse its discretion in denying appellant a separate trial. Our determination of whether there was an abuse of discretion must be based upon the showing made when the demand for a severance was presented, and not upon what may have occurred afterwards. *People v. Erno*, (Cal. Sup.) 232 P. 710. The showing made by appellant in the affidavits which he presented with his motion did not differ substantially from that which was made by the defendant in *People v. Perry* (Cal. Sup.) 234 P. 890, where the point was disposed of adversely to the contention now made by appellant. See, also, *People v. Remington* (Cal. App.) 240 P. 526, and *People v. Swoape et al.* (Cal. App.) 242 P. 1067.

[3] The court did not err in permitting the accomplice Cowdry to give testimony respecting the plans of the three men to commit other robberies. It undoubtedly is the general rule that the evidence must be confined to the issue, and that on a trial for felony the prosecution will not be permitted to give evidence tending to prove the defendant guilty of another distinct and independent crime. There are, however, exceptions to this general rule. Thus the offense of which a defendant stands accused may have been perpetrated in furtherance of a general conspiracy to commit crime. In such cases the character and purpose of the conspiracy may have a tendency to shed light upon the particular offense charged against the accused. As we already have stated, it was the theory of the prosecution that Cowdry and the two appellants, Wilson and McCormick, prior to the commission of either of the robberies for which the latter were tried, had entered into a general conspiracy to commit a series of robberies, and that the two offenses for which appellants were put on trial were but a part of this broad, underlying conspiracy to enter upon a career of crime, having for its object the commission of a chain of robberies. If such conspiracy existed, it was proper to show it. A conspiracy of that character, if it existed, would tend to shed light upon the

acts done by appellants in connection with each of the robberies for which they were indicted. Moreover, the defendant McCormick was not present at the scene of the Turkish Baths robbery. To justify his conviction of that crime, it was necessary to establish criminal liability under the general rule that, where several persons conspire or combine together to commit a crime, each is criminally responsible for the acts of his associates or confederates committed in furtherance of the common design.

[4, 5] Since the prosecution had the right to prove the existence of a general conspiracy in furtherance of which the two robberies here in question were perpetrated, it had the right to show the whole history of the conspiracy from its commencement to its conclusion. In such cases it is no objection that the evidence covers a great many transactions and extends over a long period of time, or that it may show the commission of other crimes. When the question is whether the accused was a party to a general conspiracy, distinct overt acts in furtherance of such a design may be given in evidence. *People v. Collins*, 30 P. 847, 64 Cal. 293; *People v. Berry*, 215 P. 74, 191 Cal. 109, 122; *Commonwealth v. Scott*, 123 Mass. 222, 25 Am. Rep. 81; *Hall v. State*, 3 Lea (Tenn.) 552. See, also, *Comm. v. Stuart*, 93 N. E. 825, 207 Mass. 563; *State v. Roberts*, 147 P. 828, 95 Kan. 280; *Jenkins v. Commonwealth*, 180 S. W. 961, 167 Ky. 544, 3 A. L. R. 1522; and *Worden v. United States*, 204 F. 1, 122 C. C. A. 315. In *Commonwealth v. Scott*, supra, it was held that, on the trial of one charged with breaking into and entering a bank with intent to commit robbery therein, evidence by an accomplice of a general conspiracy previously formed between the defendant, himself, and others to rob banks, in pursuance of which the robbery in question was planned and carried out, as well as evidence of the acts of the conspirators in making preparations to carry out the robbery, is admissible. In that case the court, on page 235, says:

"There being evidence sufficient to be laid before the jury to prove the conspiracy, as to which the presiding justice was in the first instance to determine, it was competent for the government to put in evidence any acts of the several conspirators in furtherance of the common purpose of the conspiracy, either before or after the robbery was committed."

In *Hall v. State*, supra, the Supreme Court of Tennessee held that under an indictment for the burning of a house evidence was admissible of the organization of a band of conspirators to rob and burn houses generally, if the particular act was done by them in furtherance of the general design, although this particular house was selected by them after the original agreement was entered into.

We think the evidence was sufficient to

warrant the inference that there existed a general conspiracy to rob—a broad, underlying conspiracy in furtherance of which the two robberies charged against these appellants were perpetrated. It seems that Pershing Square, in the city of Los Angeles, was the favorite rendezvous of the trio for the concoction of their plans. Cowdry, who had pleaded guilty to the two robberies in question, and who had confessed his part in the alleged conspiracy, gave testimony, which, reduced to narrative form, is substantially as follows:

"I have known Wilson about two years. I have known McCormick since about six weeks before our arrest on April 3, 1924. I was introduced to him by Wilson in the poolroom next to the Sultan Turkish Baths. At that time we got to discussing holdups. We discussed the holding up of the Sultan Turkish Baths. We decided that Saturday night, March 15th, was the best night to do it. There would be more money there that night. We discussed the ways of going in there. McCormick was to drive his father's car, and wait outside for Wilson and I. We agreed to meet in Pershing Square previous to the holdup. We agreed to get weapons—two guns and a blackjack. On the day following my introduction to McCormick we met again, and renewed the discussion of our plans to rob the Sultan Turkish Baths. After our first meeting in the poolroom the three of us met every day. In Pershing Square, the day following our first meeting, we planned to hold up the Eades grocery store. It was McCormick who suggested robbing that place. Then we went out and looked at the store. It was also agreed that we rob the Elite Café. Our agreement to rob that place was entered into prior to the robbery of the Sultan Turkish Baths. We also agreed to rob the Buckingham Apartments. That contemplated robbery was discussed by us in front of the Globe Cafeteria on Olive street. Four or five days later we got in McCormick's car, and went to the Buckingham Apartments. Wilson, armed with one of the guns, and McCormick, armed with the blackjack, went into the apartment house. I remained outside. After a while they came back and told me why they had not robbed the landlady. McCormick said 'that he damn near let her have it (meaning the blackjack) and taking a little brooch off her.' This was before the Sultan Turkish Baths robbery. A few days prior to the holding up of the Sultan Turkish Baths we planned to rob the Provident Loan Company. McCormick suggested it. The three of us were reading in the newspapers where that company had just lost a big sum of money, and McCormick said it would be a cinch to go up and knock them over again—that they wouldn't expect it to happen again so quickly. We talked about it in Pershing Square. The three of us then went to where the loan company had its place of business. I had the two guns and the blackjack wrapped up in a package. Wilson and I stood outside, and McCormick went in and looked around. Right after the holding up of the Turkish Baths, and prior to the bus robbery, we planned to rob division 3 of the Los Angeles Street Railway Company's car barns in Boyle Heights. McCormick said he had worked for the street car company, and knew the best places where

to stick them up. He said he had stuck up quite a few of them before. So we got in his father's car, and went to the car barns to look them over. Several days prior to the Turkish Baths holdup, and while the three of us were eating at a table in the Globe Cafeteria, either Wilson or McCormick, I have forgotten which one it was, said he would like to rob the jewelry store next door to the cafeteria. McCormick said the way to do it was to cut a window of the place in the nighttime or early in the morning and take the pieces of jewelry out. It was agreed that McCormick's part in all of these proposed holdups should be to drive his father's automobile. He wanted to drive the car because he said he could get his father's Nash. Neither Wilson nor I had a car. Three or four days previous to the Turkish Baths holdup we discussed plans to rob the Hellman Bank on Tenth street. We discussed it while on our way to Alhambra, where we are going to rob a man of the name of 'Broker Smith.' We found that Smith wasn't home, so we turned around and came back. On the way back McCormick broached the subject of robbing the Hellman Bank. He said it would be an easy place to stick up. A day or two later the three of us went down to the bank. [This visit to the bank doubtless was made for the purpose of looking over the premises preparatory to the robbery.] On the night when we held up the La Brea bus we went to the end of about ten different car lines. We drove in McCormick's father's car. We started out to hold up something."

In detailing the circumstances attending the robbery of the Turkish Baths, Cowdry testified substantially as follows:

"When we first discussed plans to rob the Turkish Baths, we agreed to do it on a Saturday night. I told Wilson and McCormick I did not care to do it on a Saturday night—that I was known there, and that I was afraid I would be recognized. So we agreed to do the job the next night, Sunday night. The three of us agreed to meet in Pershing Square before going to the scene of the proposed robbery. Wilson and I met, as agreed, at 9 o'clock on the Sunday evening when we were to hold up the Turkish Baths. McCormick did not show up, though Wilson and I waited until it was long past his appointment. Then Wilson and I went to the house where McCormick lived. Wilson went to the door and inquired for him. McCormick was not at home. Some one told Wilson that McCormick was at Solomon's dance hall. We went to the dance hall, but did not find him there. Then Wilson and I returned to Pershing Square. There we met a man whom Wilson knew, and who was introduced to me as 'Slim.' We were minus McCormick and the use of his car, so I proposed that Wilson, 'Slim' and I get a taxicab, as it would attract less attention if we went to the Turkish Baths in a taxicab. We remained in the park until about midnight. Then we got a taxicab. On arriving at the baths Wilson and I entered and robbed the place, while 'Slim' waited for us outside."

From the foregoing résumé of Cowdry's testimony it seems clear that the evidence amply justifies the prosecution's theory that there existed a general conspiracy to commit robberies in and about the city of Los An-

geles, and not merely a separate and specific conspiracy for each particular "job." It will be recalled that Cowdry testified that on the night when they robbed the driver of the La Brea bus the three men "started out to hold up something." This expression affords a key to the whole situation. It is evident that from the time these three intriguers commenced hatching their nefarious designs they "started out to hold up something"—to rob any one at any place that offered the glittering prospect of success. This general conspiracy to engage in robberies and the plots to rob the Turkish Baths and the La Brea bus were not separate conspiracies. The latter robberies were merely the outgrowth and culmination of the general conspiracy. They were merely a part of the objects and purposes of that broader conspiracy to rob. The specific plans to rob the Turkish Baths and the La Brea bus, as products of the general conspiracy to rob, could be fully understood only by showing the nature and character of the general conspiracy. Therefore it was proper, as we have said, to show the whole history of this general conspiracy from its commencement to its conclusion, even though such proof might tend to show the commission by appellants of other crimes than those for which they were on trial. The general rule is thus stated in *People v. Morani* (Cal. Sup.) 236 P. 135:

"It is well settled that a defendant in a criminal cause can be tried for no other offense than that charged in the indictment or information, and therefore it is not competent for the prosecution to prove the commission of independent crimes by the defendant, the evidence of which has no tendency to prove some material fact in connection with the particular crime charged. But this rule does not exclude such evidence when it logically tends to prove any fact necessary or pertinent to the proof of the crime for which the defendant is being tried. Such evidence is not to be rejected, because it also tends to prove the commission of other crimes or because it may prejudice the defendant in the minds of the jurors. Generally speaking, such evidence is admissible when it tends to establish intent, guilty knowledge, motive, a common scheme, plan, or system, or when it tends to connect the defendant with the crime charged, or when the other crimes are part of the res gestæ. 8 Cal. Jur. p. 60 et seq."

[6, 7] The evidence was sufficient to support the verdict convicting Wilson of the robbery charged in the second count. According to the testimony of the accomplice Cowdry, he (Wilson) and McCormick jointly participated in the La Brea bus robbery. If Cowdry's testimony be true, there can be no doubt that Wilson was guilty of that robbery. But to warrant a conviction on the evidence given by Cowdry it is essential that his testimony, being that of an accomplice, be corroborated by other independent evidence which of itself tends to connect Wil-

son with the commission of the crime. It is not required that such corroborative evidence be sufficient to establish guilt. It will suffice if it tends to connect appellant with the commission of the crime, even though if it stood alone it would be entitled to but little weight. 8 Cal. Jur. p. 179. This quantum of corroborative evidence was furnished by the driver of the bus, Edwin C. Fitts. That witness testified that two of the bandits entered the bus; that, after paying their fare, they took seats in the back of the vehicle; that, after the bus had proceeded for some little distance, the two men came forward; that one of them took a seat by the side of the witness, while the other sat down behind; that the one on the seat forward pointed a gun toward him, and told him that it was a "holdup"; that neither of the highwaymen wore a mask. Though the witness positively identified Cowdry as the robber who pointed the gun at him, he was not sure as to the identity of the other. He did testify, however, that Wilson "resembled" the other man. He testified that the one whom he said resembled Wilson rifled his pockets, and that, though he did not see that robber's face, he did see his back and shoulders, and that from his memory of his back and shoulders he was able to say that Wilson resembled the robber who took the money from his pockets. There may have been some peculiarities about the robber's back and shoulders which enabled the witness to say that he "resembled" appellant. At any rate, we cannot say that such peculiarities did not exist, for, quite naturally, the printed record before us would not show them, although they may have been observable to the jury. Such peculiarities would constitute a sufficient legal foundation for the witness' testimony that Wilson resembled the other robber.

[8, 9] It is not necessary that any of the witnesses called to identify the accused should have seen his face. "Identification," says the court in *State v. Mason*, 189 N. W. 452, 152 Minn. 306, "may be sufficient, though the person making it cannot remember the face. Identification based upon other peculiarities may be reasonably sure." There the Minnesota Supreme Court held that the identification may be sufficient though the witnesses say that they could not identify the accused from his face, the crime having been committed in the dark, but that they can identify him from his size, his general appearance, his talk and his walk. In *Bowlin v. Commonwealth*, 242 S. W. 604, 195 Ky. 600, the identification, held to be sufficient, was made from a recognition of the defendant's voice. Nor is it necessary that the identification be made in positive terms by any of the witnesses. A conviction may be sustained, though the witnesses decline to swear positively, and testify merely that they believe the accused is the person whom

they saw commit the crime. Thus, in *Commonwealth v. Cunningham*, 104 Mass. 545, the witnesses would not swear that the prisoner was the man they saw on the stolen wagon, but that "he resembled him." There the court said:

"Upon this question of identity, the evidence offered was all of it competent, and proper for the consideration of the jury. It is impossible to say that it had no tendency to convict the defendant. Its sufficiency was to be estimated and weighed exclusively by them."

To the same effect are *People v. Rolfe*, 61 Cal. 541; *People v. Franklin*, 188 P. 607, 46 Cal. App. 1; *State v. Franke*, 60 S. W. 1053, 159 Mo. 535.

The final point urged by this appellant is misconduct on the part of the district attorney, claimed to have been committed in the latter's examination of Eugene Case, a witness for the prosecution. At a previous trial of the accused, which, it seems, resulted in a disagreement of the jury, Case testified as a witness for Wilson, who sought to prove an alibi. Upon that trial Case testified that on the night of the Turkish Baths robbery he and Wilson, who were roommates, and a third man, spent the evening in the former's room. Upon the conclusion of the first trial the district attorney accused Case of having perjured himself, and caused him to be arrested and put in jail. No formal charge of perjury was lodged against him. Case remained in jail for about three weeks, when he suddenly remembered that he had made "mistake" when testifying that Wilson was in their room on the night in question. He claimed that his memory had been so refreshed by a certain incident that he realized that it was upon another night when the three men foregathered in the room occupied by himself and Wilson. On the second trial the district attorney, for the purpose, as he claimed, of establishing Wilson's consciousness of guilt, called Case to the stand, and questioned him as to the occurrences already mentioned, i. e., his arrest, imprisonment, change of heart, etc., and also deduced from the witness testimony to the effect that upon several occasions when Case visited Wilson in jail prior to the first trial appellant asked the witness if he did not remember that on the night of the Turkish Baths holdup they and the third man were in the room occupied by appellant and the witness. Counsel for McCormick interposed a number of objections to this line of examination, though it was not aimed at, nor did it affect, their client. In the course of his argument, addressed to the court in opposition to the objections interposed on behalf of McCormick, the district attorney stated that he expected to show that the testimony given by Case at the previous trial with respect to the alibi was suggested by Wilson, and that the evidence was admissible to

show a consciousness of guilt on the part of Wilson. Appellant made no objection to any of the questions put to the witness, save that once or twice during the examination, and also during the argument on the objections raised by McCormick's counsel, he interposed with a remark to the effect that the witness' testimony should be confined to what he (Wilson) said and did, and that Case should not be permitted to testify to what occurred to himself, i. e., his arrest, incarceration, and sudden realization while in jail of the mistake which he claimed to have made respecting the date when the three men were together in the witness' room. The misconduct of which appellant chiefly complains is the fact that the prosecutor propounded to the witness the questions whereby it was sought to show that he had been arrested and placed in jail until he remembered that the meeting in the witness' room was not on the night in question. Wilson made no motion in the court below to strike out any of the objectionable testimony.

[10] There is nothing in the record to indicate bad faith on the part of the district attorney, or that any of the questions were asked for the wanton purpose of raising a prejudice against either of the defendants. It frequently happens that in the heat of trial counsel ask improper questions, but inadvertences of that character are not alone sufficient to raise a presumption that the prosecuting officer was willfully endeavoring to prejudice the accused in the eyes of the jury. Moreover, appellant did not assign the alleged misconduct of the district attorney as error. In no way did he invoke any action on the part of the trial court to obviate the effect of any of the questions now assigned by him as misconduct, although any improper effect of the prosecutor's examination of the witness could readily have been avoided had the court's attention been specifically directed to it. As a consequence of appellant's neglect in this regard he is not now in a position to raise the question of misconduct. *People v. Wong Toy*, 209 P. 543, 189 Cal. 587, 595.

The foregoing covers all of the points urged by the appellant Wilson. We find no merit in any of them. The record shows that he was fairly tried, and that he was lawfully convicted of his crimes.

Appeal of the Defendant McCormick.

McCormick was not entitled to a separate trial. He made no showing in the court below on his own behalf. He claims, however, that he was entitled to a severance on the showing made by his codefendant. Even if he could thus secure vicarious salvation from the effect of his own sin of omission, still the fact remains that the showing made by his codefendant was not such as to ren-

der the court's refusal to grant a separate trial an abuse of discretion.

Coming now to appellant's claim that the evidence is insufficient to support the verdict finding him guilty of the Turkish Baths robbery: It is not claimed that the testimony of the accomplice Cowdry was not sufficiently corroborated. Indeed, the record discloses that appellant made several extrajudicial statements wherein he admitted co-operation with Cowdry and Wilson in their general conspiracy to rob. True, it was claimed by appellant, when making these statements, that he was only a feigned accomplice, and that his real motive was to secure evidence which would lead to the arrest and conviction of his two confederates. But the jury was not obliged to accept as true this self-serving and exculpatory part of his statements. What appellant does claim is that the evidence is insufficient to support the verdict convicting him of the Turkish Baths robbery, for the reason that it shows that prior to the commission of that crime he had abandoned the conspiracy to rob that particular place. It will be recalled that on the night when this robbery was committed Cowdry and Wilson met in Pershing Square pursuant to prearrangement, but that McCormick failed to put in an appearance; that, after waiting at that rendezvous for some time, with the expectation that McCormick would appear ready to carry out his part of the program, Cowdry and Wilson went to the house where McCormick then lived, and, failing to find him there, looked for him at Solomon's dance hall; that, still failing to locate their partner in crime, they met with one who was known to Wilson as "Slim," whom they took into the enterprise which was then on foot. By reason of these facts appellant says that this particular "holdup" was "staged in his absence."

[11-13] As we have seen, there was evidence to warrant the jury in finding that appellant and his two companions, Wilson and Cowdry, were parties to a general conspiracy to rob. If the robbery of the Turkish Baths was committed by Wilson and Cowdry in furtherance of that conspiracy, and while appellant was still a party thereto, then it may properly be said that appellant counseled, advised, and encouraged it. In that case the mere absence of appellant from the scene of the robbery would not make him any the less liable as a principal, subject to indictment, trial, and conviction as such. In this state the distinction between an accessory before the fact and a principal, and between principals in the first and second degree in cases of felony, has been abrogated (Pen. Code, § 971); and it is provided that all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid and abet its commission, "or, not being present, have advised and encouraged its com-

mission," are principals in any crime so committed. Pen. Code, § 31.

It is true that the plan adopted by the conspirators contemplated the presence of appellant at the scene of the robbery, actively aiding and abetting in its commission. But, though for some reason he failed to put in an appearance at the appointed hour and place, it is apparent that just such a robbery as was committed at the Turkish Baths by his two confederates was contemplated and arranged for by the conspiracy. The robbery as actually carried out was as much accomplished within the scope of the general plan as it would have been had appellant been present, performing his agreed part. The conspiracy was one to commit robbery at the Turkish Baths and at other places. The time and place for committing each of the contemplated robberies were but mere matters of detail. As was said in *Spies v. People*, 12 N. E. 942, 122 Ill. 158, 3 Am. St. Rep. 385:

"A plan for the perpetration of a crime or for the accomplishment of any action, whether worthy or unworthy, cannot always be executed in exact accordance with the original conception. It must suffer some change or modification in order to meet emergencies and unforeseen contingencies."

The mere fact that appellant failed to keep his appointment with his confederates and did not perform the precise part for which he had been cast does not necessarily evidence a withdrawal by him from the conspiracy, or detract from the force and effect of the counsel, advice, and encouragement previously given by him. A person who, by conspiring with others, advises and encourages the commission of an unlawful act cannot escape responsibility by quietly withdrawing from the scene. The influence and effect of his advice and encouragement continue until he renounces the common purpose and makes it plain to the others that he has done so, and that he does not intend to participate further. 1 R. C. L. p. 139. His withdrawal from the conspiracy must in some way be brought home to the knowledge of his confederates before the commission of the contemplated crime. *Karnes v. State*, 252 S. W. 1, 159 Ark. 240; *State v. Allen*, 47 Conn. 121; *State v. Kinchen*, 32 So. 185, 126 La. 39; 16 C. J. 137. In *Karnes v. State*, supra, a case having some striking points of resemblance to the instant case, the court says:

"One cannot aid and advise another to commit a crime and, after inducing him to do so by giving advice and encouragement and assurance of support, escape responsibility by saying that the crime was not committed at the time and place or in the exact manner he had advised. He must withdraw the aid and assistance which prompted and induced the commission of the crime, and this withdrawal must not be a mere mental process, of which the actual perpetrator

of the crime is unaware, but he must communicate the fact of his withdrawal to the person whom he has inspired to commit the crime, and must do so before its commission."

It is true that such knowledge of a conspirator's withdrawal from the conspiracy may be brought home to his confederates by acts as well as by words (*State v. Allen*, supra); but it was for the jury to determine whether appellant's failure to appear at the trying place in order to proceed thence to the scene of the contemplated robbery was, or was not, sufficient notice to his coconspirators that he had abandoned the criminal enterprise. The circumstances of the case are sufficient to warrant the finding that appellant's failure to keep his appointment with Wilson and Cowdry on the night of the Turkish Baths robbery was not intended by him to be, and was not understood by Wilson or Cowdry to be, indicative of a withdrawal from the enterprise. Indeed, the circumstances shown by this record, one of which is appellant's subsequent participation in the La Brea bus robbery, warrant the inference that McCormick had no thought of withdrawing from the general conspiracy to rob.

[14, 15] The final point made by this appellant is that the court erred in permitting the witness Dalton to testify to a conversation which he had with appellant some two or three months after the arrest of the three conspirators. Dalton, who is the manager of the protective division of the Pacific Southwest Trust & Savings Bank in the city of Los Angeles, testified that about five months prior to the day when he gave his testimony—his testimony was given on October 31, 1924—McCormick called at the bank and had a conversation with him. Dalton was asked by the district attorney to give the conversation. No objection was made to this question, and the witness proceeded to narrate the conversation which he said he had with McCormick. Before concluding his answer, the trial judge interposed with a question asking the witness if he could fix the month when the conversation occurred. Dalton replied that it occurred in the month of June or July. It was after the witness had given this reply to the court's question that McCormick's counsel interposed an objection as follows:

"I object to that on the ground it is incompetent, irrelevant, and not within the issues of this case."

This objection, the first and only one made during the witness' direct examination, was overruled. It will be noticed that the objection was not to the question which had previously been propounded to the witness. In-

deed, that question—asking the witness to fix the date of the conversation—was not in itself objectionable. Nor was the objection tantamount to a motion to strike out any answer previously given by the witness. The objection, couched in the language in which it was framed and made at the stage at which it was interposed, did not warrant a ruling in favor of appellant. It was an abortive objection, and the court committed no error in overruling it. The witness, without further objection from counsel, concluded his direct examination by giving additional details of the conversation which he said he had with appellant. In legal effect, the situation is precisely what it would have been had appellant's counsel made no attempt to interpose an objection during the direct examination of the witness. At the conclusion of the witness' examination in chief counsel for appellant, without moving to strike out any of the witness' testimony, cross-examined him respecting certain details of the conversation to which he had testified on his direct examination. When he had finished his cross-examination of the witness, appellant's counsel presented the first and only motion to strike. The motion was to strike out all of the witness' "statement" upon the grounds that it was "incompetent and irrelevant; has no relation to the matter involved in the indictment; is foreign to anything under investigation; and was made at a time subsequent to the date on which the matters charged against defendant took place." The motion was denied.

Irrespective of whether the conversation testified to by Dalton did or did not contain inadmissible statements made by appellant, we think the motion to strike came too late. It should have been made as soon as the direct examination was closed. Appellant's counsel could not take the chance of a cross-examination and then move to strike out. *Brooks v. Crosby*, 22 Cal. 42; *King v. Haney*, 46 Cal. 560, 13 Am. Rep. 217.

"The practice, whether in civil or criminal cases, of deliberately permitting evidence to be given without objection in the first instance, and then moving to strike it out on grounds which might readily have been availed of to exclude it when offered, is not to be tolerated." *People v. Long*, 43 Cal. 446.

This appellant seems to have been accorded a fair and impartial trial, free from error, prejudicial or otherwise, and was properly convicted.

The judgments against each appellant and the order denying to each of them a new trial are affirmed.

We concur: WORKS, J.; CRAIG, J.

77 Cal. App. 57

(245 P.)

HELLMUTH v. BOOS et al. (No. 5360.)

(District Court of Appeal, First District, Division 2, California. March 11, 1926.)

Novation § 9 — Acceptance of money under agreement for novation held to waive delay in payment.

Acceptance without objection by plaintiff of money sent as final payment on agreement of novation was waiver of delay in making payment.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action on a promissory note by Mary M. Hellmuth against David Boos and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Frank L. Simons and Edward Schary, both of Fresno, for appellant.

Alva E. Snow, of Fresno, for respondents.

STURTEVANT, J. This is an action on a promissory note. Judgment went for the defendant Marguerite Brandt, and the plaintiff has appealed under section 953a of the Code of Civil Procedure.

In the language of the pleadings the trial court found:

"(1) That the promissory note set out in plaintiff's amended complaint was signed by defendant Marguerite Brandt as surety and not otherwise, and the fact that she so signed said promissory note as surety was at the time heretofore, ever since has been, and now is, known to said plaintiff, and said plaintiff at the time of the execution of said promissory note consented to deal and did deal with said defendant Marguerite Brandt in the capacity of surety upon said promissory note. That said Marguerite Brandt never received any consideration for her signature thereto, and that the full consideration for said promissory note was \$1,000 and no more.

"(2) That the above-named plaintiff commenced an action against the above-named defendants in the superior court of the state of California, in and for the county of Fresno, on the 28th day of September, 1923, which said action was and is numbered in said court 32447, to obtain judgment against said defendants for the full sum of \$1,500 together with interest thereon at 8 per cent. per annum from the 2d day of January, 1923, less the sum of \$25 which had been previously paid thereon, together with attorney's fees. That said action was subsequently tried in said superior court, and upon said trial said court found that said promissory note and said loan represented thereby was and is usurious, and judgment was entered accordingly.

"(3) That in said action, numbered 32447, commenced as aforesaid, plaintiff, in due process, caused writ of attachment to be issued and the property of defendants David Boos and August Boos, Jr., was attached thereunder. That prior to said trial of said cause, and while said attachment was in full force and effect, this

plaintiff, defendants August Boos, Jr., and Annie Boos, his wife, and David Boos and Katie Boos, his wife, and for the purpose of extinguishing the obligation of each and all of the defendants herein by reason of the execution of said promissory note, agreed that, in the place and stead of and as a substitution for said promissory note sued on therein, and which is the same promissory note set out in plaintiff's amended complaint herein, said defendants August Boos, Jr., and Annie Boos, his wife, would execute to plaintiff a new and different promissory note for \$1,500, to become due November 1, 1924, bearing interest at the rate of 8 per cent. per annum, and as security for the payment of said promissory note due November 1, 1924, would execute a crop mortgage to plaintiff upon the crops to be grown during the season of 1924 on the south half of lots 191 and 192 in Perrin colony, in the county of Fresno, state of California, and that in addition to said promissory note secured by said mortgage plaintiff was to receive, in cash, the sum of \$339. That pursuant to said agreement said defendants August Boos, Jr., and Annie Boos, his wife, did execute to plaintiff for and in the place and stead of said promissory note sued upon in said prior action, and set out in plaintiff's amended complaint herein, a new promissory note in the sum of \$1,500 due November 1, 1924, bearing interest at the rate of 8 per cent. per annum, and as security for the payment thereof executed to plaintiff a crop mortgage upon the crops to be grown during the season of 1924 on the said south half of said lots 191 and 192 in said Perrin colony, which said crop mortgage was by plaintiff duly recorded in the office of the county recorder of the county of Fresno, state of California, also prior to said trial and pursuant to said agreement plaintiff was paid, and she also received, the said sum of \$339.

"(4) That the execution of the said new promissory note, together with the execution of said crop mortgage to secure the payment of same, and the payment and receipt by plaintiff of the said \$339, extinguished the obligation incurred by Marguerite Brandt, one of the defendants herein, by reason of the execution of said promissory note set out in plaintiff's amended complaint herein, and that said defendant Marguerite Brandt was then and there, and she now is, and prior to the commencement of the above-entitled action was, released from any and all obligation thereunder.

"As a conclusion of law from the foregoing facts the court finds that a judgment should be entered herein wherein and whereby it shall be ordered, adjudged, and decreed that plaintiff take nothing by reason of her action herein as against defendant Marguerite Brandt, and that said defendant Marguerite Brandt do have and recover of and from said plaintiff her (defendant's) costs of suit, and that judgment be entered accordingly."

The appellant asserts that the finding that there was a novation is not sustained by the evidence. A reading of her brief discloses the contrary. It is to be unduly liberal to the appellant to say that the evidence is conflicting, for it is not. It is in favor of the respondent. As we understand the appellant, she calls attention to the fact that, according

to the agreement as made, the \$339 should have been paid immediately, and it was not so paid. When it was paid no objection to the delay was interposed, but it was accepted, and ever since has been retained by the appellant. These facts show a waiver of the delay, and do not square with any other theory. When the \$339 was paid it was done in this manner: The respondent placed a banker's check in the hands of Mr. Graves, the attorney for David and Katie Boos, with directions to pay the amount as the final payment on the agreement of novation mentioned in the third finding. In accordance with those directions Mr. Graves sent the check in an envelop inclosed with a letter stating that the check was delivered as the final payment on said agreement.

Of her act in accepting and retaining the \$339 the trial judge in ruling said:

"The Court: She couldn't keep it legally and accept it not in accordance with the arrangement by which it was paid. She couldn't do that. She took it and credited it on this other note. She had no right to do that, because it was not paid on that note. The lady who paid it had the right to make the payment, because the whole thing was for her benefit. She could pay it and look to Mr. Boos for its return, possibly, and the plaintiff did take it and did keep it, contrary to the plain intentment of the letter, as I understand it. It does seem to me that that is conclusive, as an allegation, because the letter told her clearly enough what it was for, and, if she chose to take it at all, it was taken pursuant to the letter and not otherwise, as I view it."

We know no comment more pertinent.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

76 Cal. App. 708

WORK et al. v. ASSOCIATED ALMOND GROWERS OF PASO ROBLES.
(Civ. 5127.)

(District Court of Appeal, First District, Division 1, California. March 2, 1926.)

1. Corporations ⇨503(3).

Corporation has right to change of venue of transitory action to county of its residence upon proper showing.

2. Venue ⇨4.

Whether action is local or transitory must be determined from averments of complaint and character of judgment which might be rendered on default.

3. Venue ⇨4—To render action local as affecting venue, it must appear that judgment will directly and not merely incidentally or collaterally affect title to land (Code Civ. Proc. § 392, subd. 1).

To render action local, as affecting venue, under Code Civ. Proc. § 392, subd. 1, it must

appear that title to land will be directly affected by judgment, and it is not sufficient that title be incidentally, collaterally, or even necessarily inquired into, if judgment can be satisfied by payment of money.

4. Venue ⇨5(1)—In action merely for portion of purchase price of land, changing venue to county of defendant's residence held not violative of Code Civ. Proc. § 392, subd. 1.

Where action was merely to recover balance of purchase price of land, and no remedy sought against land itself, change of venue to county of defendant's residence from that in which land was located, held not violative of Code Civ. Proc. § 392, subd. 1.

5. Venue ⇨5(1).

Action to recover purchase price of land is not local, and may be brought in different county from that in which land is situated.

6. Venue ⇨5(3).

In action for balance of purchase price of land, prayer for specific performance held not to require that action be brought in county where land is situated.

7. Venue ⇨6—Action to recover money is essentially action for debt, and may be properly transferred to county of defendant's residence.

Action merely to recover money is essentially action for debt, and therefore transitory and not local, so that it may be properly transferred to county of defendant's residence.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by John Work and others against the Associated Almond Growers of Paso Robles. From an order granting change of venue on application of defendant, plaintiffs appeal. Affirmed.

C. F. Lacey, of Salinas, for appellants.

W. G. Griffith, of Santa Barbara, for respondent.

TYLER, P. J. Appeal from an order granting a motion for change of place of trial. The action was brought by plaintiffs as vendors against the defendant as vendee, to recover the balance of the purchase price due under a contract for the sale of certain lands, together with interest and an amount due for taxes paid.

The complaint recites, in substance, that plaintiffs entered into an agreement on July 14, 1919, with one Albert MacRae, by which they gave to him an option to purchase from them certain real property situated in Monterey and San Luis Obispo counties, comprising some 6,028.15 acres. By the terms of the agreement the price of the land was \$45 per acre. MacRae assigned his interest in the contract to defendant herein, Associated Almond Growers of Paso Robles, which agreed to perform it. Prior to the commencement of this action, defendant exercised the

option and had paid upon the purchase price with interest the sum of \$231,388.69, leaving a balance due plaintiffs of \$38,404.90. Subsequent to the assignment from MacRae to defendant it was agreed that, in the event of the exercise of the option, the real property should be conveyed to the Santa Barbara Trust Company. Plaintiffs then allege that they have fully kept and performed their part of the agreement and have tendered a deed to the trust company properly executed, and have demanded of the defendant the balance due on the purchase price, together with other sums also due, and that the trust company has refused to accept the deed and defendant has likewise refused to pay the balance due the plaintiffs.

The prayer is for judgment against defendant for the sum of \$38,404.90 with interest, that defendant be required to accept or cause the trust company to accept delivery of the conveyance tendered by plaintiffs, and for general relief.

Defendant demurred to the complaint, and it also filed its demand for a change of place of trial to the county of Santa Barbara, where it alleged it had its principal place of business and residence. This motion came on regularly for hearing, and the parties stipulated that the contract which formed the basis of the action was made and executed outside the county of Monterey, and that the principal place of business of Santa Barbara Trust Company was in the county of Santa Barbara. It was likewise conceded that the principal place of business of defendant was also in that county. The court made an order granting defendant's motion for a change of venue, from which order this appeal is taken.

[1-3] It was and is plaintiffs' contention that the action is local in character, and comes within the provisions of subdivision 1 of section 392, Code of Civil Procedure, which provides that actions for the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, or for injuries to real property, shall be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial as provided in the Code of Civil Procedure.

Defendant, on the other hand, claims, in support, of the order, that the action is transitory and not local, and that the defendant corporation has the right, the same as an individual, to have the action in the county of its residence.

That a corporation has this right when a proper showing is made there can be no ques-

tion. *Grocers, etc., Union v. Kern Co. Land Co.*, 89 P. 120, 150 Cal. 466. In determining the nature of an action, resort must be had to the averments of the complaint, and the character of the judgment which might be rendered upon a default. *McFarland v. Martin*, 78 P. 239, 144 Cal. 771. In order to give a court power under a statute of the character here involved, to change the place of trial, it must appear that title to land will be directly affected by the judgment of the court, and it will not suffice for it to be incidentally, collaterally or even necessarily inquired into, if the judgment can be satisfied by the payment of money. 27 R. C. L. p. 794; section 15, Cyc. 63.

[4] Here it is manifest from the allegations of the complaint and from the prayer that the object of the action and the relief sought is to obtain a money judgment. There is nothing in the complaint which asks for any remedy connected with the property. On the contrary, plaintiffs pray that defendant be required to accept or cause the trust company to accept delivery of the conveyance tendered by the plaintiffs. The title or any interest in the land which was the subject of the sale is therefore in no manner involved, and the judgment sought, if obtained, will not directly operate upon it.

[5, 6] It has been frequently held in this state that an action to recover the purchase price of land is not a local action, and may be brought in a different county from that in which the land is situated. *Samuel v. Allen*, 33 P. 273, 98 Cal. 406; *Terry v. Rivergarden Farms Co.*, 154 P. 476, 29 Cal. App. 59; *North Stockton, etc., v. Fischer*, 70 P. 1082, 71 P. 438, 138 Cal. 100; *Gallup v. Sac. Drainage Co.*, 151 P. 1142, 171 Cal. 71; *Paramore v. Colby*, 188 P. 72, 45 Cal. App. 559. Nor does the fact that the prayer of the complaint asks that defendant be required to specifically perform its obligation in any manner alter the situation. *O'Gorman v. Wachter* (Cal. App.) 235 P. 57.

[7] It is manifest from a reading of the complaint that the only relief sought is a money judgment. An action which has for its object the mere recovery of money is essentially an action for debt, and therefore transitory and not local. *O'Gorman v. Wachter*, supra. The instant action not being within the limitation of the section relied upon, the provision cannot be invoked against defendant. The case was therefore properly transferred to the county of the residence of the defendant.

The order appealed from is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

76 Cal. App. 715

PEOPLE v. SELBY. (Cr. 1246.)

(District Court of Appeal, Second District, Division 2, California. March 2, 1926. Hearing Denied by Supreme Court April 29, 1926.)

1. Criminal law $\hookrightarrow$ 878(4)—Conviction of assaults with intent to murder and assault with deadly weapon held not inconsistent with acquittal of robbery, where defense was not solely insanity, but also absence of requisite intent for robbery.

Conviction of assaults with intent to murder and assault with a deadly weapon held not inconsistent with acquittal of robbery, where, though defendant relied on insanity, he also relied on absence of the requisite intent for robbery.

2. Criminal law $\hookrightarrow$ 1141(2).

Accused must show error to secure reversal.

3. Criminal law $\hookrightarrow$ 865(2)—Where, after jury deliberated 71 hours, court instructed it was for interest of both state and accused that trial be concluded, acquittal on some charges and conviction on others held not to show verdict was coerced.

Where, after the jury had deliberated for 71 hours, court advised the jurors to hold their minds open to the views of their fellow jurors, stating that it was for the interest of both state and accused that the trial be concluded, acquittal on some charges and conviction on others 2½ hours later did not show that the verdict was coerced.

4. Criminal law $\hookrightarrow$ 865(2)—After jury had retired 71 hours, instruction that juror should not make up his mind until he had heard argument of fellow jurors held not objectionable (Code Civ. Proc. § 611).

After jury had retired 71 hours, instruction that juror should not make up his mind until he had heard the arguments of his fellow jurors, as men adhere to opinions to which they have given forcible expression, though advised they are not tenable, which fact is recognized in Code Civ. Proc. § 611, held not objectionable.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Norman Selby, also known as Kid McCoy, was convicted in the superior court of assaults with intent to commit murder and assault with a deadly weapon, and he appeals. Affirmed.

Cooper, Collings & Shreve and Woolwine & Giesler, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

WORKS, J. Defendant was charged, by an indictment in seven counts, with seven separate offenses; one being alleged in each count. In four of the counts he was charged with robbery. In the remaining three he was

charged with assaults with intent to murder. He was acquitted under each of the counts charging robbery. He was found guilty as charged under two of the three remaining counts and guilty of an assault with a deadly weapon under the third. He appeals from the judgments and from an order denying his motion for a new trial.

Appellant was concerned in certain transactions which occurred not far from midnight between August 12 and 13, 1924. Out of these transactions a charge of murder was made against him. The events out of which grew the seven charges above mentioned took place early on the morning of the 13th. They commenced with the arrival of appellant at a store in which the woman with whose murder he was charged and her husband had an interest. There is much evidence in the record which tends to prove that appellant went to the store to "get" the husband, against whom he entertained an intense feeling of hatred. Appellant arrived at the store a few minutes before it was opened for business, and when that event occurred he entered the place. He was highly excited at the time. There is evidence which tends to show that he was drunk. There is other evidence which tends to prove that he was insane. After he had gotten into the store, he inaugurated a reign of terror over the people in the establishment, consisting of both men and women. He menaced them with a "gun" which he carried, and made frequent threats to shoot them after he had gotten through with the husband of his alleged victim under the murder charge, and whose arrival on the scene he was awaiting. Under the fear inspired by his pointed weapon, and through blows administered by him in one or two instances, he compelled some of the people in the store to deliver to him their personal belongings. He forced some of the men present to take off their trousers and shoes, but he did not appropriate these articles. While appellant was in the store, he gave money to the porter who was employed there, and also to an individual who answered appellant's command to disgorge with the statement that he had nothing. One of the men ran out of the place in an endeavor to escape, and appellant fired a shot at him as he went through the door. Appellant pursued the fleeing individual, and before he could return one of the occupants of the premises locked the door. This is but a skeleton statement of the events which transpired in the establishment, as they were extended over a period of an hour or two. Out of them arose the four charges of robbery, and one of the charges of assault with intent to murder.

Immediately after appellant was locked out of the store he went to another place of business near at hand, which was kept by a man and his wife. Appellant knew the wife, but not the husband. As he entered the place, he asked that the husband be pointed out to him,

and, upon the request being complied with, he fired a shot at that individual. He then turned and fired at the wife, the shot striking her in the hip. He fired another shot at her which did not take effect and left the place. Out of these events arose two of the charges of assault with intent to murder.

[1] Appellant contends that the verdicts of the jury acquitting him under some of the charges contained in the indictment and convicting him under the others were inconsistent. This position is based upon the theory that the only defense made by appellant was that he was insane on the day of his most unusual escapade. It is said that, when the jury acquitted him of a part of the charges, it found that he was insane, but that, when he was convicted under the remaining charges, it was found that he was sane. It is in this sense that it is said that the two sets of verdicts are inconsistent with each other.

Unfortunately for appellant's contention, the record does not bear out the assertion that insanity was the sole defense presented at the trial. Appellant requested the court to instruct the jury as follows:

"To establish the offense of larceny from the person which under the law is grand larceny, and which is an offense included in the offense of robbery as charged in the first four counts of the indictment, it is necessary for the prosecution to prove, beyond a reasonable doubt, not only that the defendant at the time of the securing of the property was actuated by a felonious intent to steal and convert said property to his own use, but they must also prove to your satisfaction and beyond a reasonable doubt that the defendant, at the time of stealing said property, if you find that he did steal it, intended to deprive the owner thereof of the same permanently, and not merely temporarily. The test of law to be applied to the facts and circumstances for the purpose of determining the ultimate facts as to a man's intent in this respect is, Did he intend to permanently deprive the owner of his property? If he did not intend so to do, there is not that felonious intent which is a necessary part of the crime of grand larceny. The intent must in all cases be an intent to deprive permanently the owner of his property."

This proffered instruction was not given as requested, but was read to the jury in the following modified form:

"To establish the offense of larceny from the person, which under the law is grand larceny, and which is an offense included in the offense of robbery, it is necessary for the prosecution to prove, beyond a reasonable doubt, that the defendant, at the time of the securing of the property, was actuated by a felonious intent to steal said property, including the intent to deprive the owner thereof of the same permanently, and not merely temporarily."

It is plain from the instruction requested by appellant that he saw in the evidence a possible failure upon the part of the prosecution to prove that he had taken the belongings of the prosecuting witnesses with intent

permanently to deprive them of their property, and that he endeavored to procure a verdict of acquittal under the charges of robbery, or under charges included within them, on that ground. In giving the proffered instruction as modified it appears that the trial judge adopted the same theory as to the evidence. We ourselves can perceive in the record an ample support for that view. It is quite probable that the jury held the same view and acquitted appellant under the robbery charges on the ground that the prosecution had not made the requisite proof of intent. The claim that the verdicts were inconsistent therefore falls to the ground. The record provides ample support for the view that the jury rejected the defense of insanity as to each of the seven charges.

[2, 3] The deliberations of the jury over their verdicts were extended over a long period of time. After nearly 71 hours had elapsed without a conclusion of its labors being reached, the jury returned to the courtroom. What then transpired is shown by the minutes of the court:

"Defendant, counsel, and jury present at 2:10 p. m., jurors ask for further information. Additional instruction is given, and indictment is read by the clerk."

The "additional" charge which the trial judge then read to the jury was in the following language:

"It sometimes happens that, when jurors enter the jury room, they make emphatic expressions of the opinions they have in the case and of their firm determination to adhere to them. Such emphatic declarations of opinions are rarely productive of good. By their emphatic expression of opinion, a sense of pride is enlisted, and a juror subsequently, though advised that the position he has announced is not tenable, hesitates from receding from that position, for the reason that he has already expressed his determination to adhere to it. I would advise you, ladies and gentlemen, to hold your minds in a state of abeyance for a while, so you may fully and freely interchange views with each other and each individual juror hold his mind so open that he may receive the suggestions and remarks of his fellow jurors, and that his remarks may be entertained and received in the same spirit. I think that by observing this rule, interchanging fully between yourselves your views upon the evidence, that there is more likelihood you will reach a verdict than if you made an emphatic expression of the position you have assumed. You will remember, ladies and gentlemen, in matters of this character it is advisable, both for the interests of the state and the benefit of the defendant, that a verdict should be returned, that there should be a conclusion of the trial; and you are to remember, too, that you are not partisans in this matter, but you are judges, and that it is not with the opinion with which you retire, but with the verdict with which you return that the correctness of your deliberation is to be estimated; and that, in your deliberations in the jury room, there can be no

triumph, excepting the ascertainment and declaration of the truth."

It is contended that, when this supplemental instruction was given, "the jury was misinstructed as a matter of law, and coerced into bringing in a compromise verdict." In support of this claim of error appellant calls attention to the period of 71 hours which had passed when the jury returned into court, and he also points to the further fact that the trial body returned with its verdicts 2½ hours after the additional charge had been given. These circumstances are not evidence that the jury was coerced into a conclusion of its labors. Naturally, there is nothing in the record to show what stage in its performance of duty had been attained when it came in for further instructions. As against the circumstances cited by appellant we may justly indulge any one of several assumptions. These are that, when the jury came into court for additional instruction: (1) It had come to a conclusion under all of the charges except one, and that it had proceeded far in its deliberations as to that one. (2) It had come to a conclusion as to all of the charges under which it later declared that appellant was innocent, and had proceeded far in its deliberations as to the remaining charges. (3) It had come to a conclusion as to all of the charges under which it later declared that appellant was guilty, and had proceeded far in its deliberations as to the remaining charges. As it is incumbent upon an appellant in every appealed cause to show error in order to bring about a reversal, we here may properly make any of these assumptions for the reason that appellant shows us nothing to contradict any of them. The circumstances relied upon by appellant do not therefore avail him to show a coerced verdict either as a matter of fact or as a foundation upon which to discuss, as a matter of law, the alleged error in the giving of the challenged instruction. Under any one of the three possible assumptions stated above it is not surprising that the jury returned its verdict within 2½ hours after the instruction was given, notwithstanding the fact that the instruction was read 71 hours after the jury had first retired to commence its deliberations.

[4] Several cases are cited in support of appellant's contention that the supplemental instruction was an incorrect statement of the law governing the conduct of jurors during their deliberations in the jury room. The first of these is *People v. Miles*, 77 P. 666, 143 Cal. 636, but there the court upheld the judgment which was sought to be reversed because of the giving of the instruction which was assailed. The portion of the report upon which appellant relies is found in a concurring opinion containing a cautionary statement as to the giving of like instructions to that in question in the future. In *People v. Conboy*, 113 P. 703, 15 Cal. App. 97, after

quoting the instruction to which objection was made, the court said:

"These remarks amounted to a plain intimation that the court thought the evidence in the case warranted a verdict of guilty, and that the jury should so find."

We can see no such objection to the instruction here in question. *People v. Carder*, 160 P. 686, 31 Cal. App. 355, in the reasons which the court gave for condemning the questioned instruction, was much like *People v. Conboy*. The court said:

"We think it quite apparent that from the statements of the learned trial judge the jury must have concluded that he was convinced of the defendant's guilt and that as honest men it was their duty to so find."

In *Peterson v. United States*, 213 F. 920, 130 C. C. A. 398, the questioned instruction was objectionable principally because the trial judge practically told a minority of the members of the jury that they should yield their view of the cause to that of the majority. We can perceive nothing in any of these decisions which aids appellant here.

Upon principle, we think, there is no valid objection which can be made to the instruction which now lies before us. The trial judge did nothing more than tell each member of the jury that he should not finally make up his mind until he had heard the arguments of his fellows upon the questions which they were to decide. We are convinced by the language employed by him that such was his purpose. What the judge said as to the tenacity with which men cling to opinions to which they have given forcible expression was intended to effectuate this purpose, and that portion of the instruction enunciated a truth to which it is difficult to apply even an apparent refutation. Every man who has ever sat upon a court of review, every man who has spent any considerable time in the performance of any species of mental teamwork with other men, knows the danger which lies in the early formation and in the dogmatic expression of views by any member of the team before the other members have been heard. The Legislature has shown that it appreciates the existence of this truth.

"If the jury are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court * * * that it is their duty not to form or express an opinion thereon until the case is finally submitted to them." Code Civ. Proc. § 611.

We can see no objection to the course taken by the trial judge in conveying the same idea to the jury, to the limited extent to which he did convey it, after the cause had been submitted to its members and in the midst of their deliberations, especially under the circumstances which arose for his consideration. The jury asked for further "information." We must assume that the supple-

mental instruction responded to this request, which, necessarily, was stated to the judge more circumspectly than it is set forth in the minutes. Suppose—and we may justly assume—that it was stated to the judge that some juror, on entering the jury room the first time, had expressed what he said was his final view upon some particular point in the case, and for 71 hours had refused to hear the views of his fellows upon it. Was not the instruction proper for the purpose of removing such an obstacle to the work of the jury? If it was proper in such an extreme case, it was proper in general, for the language employed by the court shows that it was designed to fit some such situation, although perhaps less extreme in its nature. These views find some support in *People v. Rhodes*, 121 P. 935, 17 Cal. App. 789, and *People v. Cherry*, 158 P. 335, 30 Cal. App. 285.

Since the foregoing was prepared and filed, our attention has been called to *People v. Valencia*, 163 P. 865, 32 Cal. App. 631, in which the instruction which is quoted above was upheld.

Judgments and order affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

76 Cal. App. 680

BEEKHUIS v. PALEN. (Civ. 5124.)

(District Court of Appeal, First District, Division 1, California. March 1, 1926.)

1. Action ☞ 62.

Action cannot be maintained unless cause of action existed at time action was commenced.

2. Vendor and purchaser ☞ 339.

One suing to recover money paid for purchase of land must offer to or surrender possession to vendor before suit, offer of possession after commencement of suit being unavailable.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Action for money had and received by H. A. Beekhuis against B. C. Palen. Judgment for defendant, and plaintiff appeals. Affirmed.

B. M. Benson, of Fresno, for appellant.

G. L. Aynesworth and L. N. Barber, both of Fresno, for respondent.

TYLER, P. J. Action for money had and received.

Defendant on or about the 13th day of February, 1919, was the owner of certain real property situated in the county of Fresno. On said day he entered into a written contract with J. W. Files and Susan M. Files, his

wife, whereby he agreed to sell, and the Files agreed to purchase, the land for the sum of \$23,500. The contract provided for the payment of the sum of \$6,000 upon the execution of the agreement and the further sum of \$2,000 on or before November 1, 1919, and \$1,000 on the 1st day of November of each succeeding year until November 1, 1929, at which time the balance of the purchase price, amounting to the sum of \$6,500, was to be paid. It further provided, among other things, that the vendees should pay all taxes and assessments and not suffer or permit the same to become delinquent. The contract contained a provision that at any time after the sum of \$11,750 had been paid upon the purchase price, together with all accrued interest, the vendor should make, execute, and deliver to the vendees a good and sufficient deed to said premises free and clear of all incumbrances, subject to certain exceptions not here involved, at which time the vendees should execute and deliver to the vendor their promissory note for the balance of the purchase price, which promissory note was to be secured by a mortgage on the premises. Time was made of the essence of the contract, and the agreement provided that in the event of the failure on the part of the vendees to comply with any of the terms thereof, such failure would entitle the vendor to the immediate possession of the premises, and all moneys paid thereunder to be considered as rent for use and occupation; the vendor to be released from any obligation to convey. The agreement recited the existence of a mortgage upon the premises which the trial court found to be the sum of \$6,500.

By mesne conveyances and assignments, plaintiff herein acquired all rights of the vendees in and to the contract. Upon the execution of the agreement of sale, the vendees and their successor in interest went into possession of the premises. Up to the 26th day of May, 1923, all the covenants and conditions of the contract on their part to be performed in relation to payments were kept and performed; the amount being paid by them aggregating the sum of \$11,000. Through inadvertence, however, plaintiff failed to pay the second installment of taxes levied and assessed upon the property for the fiscal year 1922-23.

Shortly after this installment becoming delinquent, defendant sought to invoke the forfeiture clause of the agreement, for on May 26, 1923, he brought an action to quiet title against plaintiff and his predecessors in interest. The vendee thereupon paid the amount of the delinquent tax to the county, with interest and penalty, and on September 27th following, he tendered to defendant the sum of \$1,875. This sum included the payment and interest due the following November and which, if accepted, would have entitled the vendee to the deed provided for under the

contract. Defendant refused to accept the same, whereupon plaintiff brought this action for the return of the \$11,000 paid under the contract. The following day, December 16, 1919, he offered to restore possession to defendant. After trial the court found in substance that plaintiff had performed all the covenants and conditions of the contract to be by him performed except the covenant with reference to the payment of taxes, and it concluded that this omission prevented a recovery of the amount claimed, and judgment was accordingly rendered in favor of defendant for his costs.

Thereafter plaintiff filed a notice of motion to vacate the judgment and to enter one in his favor for the sum demanded, upon the grounds that the findings of fact and the conclusions of law made and entered by the court were erroneous, in this, that from said findings of fact the court should have found as a matter of law that plaintiff was entitled to judgment against defendant for the sum of \$11,000. Plaintiff likewise filed his notice of intention to move for a new trial. Both motions were denied.

It is here claimed that as the record shows that plaintiff had fully performed his contract except for the technical default of permitting the last half of the taxes for the fiscal year 1922-23 to become delinquent, there was a substantial performance by him of his contract; that defendant was not justified in refusing the payment of \$1,875 tendered him, and plaintiff by reason of such refusal was, upon surrendering possession of the property to defendant, entitled to a return of his money; he being, by reason of such circumstances, under no further duty to perform. It is also claimed that the record shows defendant to have been in default because of the mortgage upon the land which he should have caused to have been released upon the payment by plaintiff of the sum of \$11,000.

In support of the contention that plaintiff has substantially complied with all the covenants by him to be performed, we are cited to the case of *Collins v. Eksoozian*, 214 P. 670, 61 Cal. App. 184. It was there held, under facts similar to those involved in the instant case, that to sanction a forfeiture under such circumstances would be to approve a palpable injustice. Conceding the law to be correctly declared therein, this doctrine may be properly applied in the other action which the record here indicates is pending between the parties. Here, however, we are confronted with the fact that plaintiff did not restore, or even offer to restore, possession of the premises to the defendant or any benefits he may have received by reason of such possession until after he commenced his action. The appeal is on the judgment roll alone, but the record shows that the complaint was filed December 15, 1923, and the findings of the court recite that defendant took possession of the premises un-

der the contract, and that his offer to restore possession was made on December 16, 1925, the day after the complaint was filed.

[1, 2] It is well established in this state that an action cannot be maintained unless the cause of action existed at the time the action was commenced. *Wittenbrock v. Bellmer*, 57 Cal. 12. This doctrine disposes of the case. An offer to restore is a condition precedent to the maintaining of an action of this character. One suing to recover money paid for the purchase of land must offer to or surrender possession to the vendor before suit. An offer of possession after the commencement of the suit is unavailing. *Hill v. Den*, 53 P. 642, 121 Cal. 42; *Fairchild v. Western Securities Corp.*, 169 P. 363, 176 Cal. 742. The action therefore was prematurely brought.

For the reasons given, the judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

76 Cal. App. 639

**LOS ANGELES COUNTY v. INDUSTRIAL
ACCIDENT COMMISSION et al.**
(Civ. 5244.)

(District Court of Appeal, Second District,
Division 1, California. Feb. 25, 1926.
Hearing Denied by Supreme Court April 26,
1926.)

1. Motions ⚡66.

Courts having general jurisdiction have power to make effective whatever orders they are expressly authorized to enter.

2. Statutes ⚡194.

General terms in statute must yield to special provisions.

3. Master and servant ⚡388—Industrial Commission held to have had no authority in ordering commutation of award to direct payment of deceased's debts or those of his widow out of award (Workmen's Compensation, Insurance and Safety Act [St. 1917, p. 831] § 14, subd. [e], section 24, subds. [a], [b], section 28, section 63, subd. [a], and section 69, subd. [a]).

Under Workmen's Compensation, Insurance and Safety Act 1917, § 24, subds. (a), (b), and section 69, subd. (a), the Industrial Accident Commission had no authority in ordering commutation of award to direct that out of award certain debts of deceased or of his widow should be paid, notwithstanding general powers given to commission under section 14, subd. (e), section 28, and section 63, subd. (a).

4. Master and servant ⚡417(3¾)—Employer of deceased held entitled to maintain certiorari to review order on commutation of award directing payment of deceased's debts.

County, who was employer of deceased for whose death award was granted, part of its money and property being used in discharging

obligation, *held* party beneficially interested and entitled to maintain certiorari to review an order on commutation of award directing payment of deceased's debts.

Certiorari by the County of Los Angeles to review an order of the Industrial Accident Commission for commutation of an award to Jennie C. Lowe, also known as Jennie C. Lowe Setzer. Award annulled.

Edward T. Bishop, County Counsel, and R. C. McAllaster, Deputy County Counsel, both of Los Angeles, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondent Industrial Accident Commission.

HOUSER, J. This is an application for a writ of certiorari for the purpose of reviewing an order of award and commutation thereof, made by the Industrial Accident Commission in favor of the widow of an employee, which employee was killed in the course of his employment with the petitioner, county of Los Angeles.

By the order of commutation, in lieu of a direct payment to the widow, the county of Los Angeles was ordered to pay to each of certain general creditors of the deceased, or of the widow, a fixed sum of money in satisfaction of the debt owing to such creditor—the aggregate amount thereof to be deducted from the total award as commuted, and the balance thereof to be paid to the widow. The petitioner herein objects to such order of commutation on the ground that the direction therein to pay a portion of the award to general creditors is in excess of the power conferred by the statute upon the Commission.

It is admitted by the Commission that no express provisions can be found in the statute by which it is given the authority to make that part of the order to which specific objection is made, but it is contended that by reason of certain general provisions contained within the terms of the act, the order by the Commission was impliedly authorized.

By section 28 of the Workmen's Compensation, Insurance and Safety Act (Stats. 1917, p. 831, as variously amended), where, among other things, it appears that a commutation of an award is necessary for the protection of the person entitled thereto, the commission is empowered to commute the compensation payable to such person to a lump sum. Subdivision (c) of the same section places a discretionary power in the commission to pay the award as commuted directly to the person entitled thereto; or, under certain conditions, to deposit the amount for the use and benefit of such person with either a savings bank, a trust company, or the state compensation insurance fund. By section 14 (e) the commission is authorized to pay a death benefit either to the dependents of the deceased, or to a trustee or a commissioner, to be applied in accordance with the findings and di-

rection of the commission. In connection with such provision of the statute, the commission directs attention to the fact that, while lacking in express direction, further language of the act may indicate an implied power to direct that part of the order of which complaint is made. Section 63 (a) is as follows:

"The commission is hereby vested with full power, authority and jurisdiction to do and perform any and all things, whether herein specifically designated, or in addition thereto, which are necessary or convenient in the exercise of any power, authority or jurisdiction conferred upon it under this act."

Section 69 (a) enjoins upon the court a liberal construction of the terms of the statute, "with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment."

On the other hand, the petitioner points to the provisions of section 24 of the act, which it is urged contain all the direct authority bestowed upon the commission for the purpose of enabling it to direct the payment of any part of the award to any person other than the injured employee or his dependents. That part of the section to which reference has been had which is thought to be applicable to the issue, is as follows:

"(a) No claim for compensation shall be assignable before payment, but this provision shall not affect the survival thereof, nor shall any claim for compensation, or compensation awarded, adjudged or paid, be subject to be taken for the debts of the party entitled to such compensation, except as hereinafter provided. No compensation, whether awarded or voluntarily paid, shall be paid to any attorney at law or in fact or other agent, but shall be paid directly to the claimant entitled to the same, unless otherwise ordered by the commission. Any payment made to such attorney at law or in fact or other agent in violation of the provisions of this section shall not be credited to the employer.

"(b) The commission may fix and determine and allow as a lien against any amount to be paid as compensation."

Then follows a list of possible charges against either the injured employee, or if he be deceased, against his dependents, which, under the terms of the act, may be convertible into liens against the award.

[1, 2] As to courts having general jurisdiction, it is a well-recognized rule that they have power to make effective whatever orders they are expressly authorized to enter. The Industrial Accident Commission is a constitutional tribunal, having certain limited powers, which include the making of awards in compensation for injuries sustained by an employee in the course of his employment; and, as provided in the statute hereinbefore referred to, authority exists for commuting an award into a lump sum. The authority to commute an award into a lump sum and to

order distribution to the injured employee may carry with it such matters as are purely incidental to the general order of payment. But that part of the order of distribution which in the instant case directs the payment of a portion of the award to general creditors of either the deceased employee or his dependents, which creditors are not within the statutory category of possible lien claimants, would appear to be unnecessary to render effective the payment of the commuted award to the person entitled thereto. While such a division of the commuted award may be advisable and most desirable, or, as appears from the record herein, may even be with the consent and at the suggestion of the dependent, such facts cannot confer jurisdiction in the tribunal. It may be that in all fairness the debts of the deceased or of his dependents should be paid; but, unless they fall within one of the classes enumerated in the statute for which a lien on the award may be lawfully declared, the commission is not officially interested. Neither does the statute contemplate a supervision by the commission of the funds after payment thereof to the persons entitled thereto. Whether the funds made available to the dependents be wisely conserved, or whether they be spent in riotous living, by the terms of the statute, is made of no concern to the tribunal which is to order the payment of the compensation. If the final disposition by the beneficiary of the fund here in question were to be construed as being subject to the order or direction of the commission, with equal propriety could the distribution by the probate court of the estate of a deceased husband to his widow be similarly controlled by such tribunal. Or, if a widow were to bring an action on an insurance policy and were to receive judgment therein, it might as well be contended that because the court was authorized to render the judgment, as incidental thereto, it might also direct that, from the amount to be paid thereon, the insurance company should deduct and pay a stated sum to each of several creditors of the deceased or of the widow. The fact of the matter is that both in such a case, as well as in the instant case, primarily the widow is entitled to have paid to her personally the entire amount of the judgment, or the award, as the case may be. The right of the widow in the case at bar to the award itself is neither controlled nor in any wise influenced or affected by the fact that either she or her husband may be indebted to other persons. The legal relations of such persons to either the deceased husband or to her, whether such relations sound in contract or in tort, have no connection, casual or otherwise, with the statutory obligation existing between the employer and the employee. It may be commendable, highly honorable, and a most efficient method of protection of creditors, but the order of award of compensa-

tion for the death of an employee carries with it no such incidents.

The quoted section of the statute which deals with the subjection of the award to liens is definite in its character. Within its first provision is the declaration that the compensation awarded shall not "be subject to be taken for the debts of the party entitled to such compensation. * * *" In the face of such plain language, the more general provisions of the statute, which at least would appear to be not aimed at the particular situation here presented, cannot prevail. To the contrary, the rule of construction of a statute is invariable that general terms must yield to special provisions. Moreover, the opening statement of section 24 (a) is that "no claim for compensation shall be assignable before payment. * * *"

In the case of *Pacific Electric Ry. Co. v. Commonwealth Bonding, etc., Co.*, 204 P. 262, 55 Cal. App. 704, an assignment of an award to the state of California was held invalid. Among other things, the court said:

"The act states that no assignment shall be made 'before payment.' Claims are not paid until they become awards, and it is clear that the only thing payable under the provisions of the act is awards. It is evident that the Legislature intended that there should be no assignment of claimant's rights whatsoever and that the award should be paid by the one against whom it was made directly to the claimant and to no one else."

Casting aside for the moment any question of whether in violation of the terms of the statute the order to which objection is here made in effect constituted a lien on the fund made available to the dependent widow of the deceased, it is apparent that the effect of the order was at least to transfer a portion of the award before its payment to creditors of the deceased or his dependents; which is nothing less than an assignment by whatever name it may be called.

[3] We see no escape from the force of petitioner's contention that the commission exceeded its authority in directing out of the award the payment of those debts of the deceased or of his widow not so provided for in any of either of the classes enumerated in the statute.

[4] Respondent suggests that the petitioner here was not a party beneficially interested in the proceeding before the Industrial Accident Commission, and for that reason is not in a position to maintain certiorari in this court. But if the correct conclusion has been reached with reference to the lack of authority in the commission to make that part of the order of commutation which herein has been considered, it would follow that payment by the county of Los Angeles of the debts of the deceased or of his widow, as directed by such order of commutation, together with the payment to the widow of the re-

mainder of the sum awarded, would not amount to a legal satisfaction of the total award. The county of Los Angeles was the employer, and a part of its money or property would necessarily have been used in discharging the obligation against it which was created by the order of the commission. Its interest in the proceedings is therefore apparent.

It becomes unnecessary to notice the other specific objections to the award interposed by petitioner.

The award is annulled.

We concur: CONREY, P. J.; YORK, J.

77 Cal. App. 1

WILKINS v. FINNELL et al. (Civ. 5418.)

(District Court of Appeal, First District, Division 2, California. March 9, 1926.)

Evidence §417(12)—Evidence of oral guaranty of note, released to buyer of business, held admissible, as instrument did not embrace entire agreement (Civ. Code, § 2794).

Instrument whereby sellers of business released to buyer contract with third party and items appearing in an attached statement, in which note was listed, held not to embrace full contract between parties so as to exclude evidence of oral guaranty of note under Civ. Code, § 2794.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by A. G. Wilkins against Phillip S. Finnell and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Maurice J. Rankin, of San Jose, for appellants.

E. M. Rosenthal, of San Jose, for respondents.

LANGDON, P. J. This is an appeal by the defendants from a judgment against them as guarantors of a promissory note of a third party, which note defendants transferred to plaintiff's assignors in consideration of its full face value and interest.

The facts are: Prior to June 30, 1921, defendants were copartners engaged in the tractor business in San Jose, Cal. On said date they sold their business to Charles O. Dean and A. M. Phillippe for \$3,451.19. Among other items of property included in the agreement of sale was a promissory note of Thompson Bros. for \$600, which had been given as a part of the purchase price of a tractor. Plaintiff is the assignee of Messrs. Dean & Phillippe, and is claiming under an alleged oral guaranty of payment of said note made at the time the note was indorsed to Dean & Phillippe, or during the negotiations regard-

ing the sale of the business. The trial court found in accordance with said claim "that with said assignment, sale, and delivery of said promissory note defendant did then and there guarantee the payment thereof to said Dean Tractor & Implement Co."

The only question in the case is presented by defendants' objection to the introduction of evidence of an oral guaranty. Respondent relies upon section 2794, subdivision 5, Civil Code. Defendants and appellants reply that the contract of sale was in writing, and did not mention any guaranty of the said note, and that to receive evidence of an oral guaranty under section 2794, Civil Code, would be to violate another rule of evidence; i. e., that the terms of a written agreement may not be varied by parol. The written agreement relied upon as a bar to the parol evidence is as follows:

"For and in consideration of the sum of \$3,451.19, thirty-four hundred fifty-one and 19/100 dollars, as itemized on statement hereto attached, we hereby release our contract with the Cleveland Tractor Co., and all claims on any and all of the items which appear on said statement attached hereto.

"Very truly yours,

"Finnell-McEwen Co.,

"By Phillip S. Finnell.

"By Dana M. McEwen."

Said attached statement is as follows:

Itemized account of the Cletrac business being sold to C. O. Dean and A. M. Phillippe, equity in 4 Cletrac tractors stored in San Jose, Co. warehouse.....	\$ 978 80
Equity in Chevrolet delivery car.....	203 55
Note of Thompson Bros. secured by 1 model H Cletrac tractor due August 15, 1921.....	600 00
Interest on the above note.....	24 00
Stock of Cletrac parts on hand.....	1,594 84
1 desk	40 00
1 chair	10 00
	\$3,451 19

It appears that the foregoing instrument was a release of contract with the tractor company. It also mentions an attached statement in which the note in question is listed, and recites that all claims on any of such items are released; but it, obviously, does not embrace the full contract between the parties, for it does not operate as a transfer of the promissory note. It was necessary that this note be transferred by indorsement. The parties must have had some further transaction with reference to this note, and the court has found, upon substantial evidence, that defendants agreed to guarantee the payment of the note when they assigned it, and received the full face value thereof. The record shows that Dean & Phillippe did not wish to take over the note, and did so only upon receiving this guaranty of payment.

The only point to be considered upon appeal is whether or not the written instrument

herein set out expressed the full contract of the parties, and merged all other negotiations and agreements. Because of the peculiar nature of this instrument, and under the facts of this case, we think it was not intended to cover the entire transaction between the parties, and was ineffectual to do so, and that the evidence objected to was admissible not to vary a written instrument, but to establish the portion of the agreement which was not reduced to writing, and which it was not necessary to reduce to writing under the provisions of section 2794, Civil Code.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

76 Cal. App. 726

TOMLIN et al. v. NEALE et al. (Civ. 5323.)

(District Court of Appeal, First District, Division 1, California. March 3, 1926. Hearing Denied by Supreme Court April 29, 1926.)

1. Trial ⚡397(1)—Court not required to make finding of fact which was admitted in pleadings.

In action on order for payment of money, where it was alleged in complaint, and admitted by answer, that it was the understanding of the parties that instrument was an order for the defendants to pay a sum certain from money to come into their hands from the sale of cotton grown on leased premises, no finding was required as to that allegation.

2. Bills and notes ⚡152—Test in determining character of instrument ordering payment of money is whether it carries personal liability of drawer or only credit of particular fund, and it is nonnegotiable where drawn upon a particular fund (Civ. Code, § 3084, subd. 2).

In determining the character of an instrument ordering the payment of a sum of money, the true test is whether it carries the general personal credit of the drawer or only the credit of a particular fund, which question must be determined according to the circumstances of each case, and such instrument is nonnegotiable under Civ. Code, § 3084, subd. 2, if it is drawn upon a particular fund, since it then does not carry the personal credit of the drawer.

3. Appeal and error ⚡931(4)—Implied finding that order directing payment of money from proceeds of cotton crop was not drawn on personal credit of drawer, but upon fund, held supported by findings made.

In an action on lessee's order directing defendants to pay plaintiff lessor a certain sum from the proceeds of cotton returns from leased premises, implied finding that instrument was not drawn on personal credit of lessees, but on credit of fund, held supported by findings made.

4. Appeal and error ⚡1071(5)—Conclusion of trial court that lien did not exist on crop held harmless, where such conclusion was material only upon question of consideration for acceptance of order directing payment of money, and consideration therefor was supported by original indebtedness.

In action by lessor on order by lessee directing defendant to pay lessor sum from the cotton returns from leased premises, which order was accepted by defendant, court's finding that lien did not exist in plaintiff's favor was harmless, as existence of such lien was material only upon question of consideration for acceptance, and original indebtedness of lessee to lessor was sufficient to support the acceptance.

5. Bills and notes ⚡82—The acceptance of an order drawn upon a particular fund binds drawee to make payment only to amount of fund due or to become due drawer.

The acceptance of an order drawn upon a particular fund binds drawee to make payment only to amount of fund due or to become due drawer.

6. Appeal and error ⚡931(3)—In determining whether findings support judgment in which conclusions of law were merged, it will be presumed that court inferred permissible facts to uphold judgment.

In determining whether findings support judgment in which conclusions of law were merged, findings must receive such construction as will uphold rather than defeat judgment, and, if from facts found other facts may be inferred which will support judgment, it will be assumed that trial court made inference.

7. Bills and notes ⚡82—Order for payment of money from proceeds of cotton crop grown on leased premises held limited to net returns from crop after advance and expenditures were deducted therefrom by drawee.

Where lessee executed an order to defendant directing him to pay money to lessor from fund thereafter to accrue from proceeds from cotton of leased premises, held that lessor's rights were measured by agreement between lessee and defendant under which advances and expenditures made by defendant were deductible.

8. Appeal and error ⚡878(1)—Judgment will not be reversed, where defendant had not appealed, even though appellate court's construction of parties' rights would have required a judgment for defendants.

Though on appeal by plaintiff from judgment deemed insufficient appellate court's construction of rights of parties would require judgment for defendants, judgment will nevertheless be affirmed, where defendants had not appealed.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Action by I. F. Tomlin and others, co-partners, etc., against W. J. Neale and others. From a judgment for plaintiffs for an insufficient amount, they appeal. Judgment affirmed.

A. L. Hubbell, of Calexico, for appellants.
Ault & Anderson, of Calexico, for respondents.

CASHIN, J. An action upon an order for the payment of money, which was accepted by respondents.

Judgment was entered for plaintiffs, who appeal therefrom upon the judgment roll, with a bill of exceptions to the conclusions of law and judgment as not being supported by the findings of fact.

The facts found were as follows: On December 20, 1918, appellants leased lands owned by them in Lower California to certain Chinese for the term commencing on that day and ending on December 31, 1922; the rent reserved being payable in installments.

The lease, which was written in the Spanish language, was executed and recorded according to the formalities and requirements of the laws of Mexico, and contained the provision that the lessee should not have power to alienate or incumber in any manner the crops which might be produced upon the premises described while any of the rent should remain unpaid; the crops being considered as security therefore.

On November 24, 1920, there was due and unpaid installments of rent aggregating the sum of \$12,000. During the year 1920, and previous to the date last mentioned, the lessees had picked and removed from the land and delivered to respondents, to be sold for the account of the former, 146 bales of cotton, 100 bales of which had been brought within the United States. Respondents had advanced to the lessees during that year the sum of \$12,000 "for financing the crop grown on the premises," and on the date mentioned no part of the crop had been sold, and there remained thereof unpicked 214 bales. Appellants, at the suggestion of one of the respondents had procured from the lessees a writing signed by the latter, which was on the above date delivered to respondents; the writing being in words and figures as follows:

"Calexico, California, November 24, 1920.

"Tomlin, Tomlin & Company's Ranch, Consisting of 732 Acres Situated in the Northern District of Lower California, Republic of Mexico—Mr. T. J. West, Agent, Calexico, California: You will please pay to the order of Tomlin, Tomlin & Co. at Calexico, California, out of the Chick Mow Co. and Lee Wing, manager, the sum of twelve thousand dollars (\$12,000) to come out of my cotton returns from the above ranch.

"[Signed]

Chick Mow.
"Lee Wing."

Upon the delivery of the instrument it was agreed that appellants should not demand payment thereof for 60 days, at the end of which period payment was demanded and refused, following which a request was made

for the return of the writing to appellants, which request was not complied with.

Subsequent to the delivery of the instrument respondents took possession of that portion of the crop which was then unpicked and expended for its picking, ginning, and hauling, and for customs, duties, and expenses of marketing the sum of \$13,478.50, and thereafter sold the 100 bales first mentioned for the sum of \$6,595.98, and the balance of the crop for \$15,757.58.

[1] In addition to the facts expressly found, it was alleged in the complaint and admitted by the answer that it was the understanding of the parties that the instrument mentioned was an order for the defendants to pay the sum of \$12,000 from money to come into the hands of respondents from the sale of cotton grown on the leased premises. No finding was required as to this allegation, which may be treated as a part of the findings. *San Diego Realty Co. v. Hill*, 143 P. 1021, 168 Cal. 637; *Sacre v. Chalupnik*, 205 P. 449, 183 Cal. 386; *First Nat. Bank v. Maxwell*, 55 P. 980, 123 Cal. 360, 69 Am. St. Rep. 64; *Mondine v. Labaig*, 186 P. 1047, 44 Cal. App. 781.

From the foregoing the conclusions were drawn upon which judgment was entered for appellants in the sum of \$2,279.99.

As stated, appellants except to the judgment, the conclusions of law as a whole, and in particular to the following conclusions: (1) That the instrument was not a bill of exchange, but an order to pay money; (2) that plaintiffs had no lien upon the 100 bales of cotton first mentioned in the findings after its importation; (3) that defendants were entitled to the proceeds from the sale of these bales of cotton free of claims of plaintiffs; (4) that defendants were entitled to deduct the sums advanced for the production and marketing of the balance of the crops from the proceeds of its sale; (5) that plaintiffs were not entitled to judgment for the full amount of the order.

No exception was taken to the further conclusion that "the defendants by retaining the instrument after the demand for its return accepted it."

[2] In the instant case the amount directed to be paid was, according to the terms of the instrument, "to come out of my cotton returns from the above ranch"; it being the intention of the parties, as found, that this sum should be paid from money to come into the hands of respondents from the cotton grown on the leased premises. As the rule has been stated, in determining the legal effect of instruments of this character, the true test in every case is, Does the instrument carry the general personal credit of the drawer or only the credit of a particular fund? and this question must be determined according to the circumstances of each case, unless the language of the instrument puts the meaning beyond doubt; and an instrument

drawn upon a particular fund, whether the fund has already accrued or is to accrue in the future, is not negotiable, since it does not carry the general personal credit of the drawer, and is contingent upon the sufficiency of the fund on which it is drawn. 8 Corp. Jur. 121, 123; Civ. Code, § 3084, subd. 2.

[3, 4] In addition to the finding as to the intention as stated, it was further found that respondents at the time of the delivery of the instrument had advanced for the purpose of financing the crop a sum equal to the amount of the order; that no part of the crop then in their possession had been sold; that the rental payments under the lease were in arrears, and the instrument was not then accepted. These facts fairly support the inference that the lessees were then unable to meet their obligations otherwise than from the proceeds from the sale of the crop, and were sufficient to sustain the implied finding that the instrument was drawn, not upon the personal credit of the lessees, but upon the credit of the fund thereafter to accrue. This conclusion being supported by the findings, no exception having been taken to the conclusion that respondents by retaining the order accepted it, and the action not being one to enforce a lien or to recover the proceeds or value of property subject thereto, but upon an accepted order for the payment of money, whether a lien existed upon the crop or any part of it at the time of the delivery of the instrument was material only on the question as to the consideration for the acceptance, for which the original indebtedness of the lessees to appellant was sufficient (*Barlow v. Lande*, 147 P. 231, 26 Cal. App. 424); and the conclusion of the trial court that such lien did not exist, if erroneous, was harmless, if the other conclusions support the judgment (*Spencer v. Duncan*, 40 P. 549, 107 Cal. 423; *McCormick v. Sutton*, 20 P. 543, 78 Cal. 245, 246).

[5] The acceptance of an order drawn upon a particular fund binds the drawee to make payment only as to the amount of the fund due or to become due to the drawer (5 Corp. Jur. 927, 928; *Carboy v. Polstein Realty, etc., Co.*, 114 N. Y. S. 838, 62 Misc. Rep. 302; *Hall v. Jones*, 66 S. E. 350, 151 N. C. 419; *Comer v. Floore* [Tex. Civ. App.] 88 S. W. 246; 1 Parsons on Bills & Notes, 304); and the question to be determined by the trial court upon such acceptance was the extent of the obligation of respondents under the terms of the order as accepted.

[6] In determining whether the findings support the judgment in which were merged the conclusions of law (*Roberts v. Hall*, 82 P. 66, 147 Cal. 434; *Mentone, etc., Co. v. Redlands*, 100 P. 1082, 155 Cal. 323, 22 L. R. A. [N. S.] 382, 17 Ann. Cas. 1222), the findings

must receive such construction as will uphold rather than defeat the judgment; and, if from the facts found other facts may be inferred which support the judgment, it will be assumed that the trial court made the inference (*Paine v. San Bernardino, etc., Traction Co.*, 77 P. 659, 143 Cal. 654; *Lomita Land & Water Co. v. Robinson*, 97 P. 10, 154 Cal. 36, 18 L. R. A. [N. S.] 1106; *Sidney v. Wilson*, 227 P. 672, 67 Cal. App. 282, 285; *Braun v. Dallin*, 228 P. 740, 68 Cal. App. 121, 129).

[7] The instrument being drawn upon a fund to accrue from the sale of cotton from the ranch, and the order not having by its terms limited the fund to the proceeds from a portion of the crop, the only construction reasonably to be placed thereon, in view of the fact that no part of the cotton had then been sold, is that the fund within the meaning of the instrument should include the whole of the proceeds from the sale of the crop produced.

The agreement between respondents and the lessees under which the former made advances for financing the crop, subsequently took possession of the unpicked portion thereof, and made the expenditures in the amounts and for the purposes found, is not directly disclosed by the findings. It may, however, reasonably be inferred from the facts found in connection with the language of the order that the advances and expenditures mentioned were as between these parties to be deducted from the gross returns from the sale of the crop, and that the returns to the lessees within the meaning of the order were to be the net returns therefrom, which constituted the fund from which the order was payable. Such being the agreement, the rights of appellants were measured by the amount of the fund which accrued and upon which the order was drawn. *O'Brien v. Garibaldi*, 115 P. 249, 15 Cal. App. 518; *Newhall v. Clark*, 3 Cush. (Mass.) 376, 50 Am. Dec. 741; 5 Corp. Jur. 962.

[8] That our construction of the order is contrary to the conclusion of the trial court as to the rights of appellants in the proceeds from the sale of the 100 bales of cotton first delivered and imported, and that upon such construction judgment should have been entered for respondents, does not affect the judgment rendered, from which the latter have not appealed. *Larkin v. Mullen*, 60 P. 1091, 128 Cal. 449, 455; *Blood v. Munn*, 100 P. 694, 155 Cal. 228, 236; *Rauer v. Nelson*, 200 P. 809, 53 Cal. App. 695, 700. It is our conclusion that the findings were sufficient to support the judgment, which is therefore affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

76 Cal. App. 655

(245 P.)

HUNT et al. v. LAWTON et al. (Civ. 5267.)

(District Court of Appeal, First District, Division 2, California. Feb. 27, 1926.)

1. Trusts §140(3)—Deed to wife for life, in trust to pay net income to daughter, title to vest in daughter or her children at wife's death, held to create legal estate for life in wife, with beneficial interest in daughter, and contingent remainders to daughter and her children.

Deed to wife, in trust to farm and let property, pay taxes and expenses, and pay net income to daughter until grantee's death, when property should vest in daughter, if living, otherwise in her children, held to create legal estate in wife for life, with beneficial interest in daughter, and contingent remainders to daughter and her children, since trustee takes only estate commensurate with trust.

2. Trusts §112—Granting clause of trust deed conveying to grantee "and her successor or successors" held controlled by provision that property should vest in others at grantee's death.

Granting clause of trust deed, conveying to grantee "and her successor or successors," held controlled by further provision that property should vest in daughter or her children at grantee's death.

3. Trusts §205.

Estate of trustee is not broadened by power to lease, but power to lease is limited by duration of trustee's estate.

4. Bankruptcy §268—Purchaser from trustee in bankruptcy of cestui que trust of all of right, title, and interest of bankrupt held to acquire bankrupt's beneficial interest and interests acquired by bankrupt by deed from contingent remaindermen.

Purchaser from trustee in bankruptcy of cestui que trust of all of right, title, and interest of bankrupt, who also had contingent remainder, held to acquire bankrupt's beneficial interest and interests acquired by bankrupt by deed from other contingent remaindermen, since future interests pass in same manner as present interests in property.

5. Quieting title §17 — Rights of unborn contingent remaindermen cannot be affected by action to quiet title.

Rights of unborn contingent remaindermen cannot be affected by action to quiet title to property which was to vest in daughter's children, if daughter were dead, at death of mother.

6. Trusts §61(3)—Trust held not terminated by transfer of all right, title, and interest by cestui que trust and living contingent remaindermen.

Where land was given to wife for life in trust for daughter, remainder to daughter, if living, otherwise to her children, trust held not terminated during life of wife by transfer of all right, title, and interest by daughter and living children, since it must continue for protection of children that may yet be born.

7. Trusts §61(3)—Trustee held not to rescind and terminate trust by transferring all right, title, and interest in trust property to beneficiary, where other remaindermen may yet be born.

Trustee held not to rescind and terminate trust by executing instrument transferring all right, title, and interest in trust property to beneficiary, to whom living contingent remaindermen had conveyed their interests, where other remaindermen may yet be born.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action to quiet title by Frank H. Hunt and another against Emily Lawton and others. Judgment for defendants, and plaintiffs appeal. Reversed with directions.

J. L. Fleming and R. J. Gardner, both of Los Angeles, (C. C. Haskell, and Leonard, Surr & Hellyer, all of San Bernardino, of counsel), for appellants.

S. F. Macfarlane and Roland H. Mulford, both of Los Angeles, for respondents.

LANGDON, P. J. This is an appeal from a judgment in favor of the defendants in an action to quiet title to certain real property in Los Angeles county, Cal.

The facts are undisputed; the evidence consisting mainly of recorded documents in the chain of title to the property, from which it appears: That on June 12, 1897, Gerhardt H. Kallmeyer, being the owner of the real property in controversy, executed a deed to his wife, Sarah Jane Kallmeyer, one of the defendants herein, conveying the same to her and her successor or successors, "to have and to hold all and singular the said premises, together with the appurtenances unto the said party of the second part, in trust, to farm or let the said land, and out of the income derived therefrom to pay all taxes and assessments of every kind and nature and all expenses and other charges which in the judgment of the said party of the second part may be proper or necessary in the care of the said lands, and to pay the residue of the income derived from the said lands to Emily Lawton, the daughter of the grantor and grantee herein, for and during the term of the natural life of the grantee herein, and upon the death of the grantee herein, then the said premises hereby conveyed to her in trust for the benefit of the said Emily Lawton shall vest in and become the property of the said Emily Lawton, if she shall then survive, and, if she shall not survive, the said lands shall vest in and become the property of the children of said Emily Lawton, share and share alike."

At the time of the execution of the aforementioned deed, Emily Lawton had two children, Alfred Homer Lawton and David Edward Lawton, who are defendants in this action, and she has never had any other children.

On January 31, 1914, the two children, Alfred and David, each being over 21 years of age, executed to their mother, Emily Lawton, a quitclaim deed, purporting to release and convey to her all their estate, right, title, and interest, use, benefit, privilege and demand in and to the property described in the trust deed from Gerhardt Kallmeyer to Sarah Jane Kallmeyer.

On January 22, 1914, Sarah Jane Kallmeyer executed an instrument purporting to be a release of said trust, and purporting to remise, release, surrender, assign, and set over to Emily Lawton all of the estate, right, title and interest, use, benefit, privilege, and demand which she, as trustee, had in the premises.

Upon the execution of the quitclaim deed from Alfred and David to their mother, Emily Lawton, and the purported release of trust by the trustee, Sarah Jane Kallmeyer, to her daughter, Emily, the said Emily borrowed \$3,500 from R. P. Shields, and secured payment thereof by a mortgage upon the property in controversy.

On or about August 25, 1917, the said Emily Lawton was adjudicated a voluntary bankrupt, and thereafter the property involved was sold by her trustee in bankruptcy to the said R. P. Shields, and a deed was executed to him by said trustee on February 20, 1919, purporting to convey all the right, title, and interest of the said Emily Lawton in the property.

Shields executed a satisfaction of his mortgage, and thereafter executed a deed conveying the property to the plaintiffs. In May, 1920, Sarah Jane Kallmeyer executed to plaintiffs a quitclaim deed of the property.

Some of the defendants were in possession of the property at the time of the commencement of this action, and refused to surrender the possession thereof to plaintiffs, who brought this action to quiet their title and to recover possession of the property. It was resisted by the defendants upon the theory that the trust created by the first instrument mentioned herein was still valid and subsisting, and that the subsequent instruments herein mentioned were without force and effect. The trial court adopted this view, and held that the plaintiffs had no right or title to the property.

The first question presented is as to the nature of the estate of Sarah Jane Kallmeyer under the trust deed. The appellants contend it was a life estate in trust, with remainders over to Emily Lawton or her children. Respondents maintain that it was the legal title to the fee, subject to the beneficial interest of Emily. If their position be correct, the estate to Emily or her children after the death of Sarah Jane Kallmeyer was a limitation upon a fee. It is to be observed that the trust deed provided that--

"Upon the death of the grantee herein, then the said premises hereby conveyed to her in

trust for the benefit of the said Emily Lawton shall vest in and become the property of the said Emily Lawton, if she shall then survive, and if she shall not survive, the said lands shall vest in and become the property of the children of said Emily Lawton, share and share alike."

[1] It would seem upon reason and authorities to be hereafter considered that this instrument created a legal estate for life in Sarah Jane Kallmeyer, with beneficial interest in Emily Lawton, and contingent remainders to Emily Lawton and her children, one or the other of which would become vested upon the termination of the life estate.

In *Morffew v. S. F. & S. R. R. Co.*, 40 P. 810, 107 Cal. 587, the court had under consideration the quantum of estate taken under a decree of distribution by a trustee, to whom lands were distributed for the term of her natural life, in trust, to apply the income for the support and education of certain children. The court said:

"But the quantity of interest which passes to the trustee in case of an express trust is commensurate with the necessities of his office; the trustee shall have an estate in fee, if that is necessary to enable him to perform the duties imposed upon him, although it is not in terms given to him by the instrument creating the trust; on this principle a devise of lands in trust to sell clothes the trustee with the fee, because necessary to the execution of the trust. The rule being compendiously stated that the trustee 'will take an estate adequate to the execution of the trust--no more nor less.' *Perry on Trusts*, § 320; *Young v. Bradley*, 101 U. S. 787 [25 L. Ed. 1044])."

The opinion from which quotation has just been made states further:

"And the will does not impose upon the widow any other duty which requires for its discharge an estate in the land greater than for her life. So that there is no enlargement of her life estate to be implied from the necessities of the trust. And the life estate in the trustee being created by express words in the will, with limitation over, it is not enlarged to a fee by the power of sale. *Kennedy v. Kennedy* [28 A. 241] 159 Pa. St. 327; *Foos v. Scarf*, 55 Md. 310, and numerous authorities cited; *Payne v. Johnson* [24 S. W. 238] 95 Ky. 183, 184; *Hatfield v. Sohler*, 114 Mass. 48.

"It is suggested by respondents that the trustee took the fee in virtue of the provision of section 863 of the Civil Code. But, as said of a like statute by the Court of Appeals of New York: 'This section does not prevent a valid limitation of a remainder to the beneficiaries of a trust to take effect upon its termination. The declaration that a valid express trust shall vest the whole estate in the trustees, and that the beneficiaries shall take no estate or interest in the land, clearly refers, as the subsequent sections show, to the trust estate and not to an interest in the land not embraced in the trust.' *Stevenson v. Lesley*, 70 N. Y. 516, 517. So, here, we think that said section 863 has application only to the particular estate in trust, and not to the remainder in the plaintiffs."

In *Keating v. Smith*, 97 P. 300, 303, 154 Cal. 186, 192, it is said:

"The estate which a trustee takes by virtue of section 863 is not necessarily a fee, but only such estate as is required for the execution of his trust. *Morffew v. San Francisco, etc., R. R. Co.* [40 P. 810] 107 Cal. 587. Here the trustees are given an estate expressly limited in duration to the minority of the children."

An examination of the trust instrument in the instant case discloses that the only duties of the trustee were to farm and let the property, pay taxes, expenses, etc., and then pay the net income over to the beneficiary of the trust during the life of the trustee, and, therefore, a legal estate for life was sufficient for the full and free execution of this trust.

In *Barnett v. Barnett*, 37 P. 1049, 104 Cal. 298, the court had under consideration language in a deed as follows:

"Give, grant, alien, and confirm unto the said party of the second part and to his heirs (and assigns forever) all those certain lots, pieces, or parcels of land * * * to have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part (heirs and assigns forever) for and during his natural life, and to the issue and heirs of the body of the said party of the second part."

The question arose of whether the grantee took only a life estate or a fee. It was held that he took a life estate; the court saying:

"The intention of the parties to the grant is to be gathered from the instrument itself, and determined by a proper construction of the language used therein, but for the purpose of ascertaining this intention the entire instrument, the habendum as well as the premises, are to be considered, and, if it appear from such consideration that the grantor intended by the habendum clause to restrict or limit or enlarge the estate named in the granting clause the habendum will prevail over the granting clause. *Faivre v. Daley* [29 P. 256] 93 Cal. 670; *Pelissier v. Corker* [37 P. 465] 103 Cal. 516. 'It is in such case to be considered as an addendum or proviso to the conveyancing clause, which by a well-settled rule of construction must control the conveyancing clause or premises, even to the extent of destroying the effect of the same.' *Bodine v. Arthur* [14 S. W. 904] 91 Ky. 53, 34 Am. St. Rep. 162."

[2] This case is interesting upon our problem, because, in the instant case, it will be observed, that, while the granting clause in the trust deed to Sarah Jane Kallmeyer conveys to her "and her successor or successors," the deed further provides that, upon the death of the grantee, the property shall vest in Emily Lawton, and, as stated in the case last cited, this addendum or proviso to the conveyancing clause, by a well-settled rule of construction must control the conveyancing clause or premises even to the extent of destroying the effect of the same.

A case presenting a principle similar to the one presented by the instant case is *Estate of*

Aldersley, 163 P. 206, 174 Cal. 366, where it was provided that, after the death of the cestui que trust, the premises should be conveyed to the trustees themselves, or the survivors. This trust to convey was void under the decision of the *Fair Case*, 60 P. 442, 64 P. 1000, 132 Cal. 523, 84 Am. St. Rep. 70, and it was held, therefore, that the grantor had merely disposed of an estate for the life of the cestui que trust, and the reversion was in himself. It was recognized by the court that had the trust deed provided for the vesting of the estate in the designated remaindermen, instead of providing for a conveyance to be made to them, the disposition would have been valid, and the trustees would have taken an estate only for the life of the cestui que trust; the court saying:

"But the deeds after employing words of absolute conveyance clearly restrict the fee conveyed to the grantees to and for the purposes of the trusts. The actual title conveyed was therefore commensurate for this purpose and no more."

In other words, the court held that the deed conveyed to the trustees only an estate commensurate with the performance of the trust, which was an estate for the life of the cestui que trust. By analogy, the trustee in the instant case takes only an estate commensurate with the performance of the trust, i. e., an estate for her natural life.

But a most persuasive authority, indeed, a controlling one upon this court, is the decision in the *Estate of Fair*, 60 P. 442, 64 P. 1000, 132 Cal. 523, 84 Am. St. Rep. 70. That most carefully considered decision involved a trust in which property was given to trustees to hold in trust during the lives of the testator's children and the survivor of them, and, "upon the death of such survivor to transfer and convey," to certain grandchildren, etc. It was held this created a trust to convey after the death of the testator's children which was void under the laws of this state, and hence the whole trust failed; it being one entire scheme. In the various majority and dissenting opinions of record in that case, it was repeatedly and consistently recognized that, had the testator provided that upon the death of the last survivor of his children, the property should go to or vest in the ultimate beneficiaries, it would have been held that the trustees had taken an estate for the lives of the children only, and the trust would have been valid, even though there had been an added direction to the trustees to convey to the ultimate beneficiaries, because such conveyance would have been treated merely as an assurance of title. But because the will in that case did not contain a provision vesting the remainder in the ultimate beneficiaries after the termination of the life estates—a provision found in the trust deed in the instant case—the court held that the trust included a trust to convey to the ultimate beneficiaries, and was void. It seems

unnecessary to lengthen this opinion by quotations from this well-known California decision. The decision is lengthy, the facts are complicated, and any quotation, to be intelligible, would occupy much space in this opinion. It is sufficient to say that the *Fair Case* repeats, emphatically, in several places that a grant to trustees similar in principle to the one under consideration in the instant case would vest a life estate in the trustees, with remainders in the ultimate beneficiaries. It would seem that further citation of authority upon this point is needless.

The case of *Fatjo v. Swasey*, 44 P. 225, 111 Cal. 628, is relied upon by respondents to overcome the plain effect of the *Fair Case* and the other authorities cited herein. It is asserted that the *Fatjo Case* is analogous to the instant case, and that there the *cestui que trust* was held to have no mortgageable interest. That case seems to us clearly differentiable from the instant case. In the *Fatjo Case* the devise was to executors of a will "to sell" the real property. It is conceded in the authorities cited herein (*Morffew v. S. F. & S. R. R. Co.*, supra), that a devise of lands in trust to sell clothes the trustee with the fee, because necessary to the execution of the trust. Furthermore, in the *Fatjo Case*, the *cestui que trust* executed a mortgage. The contest was between the purchaser at the mortgage foreclosure sale and the trustee. It is apparent that the *cestui que trust* in that case had nothing but an equitable estate in the mortgaged property, for by the terms of the will she had no interest in remainder until after the property had been sold and the proceeds segregated into different parts, etc. When she gave a mortgage, she could mortgage nothing but her equitable interest—that being all she owned—but she attempted to mortgage the combined legal and equitable interests in the property, and, when the mortgage was foreclosed, it was foreclosed against the full title to the property, and, as the mortgagor never owned this full legal and equitable title, she could not mortgage it, and the purchaser at the foreclosure sale, necessarily, could not maintain his claim to the property. The instant case is entirely different in principle. The appellant here is not claiming under a mortgage foreclosure, but as the purchaser at a sale by the trustee in bankruptcy. As such, he was granted all the right, title, and interest of Emily Lawton. This does not include the legal interest of the trustee for the period of her life, as we shall consider later, but merely what Emily Lawton owned—her equitable estate during the life of the trustee, and her contingent remainders granted to her by the trust deed and the subsequent deeds from her sons. While the distinction between the *Fatjo Case* and the instant case seems to us to be very definite and clear, regardless of this fact, it is apparent that, if the *Fatjo Case* contains any lan-

guage in conflict with the holding in the *Fair Case*, this court is bound by the latter, which is a later authority and, upon its face, a better considered one.

[3] Respondents advance the argument that, as the trust instrument gives the trustee the power to "let" the land, she had the right to lease it, and this required her to take an estate in fee. We cannot agree with this position. In 28 Am. & Eng. Ency. of Law (2d Ed.) 1008, the rule is stated:

"In the absence of express power from the instrument, the trustees cannot grant a lease or provide for a renewal to extend beyond the life of the trust estate, but such a lease, if made, may be sustained to the extent of the trust estate."

The case of *South End Warehouse Co. v. Lavery*, 107 P. 1008, 12 Cal. App. 449, is also in point. From these authorities it seems clear that the estate of the trustee is not broadened by the power to lease, but the power to lease is limited by the duration of the trustee's estate.

[4] The title of plaintiff's predecessor in interest, if any, was acquired more than three years after the conveyance of the contingent interests of Alfred and David to their mother, pursuant to proceedings duly and regularly had in the matter of the voluntary bankruptcy of Emily Lawton, in which proceedings he purchased, according to the stipulation of the parties hereto, "all the right, title, interest and estate of said Emily Lawton in and to the property mentioned and described in the complaint." This sale was duly confirmed by the referee in bankruptcy. Emily Lawton's right, title, and interest in the property at the time of this sale consisted of her beneficial interest during the lifetime of Sarah Jane Kallmeyer, the trustee, and the contingent remainders granted to herself and to her sons, Alfred and David, who had conveyed to her. There can be no question that the contingent interests of Alfred and David Lawton passed to their mother, Emily Lawton, by their deeds to her, and such interests, together with the original contingent interest of Emily Lawton, passed to plaintiffs by reason of the conveyance hereinbefore recited. "Future interests pass by succession, will, and transfer, in the same manner as present interests." Section 699, Civ. Code. See, also, *Le Breton v. Cook*, 40 P. 552, 107 Cal. 410, 420; *Gray v. Union Trust Co.*, 154 P. 306, 171 Cal. 637, 642. "And the interest will pass (to the trustee in bankruptcy) although it may be subject to a contingency such as the contingency that the remainderman, to take, must survive the life tenant." 1 Remington on Bankruptcy, § 972, p. 545.

[5] Conceding that the trust deed granted contingent remainders not only to Alfred and David Lawton, but to any other children of Emily Lawton who might survive her, there were no other children at the time this action

was brought, and plaintiffs concede that there is a legal possibility of their interest in the property being defeated, in part, by the birth of other children of Emily Lawton, who might survive her, and whose contingent interests are not involved, and cannot be affected by this proceeding.

We have cited authorities to show that the contingent remainders held by Emily Lawton were alienable and passed to plaintiffs by the successive transfers appearing in the record. Another question presented by the appeal is whether her beneficial interest in the property during the life of her mother also passed through the trustee in bankruptcy to plaintiffs. We think it did.

"Where one for whom property is held in trust becomes a bankrupt, his entire interest in the trust estate passes to the trustee in bankruptcy, and such ownership draws with it the right of possession." 7 Corpus Juris, 118.

"If an equitable tenant for life becomes bankrupt or insolvent, all his interest goes to his assignees, and the trustee must hold it subject to their disposition; unless the property is so given that it goes over upon the bankruptcy of the cestui que trust." 2 Perry on Trusts (6th Ed.) § 555.

"Therefore, when an equitable interest is once vested in the cestui que trust, he may dispose of it, or it may pass to his assignees by operation of law, if he becomes a bankrupt." Id. § 386.

Section 867 of the Civil Code provides:

"The beneficiary of a trust for the receipt of the rents and profits of real property, or for the payment of an annuity out of such rents and profits, may be restrained from disposing of his interest in such trust, during his life or for a term of years, by the instrument creating the trust."

In *Fatjo v. Swasey*, 44 P. 225, 227, 111 Cal. 628, 637, it is said:

"Up to the time of the amendment this interest in the rents and profits could not be transferred, but now it may be, unless restrained by the instrument creating the trust."

In *Blackburn v. Webb*, 65 P. 952, 133 Cal. 420, the court said:

"It is also true that under section 867 of the Civil Code, as it now reads, the beneficiary of a trust for the receipt of the rents and profits of real property may transfer his right thereto (*Fatjo v. Swasey* [44 P. 225] 111 Cal. 628), notwithstanding the provisions of section 863 of the Civil Code."

It is apparent that there is no provision in the trust deed under consideration here which inhibits Emily Lawton from transferring her beneficial interest thereunder. She could sell, assign, convey, or incumber such interest for any purpose she saw fit, and, under the circumstances here and the authorities heretofore cited, it passed to her trustee in bankruptcy, and through him to the plaintiffs.

"The beneficial interest of a bankrupt in property held in trust for him passes to his trustee in bankruptcy." 1 Remington on Bankruptcy, § 973, p. 545.

A case similar to the instant one is found in *Loomer v. Loomer*, 57 A. 167, 76 Conn. 522. The facts appear from the following extract from the decision:

"It appears, therefore, that the testator's two sons, Lyman H. and Andrew F., at the time of their adjudication as bankrupts, were each, as cestuis que trustent, entitled, under the paragraph of the will in question, to receive one-eighth of the net income of the trust estate during the continuance of the trust to pay income as aforesaid, and were each the owner of an equitable remainder in fee in an undivided one-eighth of the trust estate, with the right to have the full legal title thereto upon the termination of the trust.

"It needs no argument to show that, upon the adjudication in bankruptcy of Lyman and Andrew, all their remainder title and interest passed to the trustee in bankruptcy. National Bankrupt Act (Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]). It is, however, contended that their rights to the income under the trust did not so pass. Whatever may be said upon the much-mooted question as to the legality of so-called spendthrift trusts, it is clear that the trust in question possesses none of the attributes of the trusts so described. The beneficial interests are absolute, and left wholly unrestrained and under the control of the beneficiaries. Such equitable estates, we have repeatedly held, are alienable, and may be subjected to the rights of creditors upon attachment and execution. *Ives v. Beecher*, 54 A. 207, 75 Conn. 564, and cases there cited. The equitable interests in question, therefore, passed to the trustee in bankruptcy, who thus, by virtue of the bankruptcy proceedings, came to stand in the shoes of the two bankrupts, as respects their rights under the paragraph of the will in question.

"As between the trustee in bankruptcy and the claimant Hubbell, to whom, on February 19, 1903, he conveyed the right, title, and interest of the two bankrupts in and to the lands in question, we understand that there is no dispute as to their respective rights. The trustee claims that share of the income to which the two bankrupts would have been entitled on February 19, 1903, had they not been adjudicated bankrupts; and Hubbell claims such share of subsequently accruing income, and their undivided shares in remainder in the real estate itself. These claims are well founded."

It follows from the foregoing discussion that the plaintiff in the instant case succeeded to all the rights of Emily Lawton as cestui que trust under the deed of trust, as well as all interest in remainder granted to her and to her children, Alfred and David.

[6] One other question remains to be determined, and that relates to the termination of the trust. Appellant contends that the trust is terminated because its purpose has ceased—that its object was to pay the income from the property to Emily Lawton—and since her beneficial interest has passed to plaintiffs,

there is no useful purpose to be served by continuing the trust in force and effect. This argument loses sight of the fact that the trustee was to manage the property, rent or lease the same, pay taxes, assessments and charges, and thus preserve it for the contingent remaindermen. While the contingent interests of Emily Lawton and Alfred and David Lawton have passed to plaintiffs, there remain outstanding contingent interests of children who may yet be born to Emily Lawton and survive her at the time of the death of the trustee. Such interests have not passed to plaintiffs, and the trust continues for their protection. The case of *Fletcher v. Los Angeles Trust & Savings Bank*, 187 P. 425, 182 Cal. 177, presents a similar question. We do not agree with appellant's differentiation of the two cases. In principle the cases are the same, although there is some variation in the facts. In the *Fletcher* Case the court refused to terminate a trust under which Mrs. Fletcher was to receive the net income of property during her lifetime, with remainders over to her children. The refusal of the court was based upon the legal possibility of Mrs. Fletcher thereafter having children, and hence all the beneficiaries or possible beneficiaries were not sui juris and before the court consenting to the termination. We conclude, therefore, that the trust created by the deed from Gerhard H. Kallmeyer to Sarah Jane Kallmeyer is not terminated.

[7] But it is also argued that the trustee by the execution of the instrument transferring all her right, title, and interest in the property to Emily Lawton, resigned as trustee, and terminated the trust. The foregoing discussion disposes of the last contention. The trust was not terminated by the consent of the trustee and the beneficiaries, because some of the possible beneficiaries may later come into existence.

As to the discharge of the trustee, we quote the following from 1 Perry on Trusts (6th Ed.) § 274, p. 470:

"If a trustee once accepts the office, he cannot by his sole action be discharged from its duties. Having once entered upon the management of the trust, he must continue to perform its duties until he is discharged in one of three ways: First, he may be removed and discharged, and a new trustee substituted in his place, by proceedings before a court having jurisdiction over the trust; second, he may be discharged, and a new trustee appointed, by the agreement and concurrence of all the parties interested in the trust; and, third, he may be discharged, and a new trustee appointed, in the manner pointed out in the instrument creating the trust, if it makes any provisions upon that subject. Mere abandonment of the trust will not vest the trust property in the hands of his co-trustee, nor relieve a trustee from liability."

The judgment appealed from is reversed, with directions to the trial court to enter a decree that the defendant Sarah Jane Kall-

meyer is the owner and holder of the legal title to the property in controversy for the period of her natural life, as a trustee, however, to pay the net income therefrom to plaintiffs, who are the owners and holders of the beneficial interest in said property during the lifetime of the said trustee, and that the plaintiffs are the owners and holders of the contingent interests in remainder after the termination of said legal life estate, which were granted to Emily Lawton and Alfred and David Lawton by the deed from Gerhard H. Kallmeyer to Sarah Jane Kallmeyer.

We concur: NOURSE, J.; STURTEVANT, J.

77 Cal. App. 4

HOWARD v. BURROW. (Civ. 5402.)

(District Court of Appeal, First District, Division 2, California. March 10, 1926. Rehearing Denied April 8, 1926. Hearing Denied by Supreme Court May 3, 1926.)

1. Brokers ⇐50—Broker not entitled to commission under contract to lease property, where landlord's agreement with tenant was made after its expiration.

Broker was not entitled to commission under contract to lease certain property, where tenant and landlord did not reach agreement until two days after expiration of such contract, notwithstanding he was instrumental in obtaining tenant.

2. Landlord and tenant ⇐22(1)—Agreement to lease, which provided that landlord should approve plans and specifications for alterations, held unenforceable, where such plans and specifications had not been prepared.

Agreement to lease, which provided that landlord should approve plans and specifications for alterations, held unenforceable, where such plans and specifications had not been prepared at time of its execution, since minds had not met on this material element.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by E. A. Howard against G. W. Burrow. Judgment for plaintiff, and defendant appeals. Reversed.

Earl D. White, of Oakland (Gus L. Baraty, of San Francisco, of counsel), for appellant. Clarence E. Todd, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant for compensation claimed to have been earned by him as a broker. The defendant appeared and filed an answer and a cross-complaint. The plaintiff answered the cross-complaint, and

a trial was had on the issues presented by those pleadings. As the trial court was sitting without a jury, it made findings. Those findings were in favor of the plaintiff, and the defendant has appealed and has brought up a bill of exceptions.

After a short conversation between them the defendant wrote out, signed, and delivered to the plaintiff a writing as follows:

"Campbell Cal.

Mar 28, 1924

"On consideration of securing the services of E. A. Howard. And efforts on his part. And at his expense to obtain a tenant on a five year lease. Subject to my approval. On property located at 3020 Broadway, and Orchard & Brook St Oakland Cal I agree to pay the regular commission as per the Realty Board of Oakland for services rendered. This contract to remain in force for ten days from date

"[Signed] G. W. Burrow.

"R. 1 Box 278 Campbell Cal."

A few days later the plaintiff took Mr. Campe, as president and general manager of the Campe Automobile Company, to the defendant's farm near Campbell and introduced him. A long conversation was held between the defendant and Mr. Campe regarding a lease from the defendant to the Campe Automobile Company. However, no agreement was reached between the parties at that time nor on or prior to April 7, 1924, the end of the term of the plaintiff's contract.

In the conversation last mentioned it developed that the Campe Automobile Company wanted a lease on the property of the defendant, but on the condition that extensive alterations and improvements should be made. The defendant did not object to alterations being made, but insisted that if they were made the work should be done so that future tenants would not find them useless or objectionable, and that they should be installed in such manner as not to mar the appearance of the building. It was known that the improvements would cost a considerable sum, and neither party was willing to bear the whole cost. The owner asked \$700 rental per month, and Mr. Campe was not willing to pay that sum and pay for the improvements.

A short time later, April 9, 1924, the parties met at the office of Mr. Campe in Oakland. Mr. Howard, Mr. Burrow, Mr. Campe, and Mr. Campe's local manager, Mr. Flint, were present. Down to this date there is not a word in the record to the effect that the failure to reach an agreement was caused by "any negligence, fault, or fraud" of Mr. Burrow. It was not until several days later that any plans and specifications of the alterations and improvements were drawn up or presented. However, at this meeting a long conversation was held, and later a writing was executed in words and figures as follows:

"We agree to lease through the agency of E. A. Howard, the following described property,

to wit: Lots 79, 80, and 82 and improvements of Academy Homestead, situate in Oakland, county of Alameda, state of California, on the following terms and conditions: That the rental of said premises shall be \$600.00 per month for a period of five years from August 1st, 1924, and that the lessor agrees to give the lessee an option of a further five years, namely from August 1st, 1929, till August 1st, 1934, at a monthly rental of \$700.00 per month. This option to be executed in the event of it being desired by the lessee ninety (90) days previous to the expiration of the lease and the option to be executed on the same terms and conditions, with the exception of the rental, as enumerated above, as the original lease.

"The lessor agrees to spend in the improvements and alterations of the interior of the premises, in accordance with the plans and specifications submitted to and approved by him the sum of \$2,500.00. This is to be exclusive of the repairing of the roof and the painting of the exterior of the building. The lessee agrees to spend a sum of \$2,500.00 or more in the improvement and alteration of said premises.

"The form of lease to be executed is to contain all of the ordinary provisions and is to be fully approved by both parties hereto.

"George Campe, Incorporated, Lessee,
"George Campe, President.

"Witness: E. A. Howard.

"G. M. Flint.

"Accepted: Lessor, G. W. Burrow.

"Dated at Oakland, California, this 9th day of April, 1924."

[1] The foregoing paper is the only instance in which the parties are claimed to have reached an agreement. Mr. Campe, a witness called by the respondent, so testified, and he was not contradicted by any other witness. If we assume, for the purpose of this case, that such is the fact and that said paper was an agreement, it will be noted that that paper was executed two days after the respondent's contract had expired. Such being the fact the respondent could not recover under his contract. Very soon after *Fultz v. Wimer*, 9 P. 316, 34 Kan. 576, was decided, it was cited by the Supreme Court of this state. *Wilson v. Sturgis*, 16 P. 772, 71 Cal. 226, 229. Later it was cited and followed in *Zeimer v. Antisell*, 17 P. 642, 75 Cal. 509, 512. It has been frequently cited and followed since that time. *Brown v. Mason*, 99 P. 867, 155 Cal. 155, 159, 21 L. R. A. (N. S.) 328. Still, assuming that the writing of April 9, 1924, constituted a valid enforceable contract, of what benefit to respondent is the fact? In the case of *Fultz v. Wimer*, 9 P. 316, 34 Kan. 576, at page 580, the Supreme Court of Kansas answered just that question. Its language is quoted with approval in *Brown v. Mason*, 99 P. 867, 869, 155 Cal. 155, at page 159, as follows:

"It is doubtless true that *Fultz* was instrumental in enabling the defendant to sell his land; but as *Fultz* and *Wimer* had entered into written stipulations as to the terms upon which *Fultz* was entitled to commission, these

stipulations must control. Fultz failed to find or produce a purchaser ready and willing to take the farm and pay the money within the time prescribed in the written contract or within the time that Wimer extended such contract, and Wimer was under no obligation to wait any longer that he might make further efforts. 22 Cent. Law J., 466; Wylie v. Marine, etc., Bank, 61 N. Y. 415. After the extension of the contract had expired, Wimer had the right to sell to Galli or to any one else; and under the written contract, he was not liable to pay to Fultz his commission, or any other sum, because, after the expiration of the extension of the contract, the contract had spent its force. Coleman v. Meade, 13 Bush, 358; Charlton v. Wood, 11 Heisk. 19. If the delay in closing the sale between Galli and Wimer had been caused by any negligence, fault or fraud of Wimer, Fultz would be entitled to his commission; but the evidence shows nothing of this kind. Wimer acted in the best of faith, and was very desirous, being over-anxious, for Fultz to produce a cash purchaser upon the terms prescribed in the written contract."

It follows that the judgment in this case should be reversed.

[2] In what we have said above, we assumed that the writing dated April 9, 1924, was a valid enforceable contract. Under the settled law of this state and of many other states we went too far in making that assumption. The Campe Company was to make the alterations and improvements. The plans and specifications had not been prepared. When they were prepared it is manifest that they should be prepared by, and to the satisfaction of, the Campe Company. By the clear language of the written instrument dated April 9, 1924, they were also to be approved by Mr. Burrow. There was, therefore, a material element in the writing on which the minds of the parties had not met. However, it was of the very essence of the respondent's contract that he should bring the parties to an agreement. Ayres v. Thomas, 47 P. 1013, 116 Cal. 140, 144. There is a long line of cases in this state holding that writings in such form are incomplete and not enforceable as executory contracts to enter into a lease. Morrison v. Rossignol, 5 Cal. 64, 65; Stanton v. Singleton, 59 P. 146, 126 Cal. 657, 664, 47 L. R. A. 334; Wineburgh v. Gay, 150 P. 1003, 27 Cal. App. 603, 605; Durst v. Jolly, 169 P. 449, 35 Cal. App. 184, 189. And the same rule has been applied to executory contracts of sale. Klein v. Markarian, 165 P. 3, 175 Cal. 37, 40-41. Speaking of the rule in general, in 1 Williston on Contracts, § 45, the author says:

"Although a promise may be sufficiently definite when it contains an option given to the promisor or promisee, yet if something is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the very terms of the promise may refuse to agree to anything to which the

other party will agree, it is impossible for the law to affix any obligation to such a promise. It should be observed, however, that though such a promise is invalid, it will not necessarily invalidate an entire agreement of which it forms a part."

A leading case in New York is a parallel case. Mayer v. McCreery, 23 N. E. 1045, 119 N. Y. 434. In that case Mr. Justice Peckham, speaking for the court, said:

"It is, in substance, an agreement that *if the parties shall thereafter agree upon plans for the alteration of the building*, that thereupon a lease of the building upon the terms specified in the letters will be given by the defendant to the plaintiff." (Italics ours.)

On the uncontradicted evidence it follows that the respondent never performed his contract, and he was not entitled to recover.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

X

76 Cal. App. 761

GOLDMAN v. CALIFORNIA CAR CO.
(Civ. 5164.)

(District Court of Appeal, First District, Division 2, California. March 6, 1926.)

1. Corporations ⇨413—Recovery from corporation may be had of money loaned to president which was used to increase corporation's assets, and not wasted or misapplied, irrespective of his authority to borrow.

Recovery from corporation may be had on showing that loans to president were used to increase assets of corporation, irrespective of his authority to borrow, particularly where there was no showing that any moneys were wasted or misapplied.

2. Appeal and error ⇨994(3).

Determination of trial court on truth or falsity of testimony is conclusive on appellate court.

Appeal from Superior Court, City and County of San Francisco; George H. Caba-niss, Judge.

Action by Joseph H. Goldman against the California Car Company and another. Judgment for plaintiff against the defendant named, and it appeals. Affirmed.

John E. Bennett, of San Francisco, for appellant.

Charles N. Douglas, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant corporation and one of its stockholders to obtain a judgment for money. In a common count

he alleged that there was \$500 due him which had not been repaid. The corporation and the stockholder answered the complaint. Later the action was dismissed as to the stockholder, and a trial was had in the trial court of the issues presented by the plaintiff's complaint and the answer thereto by the defendant corporation. The trial court made findings of fact in favor of the plaintiff and ordered a judgment entered in accordance therewith. The defendant has appealed from the judgment and has brought up a bill of exceptions.

[1, 2] The first point made by the appellant is that the evidence is insufficient to sustain the findings. During a part of the time Mr. A. D. Bowen was president of the defendant corporation. On August 20, 1921, the plaintiff drew his check in favor of A. D. Bowen in the sum of \$200; on August 21, 1921, he drew a similar check in the sum of \$50; and on October 6, 1921, he drew a similar check in the sum of \$300. All of those checks were produced at the trial by the plaintiff and there was no question but what the same had been cashed. Mr. Bowen testified that every cent of the money went into the California Car Company. Furthermore, it appeared that all of the checks were deposited in a special account maintained by Mr. Bowen as trustee, and before this action was commenced, so the record runs, that entire account was covered into the accounts of the defendant corporation. Moreover, there is not a trace of evidence to the effect that any of the moneys were wasted or misapplied in any respect. As we understand the appellant, its position is that no corporate authority was presented showing that Mr. Bowen had the power to borrow moneys either in the name of, or for the benefit of, the corporation; and, if we understand the appellant correctly, it takes the position that, therefore, the obligations were the obligations of Mr. Bowen and not the obligations of the appellant. In making this contention it entirely overlooks the testimony to the effect that all of the moneys went to increase the assets of the appellant, and that there was no testimony whatever to the effect that the proceeds of the checks were used or intended to be used for the personal affairs of Mr. Bowen. In *Pauly v. Pauly*, 40 P. 29, 30, 107 Cal. 8, 18, 48 Am. St. Rep. 98, the Supreme Court said:

"If the bank, in fact, furnished to the cable company moneys, whether as loans upon unauthorized promissory notes, or upon account, or paid money for construction of its road, or in discharge of its legal liabilities, so far as the same were in fact applied to the proper use and benefit of the cable company, such moneys may be recovered by the plaintiff to the extent to which they have not been repaid. Plaintiff in the last count of his complaint pleaded facts which, if proved, would entitle him to such a recovery."

If it be claimed that the moneys did not in fact go to swell the assets of the defendant corporation, the reply is that the truth or falsity of the testimony on the subject was for the determination of the trial court, and its determination of the question of fact is conclusive on this court.

We find no error in the record.

The judgment is affirmed.

We concur: LANGDON, P. J.;
NOURSE, J.

77 Cal. App. 60

PEOPLE v. MULLALY. (Cr. 883.)

(District Court of Appeal, Third District, California. March 11, 1926.)

1. Criminal law $\S$ 1159(3).

In prosecution for unlawfully possessing intoxicating liquor, implied findings of jury against defendant on conflicting evidence *held* conclusive.

2. Criminal law $\S$ 369(6)—Admitting evidence of sales of intoxicating liquor, made prior to time of alleged offense of unlawful possession, *held* not error (Pen. Code, $\S$ 1025).

In view of Pen. Code, $\S$ 1025, in prosecution for unlawfully possessing intoxicating liquor, evidence of defendant's sales, made prior to time of alleged offense, *held* admissible to show that liquor found on premises belonged to him.

3. Criminal law $\S$ 369(2).

In view of Pen. Code, $\S$ 1025, fact that evidence material to crime charged may disclose commission of another crime by defendant is no objection to its admission.

4. Criminal law $\S$ 1172(2)—Defendant's rights *held* not to have been prejudiced by instruction on law applicable to sale of liquors.

In prosecution for unlawfully possessing intoxicating liquor, since any sale of liquor made by defendant at his place of business was unlawful, his rights were not prejudiced by instruction on law applicable to such sales.

5. Criminal law $\S$ 1172(2) — Instruction that defendant had burden of proving license or permit to have liquors in his possession *held* not to have affected result of trial.

Where sole defense to prosecution for unlawfully possessing liquors was that defendant did not possess liquor at all, and circumstances proved showed that, if he did have it in his possession, it was unlawful, charge that burden of proving license or permit authorizing him to have it in his possession was on him *held* not to have affected result of trial.

6. Criminal law $\S$ 783(1)—Refusal of instruction to consider defendant's previous sales of liquor only on question of intent, and not as evidence of commission of offense charged, *held* not error.

In prosecution for unlawfully possessing intoxicating liquor, where evidence as to previous

sales was admissible to show liquor found was in defendant's possession, it was not error to refuse his instruction that proof of previous sales was admissible only on question of intent, and not as evidence of commission of offense charged.

Appeal from Superior Court, Stanislaus County; L. W. Fulkert, Judge.

Pat Mullaly was convicted of unlawful possession of intoxicating liquor, and he appeals. Affirmed.

J. B. Jennings and T. F. Griffin, both of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The information herein charges the defendant with the offense of unlawful possession of intoxicating liquor and alleges that prior to the commission thereof he was "duly convicted of the offense of unlawfully having intoxicating liquor in his possession." He admitted the prior conviction and was convicted of the offense charged. This appeal is from the judgment and the order denying a new trial.

[1] At the time of the alleged offense the defendant was conducting a hotel. On the 23d day of February, 1925, between 8 and 10 o'clock p. m., a deputy sheriff, a constable, and two city marshals duly searched the defendant's hotel and the premises adjacent thereto. From their testimony it appears that there was a bar in the hotel at which soft drinks were served. There was a tankhouse about 15 or 20 feet from the rear of the hotel, and a barn, in which defendant had been keeping his horses, estimated to be from 75 to 150 feet diagonally from the rear of the hotel. In the kitchen they found a flask containing a small quantity of jackass brandy, and there was a strong odor of the same kind of liquor in a bucket of water behind the bar and also in some glasses at the same place. In the tankhouse they found two bottles containing a "very, very little" of the same kind of liquor. Three bottles of wine were found in the barn. There were many empty bottles and jugs in the tankhouse and in the back yard. One of the city marshals testified as follows relative to the actions of defendant during the search:

"I went in the hotel after I had been in the back yard, and he was wandering around from one room to the other, and didn't seem to be anybody keeping track of him, so I kind of kept track of him. * * * He went from one room to another, trying to chase a dog out of the house. * * * He finally left the dog in the bar room and * * * he went out through the hallway, into the dining room and from the dining room to the kitchen and out the back screen door. * * * When he went out the back door, he started on a run, * * * and I kept as near to him as I could, and he reached down in the yard and grabbed a bottle and ran a little further, * * * and then he threw

the bottle, and I heard the crash, and in an instant I smelled the liquor. I asked him, * * * 'Pat, what did you throw at?' He says, 'The * * * dog.' I says, 'There ain't no dog there.' He says, 'Yes, there was.' I says, 'You broke the bottle.' 'I didn't break no bottle,' he says.

"Q. Where was the dog at that time? A. In the hotel. * * * The side of the building and brick was wet and broken glass there was wet. * * *

"Q. And did you smell anything on the bottle? A. Yes, sir. * * * What is known as jack-ass brandy."

Others of the officers testified that they heard the crash of the bottle when it was thrown and that the liquid therefrom was jackass brandy. Three previous sales of intoxicating liquor by defendant were proved. At the first sale he went out the rear door to get the liquor and was gone "just a few minutes." He took the liquor from the barn for the second sale and from behind the bar for the third. The defendant took the witness stand, and denied practically everything stated by the witnesses for the prosecution, except that his premises were searched. The implied findings of the jury are conclusive against him upon such conflicting evidence.

[2, 3] Appellant contends that it was error to admit evidence of sales made by him prior to the time of the alleged offense. Such evidence was admissible as tending to show that the liquor found in the barn and in the tankhouse belonged to defendant. *People v. Buttalia* (Cal. App.) 233 P. 401. It also tended to show that defendant's possession thereof was for an unlawful purpose. Appellant's specific contention is that these sales "were included in offense * * * for which he had suffered a previous conviction" as charged in the information and for that reason "should not have been alluded to on the trial." Section 1025 of the Penal Code provides that, where a previous conviction is charged, if the defendant "answers that he has suffered the previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial." Clearly it is the previous conviction, not the evidence upon which such conviction was had, which must not be "alluded to on the trial." The mere fact that evidence which is material to the crime charged may disclose the commission of another crime by defendant is no objection to its admission.

[4] Appellant contends that the court erroneously instructed the jury upon the law applicable to the sale of intoxicating liquor. Under no provision of the law could the defendant have made a lawful sale of such liquor at his place of business. It follows that any sale made by him must have been unlawful, and therefore his rights could not have been prejudiced by the instruction. *People v. Silva*, 227 P. 976, 67 Cal App. 351, 357.

[5] The court instructed the jury as follows:

"The court instructs you that upon proof by the prosecution beyond a reasonable doubt that the defendant had possession of said intoxicating liquor, and for an unlawful purpose such as the unlawful sale thereof, but burden of proving any license or permit authorizing the defendant to have said intoxicating liquor in his possession is upon the defendant, as any such permit, if in existence, is a matter peculiarly within the knowledge of the defendant. And if under such circumstances, and after such proof by the prosecution, the defendant fails to prove or produce any such permit or authority to have such intoxicating liquor in his possession, you are to presume that the defendant has no such permit or authority."

The instruction, in part at least, is not in harmony with the law as stated in *People v. Pagni*, 230 P. 1001, 69 Cal. App. 94; *People v. Arnarez*, 230 P. 193, 68 Cal. App. 645; *People v. Silva*, supra, and *People v. Matos*, 227 P. 974, 67 Cal. App. 346. In the *Arnarez* Case it is said:

"That the jury may properly infer from proof of possession of intoxicating liquor and the circumstances concerning the possession that the defendant has it for unlawful purposes, as defined in the Volstead Act, and might find the defendant guilty upon such proof without further testimony, is an entirely different matter from stating to the jury that, under mere proof of possession, the jury is bound as a matter of law to bring in a verdict of possession for unlawful purposes."

There was no pretense at the trial, however, that the defendant had the liquor lawfully or for a lawful purpose. His sole defense was that he did not have possession of the liquor at all, and the circumstances proved were such as to show conclusively that, if he did have the liquor, his possession thereof was unlawful. The instruction, therefore, could not have affected the result of the trial.

[6] The court refused to give an instruction requested by defendant to the effect:

That proof of previous sales of liquor by defendant "will be considered by you only for the purpose of showing a willful intent * * * on the part of the defendant to commit the offense charged in the information, * * * and not as evidence of the commission of the offense charged in the information; * * * and, if the prosecution has not proved beyond a reasonable doubt that such other offenses show a willful intent on the part of the defendant to continue to violate the law, then it is your duty not to take into consideration at all any other offenses."

Such evidence was admissible for the purpose, not stated in the proposed instruction, of showing that the liquor found in the barn and in the tankhouse was in defendant's possession. The instruction, therefore, was properly refused. In other instructions the court told the jury that the defendant was not on trial for and could not be convicted of such prior sales.

There is no prejudicial error shown by the record. The evidence against defendant is strong and convincing and his guilt is abundantly proved.

The judgment and the order are affirmed.

We concur: PLUMMER, J.; HART, J.

HALL v. SUPERIOR COURT IN AND FOR IMPERIAL COUNTY et al. (Civ. 4810.)

(District Court of Appeal, Second District,
Division 2, California. March 31,
1925.)

1. Prohibition  28—Disqualification of judges of superior court to act in action involving irrigation district's property because of ownership therein cannot be considered on prohibition, where district was not made a party to the action.

Disqualification of judges of superior court owning property in irrigation district to act in action involving district's property cannot be considered on prohibition to prevent making of findings and entry of judgment in such action, where district in whose property judges had an interest was not a party to the action.

2. Prohibition 11.

General writ of prohibition may not be employed to review errors of an inferior tribunal.

On rehearing. Writ denied.

For former opinion, see 233 P. 80.

See, also, 245 P. 814.

Jesse George, of San Diego, for petitioner.
Leon R. Yankwich and Luther Brown, both of Los Angeles, and J. Stewart Ross, Robt. B. Whitelaw, and Chas. L. Brown, all of El Centro, for respondents.

WORKS, J. This proceeding, along with two others which were companions with it, was treated in the opinion in *Hall v. Superior Court* (Cal. App.) 233 P. 80. In this matter there were certain conditions of fact which in some material respects differentiated it from the other two. These differences were not made the basis of specific argument in the briefs, but the three proceedings having been briefed together, they were all treated by us as if they were identical in every respect. A petition for rehearing was filed in this matter, in which the differences above mentioned were specified, and the petition was granted. In this opinion upon the rehearing we refer to the facts stated in our former opinion, as far as they are pertinent, making below such additional statement as is necessary.

The present proceeding was different from its companions in these respects: In the cause pending in respondent court, proceed-

ings in which are here sought to be halted, no findings and judgment have yet been signed and filed, and one of respondent judges, but for the pendency of this matter, threatens to make therein findings and render therein judgment adverse to petitioner. It therefore becomes necessary for us now to pay more extended attention to a question which was merely mentioned in our former opinion, the question whether respondent judges are disqualified to act in the cause mentioned.

[1, 2] The alleged disqualification of respondent judges arises from their ownership of lands in respondent irrigation district, which public corporation, as will be noted from the statement of facts contained in our former opinion, is not a party to the action. It is also to be observed that, as stated in the same place, an application for leave to file an amended and supplemental complaint making it a party has been denied by one of respondent judges. This situation meets us at the threshold of any investigation of the question whether respondents are disqualified. Is there any theory upon which the point as to their alleged disqualification may be considered, there being no party to the action in whose welfare or in whose property they have an interest? It appears to us that there is not. To reach a contrary conclusion involves two things: First, it must be determined that respondent court erred in refusing to permit the irrigation district to be made a party; second, we must hold that the error can be reviewed and corrected in this proceeding. As to the second question, laying the first aside, it is the general rule that the writ of prohibition may not be employed for the purpose of reviewing errors of an inferior tribunal, as the purpose of the writ is to prohibit threatened action and not to correct action which is already complete. *Traffic Truck Sales Co. v. Justice's Court*, 220 P. 306, 192 Cal. 377. It has often been determined, it is true, that where the right to prohibition exists the court will sometimes annul or set aside past orders which stand in the way of complete relief. For instance, it was said in *Havemeyer v. Superior Court*, 24 P. 121, 138, 84 Cal. 327, 394 (10 L. R. A. 627, 18 Am. St. Rep. 192):

"It [the writ] is primarily and principally preventive,—its office is to arrest proceedings; but when a case arises in which there are proceedings to be stayed or prevented, it will also annul such prior proceedings as may be necessary to make the remedy complete. The principle is that which prevails in equity. When there is jurisdiction, the court will afford complete relief."

Many and later cases might be cited to the same effect, but we know of none which will support the contention of petitioners here. Let us contrast the situation in this proceeding with that supposed in the quotation from

the opinion in *Havemeyer v. Superior Court*. If we were to hold that the order of respondent court refusing leave to bring in the irrigation district as a party was erroneously made, we are asked to correct that error by deciding, in effect, that the new party shall be brought in, are sought to demean ourselves as if in fact it had been brought in, and are upon that foundation requested to declare that respondent judges are disqualified. While it is said in the quotation that the writ "is primarily and principally preventive," we are expected first, or primarily, upon petition for the writ, to administer a corrective, and thereafter, or secondarily, to administer the preventive purely as a resultant from the corrective. It is said, again, that—

"When a case arises in which there are proceedings to be stayed or prevented, it [the writ] will also annul such prior proceedings as may be necessary to make the remedy complete."

Here we are asked to annul a prior proceeding to the end that there may thereupon arise or be made apparent a proceeding to be stayed or prevented. We are not in the position of a court of equity, which, after having acquired jurisdiction, will afford complete relief; but it is insisted that we may award a preliminary corrective relief as a foundation for the acquisition of jurisdiction or power to afford the preventive relief which is the usual and ordinary purpose of the writ. We are satisfied that petitioner is not entitled to the ultimate relief which is sought.

The alternative writ of prohibition is vacated, and a peremptory writ is denied.

We concur: FINLAYSON, P. J.; CRAIG, J.

198 Cal. 373

HALL v. SUPERIOR COURT IN AND FOR IMPERIAL COUNTY et al. (L. A. 8699.)

(Supreme Court of California. March 31, 1926.)

1. Judges ~~§~~42—Interest disqualifying judge must be certain, definable, pecuniary, or proprietary interest which will be directly affected by judgment rendered (Code Civ. Proc. § 170, subd. 1).

Interest which disqualifies a judge from acting judicially in an action under Code Civ. Proc. § 170, subd. 1, must be certain, definable, pecuniary, or proprietary interest which will be directly affected by judgment rendered.

2. Judges ~~§~~42—Disqualification of judge may be disclosed by facts alleged in complaint in conjunction with extrinsic facts shown in support of petition for prohibition.

It is not essential that disqualification of judge be manifest on face of complaint, it being sufficient if disqualifying interest is disclosed by

facts alleged in complaint in conjunction with extrinsic facts shown in support of petition for prohibition.

3. Judges $\S$ 42—Judge may be disqualified for interest where, because of form of action or kind of relief asked, he would be unable to become a party to such action.

Judge may be disqualified by reason of his interest in the subject-matter where, because of form of particular action or kind of relief asked, he would be unable to become a party to such action, if he so desired.

4. Judges $\S$ 43—Judge is disqualified if holding stock in corporation which is interested in property involved in controversy.

Judge is disqualified if he is a stockholder in a corporation, where corporation is interested in property involved in controversy, although not a formal party to action.

5. Judges $\S$ 42—Judges of superior court owning property in irrigation district held disqualified by interest from presiding in an action involving district's property, though district was not a party to action (Code Civ. Proc. $\S$ 170, subds. 1, 5).

Judges of superior court owning property in irrigation district had such a proprietary interest in district's property, so as to be disqualified by interest from presiding in an action against district's predecessor to enjoin operation of canal so as to permit seepage, in view of Code Civ. Proc. $\S$ 170, subds. 1, 5; it being immaterial that district was not a party to the action, as decree therein would directly affect it.

6. Judges $\S$ 51(2)—Objection on ground of disqualification of presiding judges might be raised at any time.

If irrigation district was interested in a cause by virtue of its ownership of property which would be affected by a judgment therein, objection made on ground of disqualification of presiding judges might be raised at any time.

7. Waters and water courses $\S$ 224—Members of irrigation district have proprietary interest in district's property.

While not occupying precise status of stockholders in a corporation, landowners as members of an irrigation district sustain such relation to the district as to give them a proprietary interest in district's property.

8. Judges $\S$ 39—Statute providing for disqualification of judges of superior court in certain proceedings is applicable to an irrigation district; "public agency" (Code Civ. Proc. $\S$ 170, subd. 5).

Code Civ. Proc. $\S$ 170, subd. 5, relating to disqualification of judges of superior court in actions against the state reclamation board, levee, swamp land, or drainage districts, or any "public agency," is applicable to an irrigation district.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Agency.]

9. Judges $\S$ 42—Judges of superior court owning property in irrigation district held disqualified, on filing of supplemental complaint by plaintiff seeking in good faith to make district formal party to action involving district's property.

Judges of superior court owning property in irrigation district held disqualified by interest on filing of supplemental complaint by plaintiff seeking in good faith to make district a formal party to an action involving property of district.

10. Judges $\S$ 55—Judge's disqualification is not dissipated by refusal to permit pleadings making him party in good faith to be filed.

Judge's disqualification is not dissipated by his refusal to permit pleadings to be filed making him party in good faith and by striking out such pleadings after they are filed.

11. Prohibition $\S$ 3(2).

Prohibition held proper remedy to prevent making of findings and entry of judgment by disqualified judge, notwithstanding availability of remedy by appeal.

In Bank.

Application for writ of prohibition by Maude Hall against the Superior Court of the State of California in and for the County of Imperial and others. Writ granted.

For opinion in District Court of Appeal, see 245 P. 813.

See, also, 233 P. 80.

Jesse George, of San Diego, for petitioner.

Leon R. Yankwich and Luther Brown, both of Los Angeles, and J. Stewart Ross, Robt. B. Whitelaw, and Chas. L. Brown, all of El Centro, for respondents.

LENNON, J. This proceeding in prohibition was instituted to restrain the judges of the superior court in and for the county of Imperial from further participating in an action pending in said court. The writ is sought upon the ground that the said judges are disqualified under the provisions of subdivision 1 of section 170 of the Code of Civil Procedure to sit or act in said action by virtue of their alleged interest in the subject-matter of said actions, and are further disqualified by virtue of the provisions of subdivision 5 of section 170 of the Code of Civil Procedure as it existed at the time the action was instituted and the proceedings in controversy here heard and determined.

The facts set forth in the petition for the writ of prohibition are these: The petitioner herein commenced an action on May 17, 1917, in the superior court of Imperial county against "Imperial Water Company No. 7," a corporation, for the purpose of recovering the sum of \$12,610 for damages, which it is alleged was done to petitioner's land by the seepage of water from one of the canals of said water company upon the land of the petitioner and for injunctive relief abating the

use and operation of said canal in such a manner as to cause the water therein to seep upon the petitioner's land. A trial of the cause was had before Judge Cole, one of the respondent judges, who, subsequent to a trial of said case, rendered a decision directing a judgment in favor of the defendants. Only a minute entry of this judgment was made. Subsequent thereto in August, 1923, upon motion by the attorney for the petitioner, plaintiff in said action, the court set aside said minute entry and decision, but refused the request to permit additional testimony to be introduced. On August 19, 1923, said judge, sitting in said court, granted the petitioner, plaintiff therein, damages in the sum of \$300, but denied all injunctive relief. No findings and judgment have ever been made and entered in said action. In November, 1922, the Imperial irrigation district, a public corporation, purchased all of the property of the said water company, including the said canal from which water seeped upon and damaged the petitioner's land. Since the purchase of the said canal, the irrigation district has operated and still continues to operate it in such a manner as to cause water to continue to seep therefrom and upon petitioner's land, so that the said canal continues to be a nuisance. Unknown to the petitioner, whose lands were not within the Imperial irrigation district at the time she commenced said action and at the time of the trial thereof, the said irrigation district was the party who diverted the water from its natural course in the Colorado river, and caused it to be carried through the canals of the said water company. Petitioner was also ignorant at this time of the fact that the respondent judges of the superior court in Imperial county were landowners in said irrigation district. It was not until July, 1924, that the petitioner became aware of these facts concerning the interest of the said irrigation district in the said canal and the interest of the respondent judges in the irrigation district. Upon the discovery of these facts and prior to findings made or entry of judgment in the action commenced against the "Imperial Water Company No. 7," the petitioner, plaintiff in said action, filed an objection to respondent judges sitting or acting further in said action, upon the ground that they were and are interested therein and moved to be permitted to file an amended and supplemental complaint making the said Imperial irrigation district a party defendant in said action. The objection to said judges was supported by proper affidavits showing their ownership of land within the irrigation district. One of the alleged disqualified judges, Judge Cole, overruled the objections of petitioner to himself and the other judge of the superior court of Imperial county, and denied the motion to file the amended and supplemental complaint making the said irrigation district a party to the action. Thereupon and prior to any findings

made or judgment entered in said action, the petitioner presented her petition for the writ of prohibition to the District Court of Appeal, Second Appellate District, Division 2, to prevent said judges from making findings and entering judgment therein, as it is alleged they threatened to do. 233 P. 80.

The present proceeding was instituted in conjunction with two similar proceedings directed against two other water companies—Water Companies No. 3 and No. 5. As the time within which the motion for a new trial might have been made in these cases had expired by operation of law and as there were no proceedings pending in those two cases to which a writ of prohibition could be directed, no hearing by this court was asked in those cases and the judgment therein is now final. We are confined, therefore, to the case against Water Company No. 7, in which action a decision has been made, but no findings made or judgment entered, and, consequently, there are proceedings in that case to which a writ of prohibition—if it be deemed that a writ should issue—could be directed.

Petitioner charges that the respondent judges of the superior court in Imperial county are disqualified to sit or act in the action pending therein by virtue of the provisions of section 170, subd. 1, of the Code of Civil Procedure, for interest in said action growing out of their ownership of land within the confines of said Imperial irrigation district. Respondents insist, on the other hand, that the irrigation district not being a party to the action and the action not relating to its property, the ownership of land in the irrigation district by the respondent judges does not create grounds for their disqualification. In other words, the respondents declare that a superior court judge, who is a landowner in an irrigation district, may sit and act in a case directly affecting the property owned by such district unless or until such district is made a party to the action. In this behalf it is argued that there is not before the court a party in whose welfare or in whose property the respondent judges have an interest, and, in the absence thereof, their disqualification cannot be raised. The case of *San Diego v. Andrews* (Cal. Sup.) 231 P. 726, relied upon by respondents in support of this proposition, is not in point. That case involved the disqualification of the trial judge under subdivision 5 of section 170 of the Code of Civil Procedure. The question of whether or not a judge was disqualified under subdivision 1 of said section was not raised. The rule therein announced must be restricted to cases involving subdivision 5 of section 170 of the Code of Civil Procedure. The fallacy of respondents' argument in this behalf lies in its assumption that the action does not relate to the property in which the irrigation district is an interested party. Predicated primarily upon the facts existent at the commencement of the action, the argument ig-

noses the change wrought in the interest of the irrigation district in the property involved in the litigation, i. e., the complained of canal, by its purchase of the same prior to the making of any findings and entry of judgment in the action. Thus we are confronted with the question of whether or not a judge may be disqualified because of interest in the result of the litigation even though that interest may not appear upon the face of the proceedings and although the subject-matter of the judges' interest may not be formally involved in the controversy.

[1-4] The interest which disqualifies a judge from acting judicially in an action under section 170, subd. 1, of the Code of Civil Procedure, must be a certain, definable, pecuniary, or proprietary interest which will be directly affected by the judgment rendered. *Adams v. Minor*, 53 P. 815, 121 Cal. 372; *Meyer v. San Diego*, 53 P. 434, 121 Cal. 102, 41 L. R. A. 762, 66 Am. St. Rep. 22; *North Bloomfield, etc., Co. v. Keyser*, 53 Cal. 315; *Heilbron v. Campbell*, 23 P. 122, 3 Cal. Unrep. Cas. 204; *Quatman v. Superior Court*, 221 P. 666, 64 Cal. App. 203; *Lindsay-Strathmore Irr. Dist. v. Superior Court*, 187 P. 1056, 182 Cal. 315. It is not essential that the disqualification be manifest upon the face of the complaint. It is sufficient if the disqualifying interest is disclosed by the facts alleged in the complaint in conjunction with extrinsic facts shown in support of the petition for prohibition. *Lindsay-Strathmore Irr. Dist. v. Superior Court*, supra. "The judge may be disqualified by reason of his interest in the subject-matter where, because of the form of the particular action or the kind of relief asked, he would be unable to become a party to such action if he so desired." *Lindsay-Strathmore Irr. Dist. v. Superior Court*, supra. And a judge is disqualified if he is a stockholder in a corporation where the corporation is interested in the property involved in the controversy, although not a formal party to the action. *Adams v. Minor*, supra.

In *Adams v. Minor*, supra, the action involved the validity of certain bonds issued by an irrigation district. The Bank of Modesto held a portion of these bonds. The judge before whom the case was tried owned some shares of capital stock in said bank. The parties to the action were Adams, Stoddard, and certain others, as plaintiffs, and the collector of the Modesto irrigation district as defendant. The First National Bank of Los Angeles was an intervener in the action. It did not appear that the Bank of Modesto, in which the respondent judge was a stockholder, and which held certain of the disputed bonds of the irrigation district, was a party to the action. The question involved was that of whether or not the judge was disqualified by reason of his interest by virtue of being a stockholder in the Modesto Bank from trying the action. The court held that

the said judge was disqualified from sitting or acting in the case and the mere fact that subsequent to the submission of the cause and pending decision the judge disposed of his stock in the said bank did not remove the disqualification. The following language constitutes the basis of the court's decision:

"It was held by Chancellor Sanford in *Washington Ins. Co. v. Price*, 1 Hopk. Ch. (N. Y.) 1, that a chancellor being a stockholder in a corporation cannot do any judicial act in a cause in which that corporation is a party, although he is not personally a party to the record.

"We can see no substantial difference in the case of a judge who is a stockholder in a corporation sitting in a case brought by or against such corporation, and a case where the matter in controversy involves the property of such corporation although it is not a party to the action."

The rule enunciated in that case governs and controls us in the determination of the question presented in the case at bar. It seems obvious that the disqualification of the respondent judges does not depend, as respondents contend, upon the irrigation district being a party to the action, but rather upon the interest of the irrigation district in the property involved in the action, and the interest of the respondent judges in the irrigation district as landowners therein. Although the irrigation district was not a party to the action, yet that was not essential under the rule of *Adams v. Minor*, supra, for the action involves property in which the irrigation district was interested and as owners of such property of the irrigation district the respondent judges had an interest therein. It was unnecessary, therefore, for the irrigation district to be made a party to the suit, but merely to make it appear that the property in which it had a proprietary interest be involved therein. For if the irrigation district is interested in the property in controversy and the respondent judges are interested in the irrigation district and will be pecuniarily affected by the determination of the case, they must be held to come within the purview of the rule enunciated in the case of *Adams v. Minor*, and are disqualified from taking judicial part in the action.

The Imperial irrigation district is a public corporation. It is the owner of numerous canals, rights of way, and other easements within Imperial county. Having purchased the properties of the Imperial Water Company, including the canal complained of, said irrigation district became interested in the outcome of the action, seeking, among other things, the abatement of said canal. It is patent that the granting or the denial of a decree, subsequent to said purchase by said irrigation district, would necessarily affect said irrigation district. If the relief prayed for in the action against the water company is awarded, the canal, which is the property

of said irrigation district, cannot be used until it is put into such shape that water will not seep therefrom upon the petitioner's land. This will necessarily entail an expenditure of money—the amount not being material—by the said district. If the relief is denied, the irrigation district will not be compelled to expend any money in the conditioning of said canal. If the relief prayed for is granted and the irrigation district discontinues the use of the canal, the said district will be peculiarly affected by the same, for the said canal is now used to divert some ten thousand acre feet of water per annum and the closing of the canal would materially diminish the supply of water available for use within said district. Thus it is palpable that a judgment and decree in said action, now pending in the superior court in Imperial county before one of the respondent judges, would directly affect the said irrigation district. At all events, it would limit and control the use of the canal.

[5-7] Respondents contend, however, that petitioner elected to proceed against the water company, who it is conceded is a cotortfeasor, without joining the irrigation district, and having done so she cannot now complain because she neglected to make the district a party and ask that a writ of prohibition be issued. This contention overlooks the fact alleged under oath in the petition for the writ of prohibition, and which is not controverted, that the petitioner had no knowledge of the facts concerning the responsibility of the irrigation district for the diversion of the water nor of the ownership by said district of the canal, of which complaint is made. Moreover, if the irrigation district is interested in the cause by virtue of its ownership of property which will be affected by a judgment therein, the objection made on the ground of the disqualification of the respondent judges may be raised at any time. *Lindsay-Strathmore Irr. Dist. v. Superior Court*, supra. Respondents insist, however, that the denial of injunctive relief depended upon facts as they existed at the time of trial, upon facts which occurred prior to the assumption of ownership of the canal by the irrigation district and that the said district did not assume by the purchase of the water company's property the liabilities of said water company which arose prior to the purchase. It is therefore immaterial, it is argued, whether relief for the injury caused by the said canal be in the nature of damages or for equitable relief or both. While it may be conceded that the district did not assume liability for the damage caused by the canal prior to the purchase thereof, and conceding also that the water company was independently liable for the damages occasioned by the seepage from the said canal, yet it ignores the very salient fact that not only are damages sought in the action, but, in addition

thereto, equitable relief in the nature of an injunction abating the said canal. The uncontroverted allegations in the petition for the writ are to the effect that the canal still continues to be a nuisance and continues to injure the petitioner's land by seepage of water therefrom; this being so, if injunctive relief necessarily be affected thereby. The irrigation district being an interested party in the property involved in the controversy, the question now arises as to the nature of the interest of the respondent judges in the irrigation district. The interest of said judges as landowners within said district was such a direct, proprietary interest as to disqualify them from acting in an action involving the property of said district. While not occupying the precise status of stockholders in a corporation, yet the landowners, as members of an irrigation district, sustain such a relation to the district as to give them a proprietary interest in the district's property. This relation is aptly pointed out in the case of *Merchants' National Bank v. Escondido Irr. Dist.*, 77 P. 937, 939, 144 Cal. 329, 334, where the court distinguishes irrigation districts from ordinary municipal corporations in the following language:

"But here, the corporation in question is distinguished from ordinary municipal corporations by the fact that 'the legal title,' only of the property of the corporation is vested in the district, 'in trust for the uses and purposes set forth in [the] act'; and that the beneficiaries of the trust—who, upon familiar equitable principles, are to be regarded as the owners of the property—are the landowners in the district with whose funds the property has been acquired (Civ. Code, § 853); and in whom, indeed, is vested by the express provisions of the statute, in each, the right to the several use of a definite proportion of the water of the district, and in all, in common, the equitable ownership of its water-rights, reservoirs, ditches, and property generally, as the means of supplying water. (Stats. 1887, pp. 34, 35, §§ 11, 13.) Such rights as these cannot be distinguished in any way from other private rights. * * *

Thus it is patent that the respondent judges as the equitable owners of the property of the irrigation district had a direct, proprietary interest in the property involved in the action and by virtue of this ownership were disqualified from acting judicially therein. It follows then that the action of the respondent judge in overruling the objection to their sitting or acting further in the cause was void and without effect in law. *People v. De La Guerra*, 24 Cal. 73; *Johnson v. German Am. Ins. Co.*, 88 P. 985, 150 Cal. 336; *Lindsay-Strathmore Irr. Dist. v. Superior Court*, supra.

Respondents advance the additional argument that the subject of the action is the past operation of the canal, the canal being merely the object through which the alleged injury was accomplished. This argument fails, however, to consider the fact that the,

relief requested is, among other things, for the abatement of the canal as a nuisance and the granting or the denial of the relief is a matter in which the respondent judges are directly interested.

[8] The trial judges were also disqualified to sit or act in said action by virtue of the provisions of subdivision 5 of section 170 of the Code of Civil Procedure as it existed at the time the action was instituted. Respondents insist that, the irrigation district not being a party to the action, this Code section is inapplicable to the instant case. The facts set out in the petition for the writ bring this case clearly within the purview of said Code section, which provided:

"In an action or proceeding brought in the superior court * * * by or against the reclamation board of the state of California, or any reclamation, levee, swamp land or drainage district, or any public agency, * * * affecting or relating to any real property or an easement or right of way, levee, embankment, canal, * * * the judge of the superior court of the county, * * * in which such real property, or any part thereof, or such easement or right of way, * * * canal or work, or any part thereof is situated shall be disqualified to sit or act, and such action, if brought in the superior court, shall be heard and tried by some other judge of the superior court requested to sit therein by the Governor. * * *

There is an additional provision permitting parties, by stipulation in writing, to waive the disqualification. No such waiver appears in the instant case. An irrigation district, although not specifically designated in said Code section, is a public agency of a kindred character to those particularly mentioned therein and is one of the "public agencies" contemplated by said Code section. *Lindsay-Strathmore Irr. Dist. v. Superior Court*, 187 P. 1056, 182 Cal. 315.

[9, 10] It is not disputed that the complained of canal is situate in Imperial county. The offer of an amended and supplemental complaint by the plaintiff, petitioner herein, in the action pending in said superior court of Imperial county, seeking in good faith to make the Imperial irrigation district a formal party to the action was, it seems to us, sufficient in and of itself to disqualify said judges. The mere filing of the original complaint making the irrigation district a party would have disqualified them from further judicial participation in the cause. *People v. De La Guerra*, 24 Cal. 73. This being so, we think a like effect should be given to the presentation of an amended or supplemental complaint making an irrigation district a party to the action. A judge's disqualification is not dissipated by his refusal to permit pleadings to be filed making him a party in good faith or by striking out such pleadings after they are filed. *People v. De La Guerra*, 24 Cal. 73; *Younger v. Superior Court*, 69 P. 485, 136 Cal. 682.

In *People v. De La Guerra*, supra, a change of venue was requested on the ground that the judge was disqualified. Instead of granting the request, the judge dismissed the action because he believed that under the pleadings there was nothing to try and that a change of venue was unnecessary. This court held the dismissal of the proceedings was void on the ground of the incompetency of the judge to act and that the refusal to change the place of trial was erroneous.

In *Younger v. Superior Court*, supra, the trial judge struck out the complaint and dismissed the action, although the complaint alleged his interest in the action and he was made a party thereto. In dismissing the action the judge stated, in effect, that the court was satisfied that the allegation was made "for the sole purpose of making said Lucas F. Smith a party defendant in said action in order to disqualify him as judge of said court in the trial of said action, and to prevent him from acting therein as such judge, and for no other reason." On certiorari, this court held the action of the trial judge to be void and stated, among other things, that "where the judge is made a party, upon proper allegation, he cannot arbitrarily determine that he is not a party, nor that he is not interested."

Although in the instant case the Imperial irrigation district was not a formal party to the action, yet the motion to file an amended complaint making said irrigation district a party, if granted, would have disqualified the respondent judges from sitting or acting in the case. The denial of this motion was tantamount to a dismissal of the action in so far as it affected the said district. It will be especially noted that at the time said motion was made the irrigation district was the owner of the complained of canal and was operating it, as alleged, in such a manner that it continued to damage the petitioner's land. Thus in order to grant full injunctive relief—if it were determined that such relief should be granted—the irrigation district was a necessary party to the action.

The case of *San Diego v. Andrews* (Cal. Sup.) 231 P. 726, cited by respondents to the effect that no disqualification arises until an irrigation district is made a party to the action, presents no barrier to our conclusion. In that case the original parties to the action entered into a stipulation waiving the disqualification of a judge. Thereafter an irrigation district and other parties intervened. The question of the effect of the stipulation upon the parties subsequently intervening arose. This court held that since, at the time the stipulation was entered into and filed, none of the public agencies mentioned in or contemplated by subdivision 5 of section 170 of the Code of Civil Procedure was a party to the action, the stipulation was a nullity and that the disqualification did not arise until the entrance into the case of the irrigation

district as a party. The soundness of this conclusion is indubitable. In the instant case, however, the respondent judge refused to permit the irrigation district to be made a party and thus in effect, in a manner of speaking, circumvented his own disqualification which would necessarily have arisen as soon as the irrigation district became a party to the action.

It should be here noted, however, that subdivision 5 of section 170 of the Code of Civil Procedure was by the amendment of 1925 eliminated. Stats. 1925, p. 18. Having been eliminated, it follows that although the judges were disqualified under this subdivision to said section to participate in said action, they are not now disqualified. Were it not for the fact, therefore, that the judges, as previously indicated, are disqualified from sitting by virtue of the provisions of subdivision 1 of section 170 of the Code of Civil Procedure, we would be constrained to deny the writ sought.

[11] Respondents contend that the granting of the writ would involve a review of the ruling of the trial court on the motion to file the amended and supplemental complaint making the irrigation district a party to the action, and that such error—if it be error—cannot be reviewed and corrected in this proceeding. In this behalf, it is argued that the writ of prohibition may not be employed for the purpose of reviewing errors of an inferior tribunal, as the purpose of the writ is to prevent threatened action and not to correct completed action. Conceding this to be the purpose of the writ of prohibition, yet the facts of the instant case come squarely within the scope of its purpose. The writ is not being sought primarily to correct errors of the trial court, but to prevent a threatened judicial action—the making of findings and the entry of judgment by a disqualified judge. Where further action is threatened to be taken by a disqualified judge, this court, on application for prohibition, will not only stay further action, but “* * * it will also annul such prior

proceedings as may be necessary to make the remedy complete. The principle is that which prevails in equity. When there is jurisdiction, the court will afford complete relief.” *Havemeyer v. Superior Court*, 24 P. 121, 84 Cal. 327, 10 L. R. A. 627, 18 Am. St. Rep. 192.

It is insisted, however, that the petitioner has other remedies, i. e., by appeal, and that therefore the writ should not issue. This argument is not well taken. In the case of *Lindsay-Strathmore Irr. Dist. v. Superior Court*, supra, the writ was granted, although the same result could have been achieved by taking an appeal. In *Quatman v. Superior Court*, 221 P. 666, 64 Cal. App. 203, the same objection was raised as in the instant case, and in answer thereto the court said:

“Where a judge is disqualified to act in any proceeding or cause the disability necessarily enters into all orders and decisions made by him other than those specially excepted and provided for in the Codes, and to refuse the writ on the ground that a remedy might be had in another manner would be to permit the trial to proceed to a final conclusion by the disqualified judge and then set aside the proceedings as void ab initio.”

No good purpose could be served in permitting a disqualified judge to perform certain acts and thereafter declare them void on the ground that he had no jurisdiction to perform the same.

The order of the respondent court denying the motion of the petitioner for leave to file an amended and supplemental complaint making the said irrigation district a party to said action should be annulled, on the ground that the respondent judge who denied said motion was disqualified to act thereon, and the judges of the respondent court should be prohibited from acting on said motion on the ground of their disqualification under subdivision 1 of section 170 of the Code of Civil Procedure. Let the writ issue accordingly.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; LAWLOR, J.

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PEOPLE v. ADAMS et al. (Cr. 2832.)

(Supreme Court of California. April 14, 1926.
Rehearing Denied May 13, 1926.)

1. Homicide ☞253(1).

Evidence held to sustain conviction of first degree murder.

2. Homicide ☞305—Instruction on law of conspiracy held not prejudicial to defendants in murder trial.

In murder prosecution, where evidence supported theory that defendants were conspirators in commission of the crime, instruction on law of conspiracy held not prejudicial to affect defendants.

3. Homicide ☞305—Jury in murder trial were properly instructed that they must consider evidence in its application to each particular defendant.

In murder prosecution, jury were properly instructed that they should consider evidence in its application to each particular defendant, and that, if one stood by at time of the crime, but did not act prior to death of the victim to aid and assist, he was entitled to acquittal, and that mere presence at time of homicide was insufficient to make such person an aider or abettor.

4. Criminal law ☞796—Right of jury to impose life imprisonment held not to have been limited by instructions (Pen. Code, § 190).

Since jury were told that right to relieve defendants of death penalty in exercise of their discretion was absolute, and that they were free to return verdict for life imprisonment, right of jury, under Pen. Code, § 190, to relieve defendants of death penalty was not limited by instructions.

5. Homicide ☞338(2)—Evidence as to compelling one of defendants to revisit place of homicide held without prejudice to him.

Evidence as to compelling one of defendants to revisit place of the homicide, and of his appearance and conduct, showing his reluctance to enter, held without prejudice.

6. Criminal law ☞516—Statements of defendant, under arrest, held not to amount to confession, and admissible without preliminary proof that they were voluntarily made.

Where defendant at no time admitted his guilt, statements made by him when compelled to revisit scene of the homicide held not to amount to confession, and were admissible without requiring preliminary proof that they were freely and voluntarily made.

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Willie Adams and another were convicted of first degree murder, and they appeal. Affirmed.

Wm. T. Aggeler, Public Defender, and Franklin Padan and G. A. Benedict, Deputy Public Defenders, all of Los Angeles, for appellant Adams.

H. M. Dalton, of Los Angeles, for appellant Rincon.

U. S. Webb, Atty. Gen., and Erwin J. Widney, Deputy Atty. Gen., for the People.

SEAWELL, J. The defendants, Willie Adams and Alfonse Rincon, were accused by the district attorney of the county of Los Angeles, by an information filed in the superior court of said county of Los Angeles against them, with the crime of having, on or about the 17th day of May, 1925, in said county of Los Angeles, murdered one T. K. Ullman. The trial resulted in the jury finding each defendant guilty, by separate verdict, of murder in the first degree, which verdicts, under the law, carried with them the imposition of the death penalty. A death judgment was accordingly pronounced by the court against the said defendants. At the trial they were represented by separate counsel, and each appealed from the judgment imposing the death penalty and from the order denying the motion made by each for a new trial. Both defendants are from Mexican ancestry. Rincon is a native of this state, and was past 26 years of age at the time of the commission of the crime with which he stands convicted. As a youth he attended the grammar and high schools of the city of Los Angeles. Adams was past 22 years of age, a native of Mexico, but had been a resident of this state since he was of the age of about 12 years.

[1] The proof of the guilt of the defendants was conclusively shown at the trial, and there is no reasonable ground to sustain the claim that either should have escaped the consequences of an exceptionally cruel murder. Briefly told, the circumstances are that the deceased, T. K. Ullman, aged about 58 years, lived alone in a sparsely settled community near Elizabeth Lake, situate in the northern portion of the county of Los Angeles, and approximately 65 or 70 miles from the city of Los Angeles. The entrance to Ullman's lands was by way of a byroad leading from the Elizabeth Lake and Palmdale public road. He was the owner of a number of acres of land, upon which he resided, and in connection with his ranch interests he conducted a blacksmith shop, and performed such occasional service as came his way. He was crippled in both limbs, and walked with considerable difficulty. The few persons living in the general locality were widely separated by great distances. The view from one neighbor's home to another was obstructed by intervening hills. Defendant Willie Adams, who seems to have had no fixed place of abode, had for a period of about 2 years worked in turn for the several ranchers in the neighborhood, including the deceased. At the time of the murder he was cultivating, or had been cultivating, a small vegetable garden on Ullman's property upon shares,

but his most recent employment was by Mr. R. L. McDaniels, whose connection with the defendants will hereafter appear. Defendant Rincon resided in the city of Los Angeles with his sister and her husband, Mr. and Mrs. McDaniels. He had part-week employment at a Los Angeles daily newspaper. In January, 1925, Mr. McDaniels seems to have made an entry upon lands lying contiguous to the lands of Ullman, claiming the same to be public lands, and subject to entry by virtue of the homestead laws of the various acts of Congress. There was no convenient way of ingress or egress into or from said lands except over the lands of Ullman, and said homestead lands were without a water supply. McDaniels claimed that an old, unoccupied house supposedly upon the Ullman lands was in fact upon his homestead, and he proceeded to occupy the same. McDaniels erected no buildings upon his homestead. He carried with him to said entry a tent, in which he expected to live, and two spring bed mattresses, two or three chairs, a cooking stove, and a few other articles of lesser importance, none of which was of any considerable value. In addition to taking possession of the unoccupied house upon Ullman's lands, McDaniels also disputed the property lines as previously fixed by Ullman, and claimed the right to travel across and upon lands supposedly owned by Ullman. Bitter feelings of hostility were engendered between McDaniels and Ullman. Adams was in pronounced sympathy with his employer, and shared with him his feelings of ill will for Ullman. The disputes between Ullman and McDaniels were halted upon Ullman causing McDaniels' arrest upon a complaint charging him with trespass. McDaniels returned to his home at Los Angeles almost immediately following his arrest, and upon the second day after reaching home he suffered a heart attack, which resulted in his sudden death. During the controversies between McDaniels and Ullman as to property lines and the right of McDaniels to travel upon Ullman's lands, Adams was quite self-assertive, and upon one occasion, at least, when registering a complaint against Ullman for refusing to allow McDaniels to cross his lands for the purpose of bringing water to the homestead, remarked that he would kill "that Dutchman." Adams admitted that he made the remark attributed to him, but claimed that it was made in a light vein and in a joking mood. Other witnesses testified to threats made by him against the life of Ullman upon other occasions. The defendant Rincon had been upon the McDaniels' claim but once prior to the latter's death, and, while there, made the acquaintance of Adams. It was on or about May 12th that Rincon, after a number of visits from Adams, concluded to visit the McDaniels' claim for the asserted purpose of caring for a hay crop, and gathering up the personal effects belonging to McDaniels. Accordingly, he went from

Los Angeles to the McDaniels' homestead with Adams, and was constantly in his company to the day following the commission of the crime. Both occupied, without the consent of the owner, the house of a neighbor who was temporarily absent. Both were seen on the day before, and on the morning of the day the crime was committed, at or near Ullman's house. It was made certain by the evidence that both were reduced in circumstances. Rincon had attempted to sell a rifle belonging to McDaniels to a neighbor, but failed. They were without provisions and tobacco, and were unable to purchase either in any substantial quantities. Ullman, it seems, kept on hand a small supply of cigarettes, and a tin or two containing small cigars. He also had in his house a small money safe, the outer door of which was fastened by a combination lock, and the inner door was locked by key. On the day of the murder he had something like \$7 in coin and currency in his purse, and he also had in his pocket the key which unlocked the inner safe door and the key which fitted the Ford automobile lock. The automobile was equipped with a delivery bed and top. Upon reconnoitering the locality and selecting an opportune time, which chanced to be the hour of about 3 o'clock in the afternoon, the defendants entered the home of Ullman, who was seated in a rocking chair, evidently enjoying the entertainment furnished by his radio. Either Adams or Rincon informed Ullman that he wished to buy cigarettes, and, as Ullman arose from his chair to receive the 25 cents handed to him by the purchaser, and was in the act of putting it into his purse, the other struck him upon the back of the head from behind with an iron bar, which the defendants had carefully selected from a scrap pile of old iron which was near to or in Ullman's blacksmith shop. The first blow felled him to the floor, and as he lay there, he was struck two successive blows, one on each side of the head in the region of the temples. No sound save a groan of pain escaped the old man's lips, and death probably ensued very soon after he received the mortal blows. The body was searched by the defendants and the keys, and what money that his purse contained, amounting to about \$6, were taken, while a silver dollar and some small coins, which doubtless fell from his purse to the floor, were overlooked by the defendants. The house was thoroughly searched by the defendants for plunder, and it was left in a condition of disorder by them. Both defendants admitted at the trial, and upon other occasions, that they carried the body from the room in which the deceased was killed to the open well, containing water, a distance greater than 50 feet, and deposited it in the well, and filled the space between the water and the level of the earth with broken boxes and debris. They repaired to the shed or barn, where the Ford machine

was kept, took possession of it, and made their way to Los Angeles, stopping at a friend's house before arriving at the home of Mrs. McDaniels, where they remained that night and until late on the following afternoon, which was Monday, May 18th. The plate containing the number of the stolen machine was removed, and the plate under which the McDaniels machine was operated substituted in its stead. The top of the Ford car was also removed and other changes calculated to disguise the identity of the machine were made. In the afternoon of that day—Monday—defendant Adams and two Mexican women started to the locality in which Ullman had been murdered. Adams claimed that he had interested the two women in the purchase of the McDaniels furniture, and he was taking them to the place where he and Rincon had left the furniture that they might inspect the same. In the meantime the discovery of Ullman's body had been made by neighbors, and the blood-bespattered room in which he had been murdered and other evidences of the gruesome deed pointed to murder. Adams and Rincon were strongly suspected of the crime, and it was the understanding among the neighbors that, should either be found in the neighborhood, the person so finding them should detain them for investigation as to their knowledge of the crime. At dusk on the afternoon of Monday, May 18th, Adams arrived at the residence of one of Ullman's neighbors in company with the two women above referred to. The neighbor informed Adams of the discovery of Ullman's body, and told him that the neighborhood suspected him and Rincon as the persons who had murdered Ullman. He told him that he had instructions to arrest him and take him to a neighbor's residence for examination. Adams expressed a willingness to go, and told the neighbor to go into the house and put on his coat and prepare himself to accompany him, and he would drive him to said neighbor's residence. As the neighbor entered his house to prepare for the journey, Adams hurried to where the automobile was standing, leaped into it and started away at a high rate of speed. The neighbor, upon discovering that he had fled, mounted a horse, and followed as rapidly as he could. Upon reaching the main highway, Adams, in his attempt to turn into it, overturned the machine he was driving, and the two women riding with him were thrown clear of the machine, but he was pinioned beneath it. He was held there until the arrival of several neighbors, who released him from his position and took him into custody. That night he was taken to a neighbor's, and, in the presence of several persons, made a statement as to his and Rincon's participation in the murder. He stated that they had committed it for the purpose of robbery. A blood-stained \$1 bill and other coins which had been taken from Ullman's body were up-

on his person. He related with much detail the plan of execution of the crime, and directed the officers to another well, into which he and Rincon had deposited the clothing which they wore at the time they committed the crime. The clothing, blood-stained, was, according to description, recovered. He gave other information, which, upon investigation, was verified by indisputable physical facts. The discovery and rescue of Ullman's body from the well was followed by disclosures which cast suspicion upon Adams and Rincon. The reports of the discoveries quickly spread to the city of Los Angeles, and on the same afternoon one of the local papers carried a story of the murder. A friend of Rincon's, upon reading the article, hastened to the McDaniels home to inform him of the report that was upon the streets. Rincon became very much alarmed, and, after a consultation with his sister and one or two friends, proceeded to a Los Angeles newspaper office, and made a statement denying any participation in the murder of Ullman. This was the first information given out by Rincon to any person concerning the tragedy, with the possible exception of informing his sister that Ullman had been killed. He made no report of Ullman's death to any officer of the law. He was taken into custody the following morning.

A short time after Adams made his first statement of his and Rincon's connection with the crime he made a second statement, in which he implicated Mrs. McDaniels and another person, whom he claimed were at the scene of the murder and were active participants therein. He excused himself of any participation whatsoever in the murder, and stated that he had no knowledge that Ullman was to be killed. His claim was that, after Ullman had been slain by Rincon, he was forced by the latter's threats to take his life if he should refuse to assist in carrying the body to the well, and he was acting under the influence of fear when he assisted in making a search of the house for money and valuable property, and thereafter, while driving the automobile into Los Angeles. In fact, he insisted that everything he did from the moment of Ullman's death to the time when he left the McDaniels home on Monday, May 18th, was done under pressure of fear and threats. He afterwards abandoned the portion of his story which incriminated the two persons whom he had falsely accused, but clung to that portion of his story in which he claimed that he acted under a sense of fear alone when he did the things which appeared to connect him with the crime. According to a subsequently revised story, Rincon was declared to be the sole person who coerced and intimidated him by threats of violence to do everything done by him which had an inculpatory aspect. Rincon, on the other hand, excused himself and accused Adams. Both of the defendants made a num-

ber of statements in which they described in detail the manner in which the crime was executed. In this respect there is no material difference between their statements. The manner of the execution of the crime as told by each is fully corroborated by physical facts. The only difference between the stories of the defendants is that each claimed that the other committed the crime in precisely the same manner as described by each and under the pressure of threats made by the other. Each incriminatory statement charged by one as having been made by the other was turned by the one accused as the statement of the accuser. We have carefully examined the record in this case, which consists of more than 1,000 typewritten pages, and are convinced by our examination of the record, as the jury must have been convinced by the statements made by the defendants themselves and by the testimony of numerous witnesses and corroborating circumstances, that there is no possible theory upon which either of the defendants can be innocent of the crime charged against them. It is not our purpose to enter into a discussion of the weight, effect, or conclusiveness of the evidence. It is so overwhelming in its convincing force to the effect that the two acted in concert as to sweep away the feeble efforts made by each of the defendants to relieve himself of the consequences of a brutal, deliberately planned murder. The motive on the part of each was twofold. There can be no doubt but that Mrs. McDaniels, the sister of Rincon, and Rincon himself, absorbed much of the bitterness of feeling that McDaniels held for Ullman as a result of the disputes which arose out of the asserted right of McDaniels to travel the Ullman lands. Neither can there be any doubt but that Rincon felt that the heart attack which resulted in the sudden death of his sister's husband was attributable directly to the excitement produced by Ullman in procuring McDaniels' arrest. There is no doubt but that Adams, who had worked for McDaniels, and who had become a partisan in the disputes which arose between McDaniels and Ullman, was hostile to the latter, as his declarations and conduct plainly indicated. So much for malice on the part of the defendants. That they were also moved to the commission of the murder by a desire to possess Ullman's property is proved by the fact that they actually looted and plundered his home. The \$6 taken from the person of the deceased and the larceny of the automobile and some other articles is cumulative upon the issue. So far as overt acts would indicate, Adams was the bolder and more abandoned of the two. But that they acted in concert and jointly executed the crime there seems to be no room for reasonable doubt. Both had been in the immediate vicinity of Ullman's house for some 5 or 6 days prior to the commission of the crime, and no legitimate business

seems to have required the presence of either in that locality. They were constantly together, acting in all matters in apparent unity and accord, and both entertained a hostile feeling against Ullman. The claim made by each that the other struck the fatal blow, and the further claim as to the robbery of the house and the theft of the automobile, and the concealment of the body, and the prior and subsequent conduct of the defendants, were questions for the jury's consideration in determining the part taken by each of the defendants in the commission of the crime and their relation thereto. The jury by its general verdict impliedly found against the defendants on every material issue advanced by them. The verdict is unquestionably sustained by the evidence.

[2, 3] The questions of law presented for our consideration are few and simple. The court instructed the jury as to what acts are necessary to be established in order to constitute a person an accomplice with another in the commission of a crime. It is admitted that the instructions given on the subject are academically correct, and not subject to just criticism, but it is urged that such instructions were not applicable to the facts of the case, and the recitation of the law of conspiracy prejudicially affected the jury in its consideration of the defendants' cause. This contention is wholly without merit. The facts as herein related are a complete answer to the contention that the evidence was insufficient to support the theory, or to justify a conviction of the defendants, upon the basis that they were coconspirators in the commission of the crime. The court would have fallen short of performing its full duty had it refused to instruct the jury as to the law of conspiracy. The instructions given by the court upon this issue, as well as upon all the issues presented are exceptionally full, fair, and free from error. Every phase of the law was fully covered, and the defendants suffered no prejudice in any single particular by the court's instructions. They certainly were as favorable to them as they could reasonably request. The jury was told that they must consider the evidence in its application to each particular defendant, and was charged by separate instructions that, even if one defendant stood by at the time the offense was committed, but did no acts prior to the death of the deceased to aid and assist the same, such one was entitled to an acquittal; that the mere presence of either of the defendants at the place where and at the time the homicide was committed was not sufficient to make such a person an aider or abettor of the crime. The rights of the defendants were carefully guarded by the charge of the court.

[4-6] The defendants make the further complaint that the right of the jury, in the exercise of its discretion, to relieve the defendants of the death penalty, and impose imprisonment for life, was limited by the

court's instructions. This contention is not supported by the record. The jury in effect was told that the exercise of their discretion in this respect was substantially absolute, and it was free to return a verdict carrying with it imprisonment for life rather than the infliction of the death penalty, and that the infliction of either penalty was a question submitted solely to its sound judgment and discretion. The language of the instruction will not support a contrary construction. It therefore becomes unnecessary to cite authorities construing section 190, Penal Code, because there is not sufficient substance in the objection made to require a review of said authorities. Defendant Rincon specially assigns as error the conduct of the prosecution in compelling him to revisit the Ullman home on the day the inquest was held at Lancaster, near the place where the crime was committed. After the preliminary examination had concluded, Adams and Rincon were handcuffed together and taken to the Ullman home. Rincon entered the house with considerable reluctance, while Adams seemed wholly unabashed. The latter freely recited the circumstances of the crime in a realistic manner, the greater portion of which we have herein related. Rincon, who was not represented by counsel, was informed by the prosecution that he was not required to make any statement whatsoever. A number of the statements made by Adams incriminating Rincon were denied by the latter. At no time did Rincon admit his guilt, but at all times challenged the truth of the statements made by Adams that he, Rincon, struck the mortal blows or took any part in the homicide. He admitted that he assisted in carrying Ullman's body to the well, assisted in searching the home and riding into Los Angeles in Ullman's automobile with Adams after the commission of the homicide. He undoubtedly assisted in changing the appearance of the automobile on the following day, and received his share of the small sum of money which Ullman had in his possession at the time he was assaulted. Upon the trial of the case several witnesses testified to the fact that Rincon, when taken to the Ullman house, was reluctant to enter, and appeared to be very nervous and pale. His appearance and conduct at the Ullman home was shown in evidence, and it was claimed that both were evidence of a consciousness of guilt. The claim is made by appellant Rincon that his enforced visit to the Ullman house compelled him to give evidence against himself. While we do not commend the procedure adopted by the prosecution, we do not see how Rincon could have been prejudiced thereby. Had he made a confession of guilt under the circumstances related, a very serious question would be presented for our consideration. But this he did not do. His appearance under the stress of the situation

had no special significance. The probabilities are very great that any person, whether he be guilty or innocent, if placed in his position, would have shown apprehension which is usually exhibited by nervousness and pallor. We feel satisfied that the jury, composed of reasonable persons, was not affected prejudicially by anything that took place at the Ullman home. Any statement there made not amounting to a confession was admissible against him without requiring preliminary proof of the fact that it was freely and voluntarily made. The distinction between a statement or admission of fact and a confession of guilt is well settled. *People v. Ammerman*, 50 P. 15, 118 Cal. 23; *People v. Connelly* (Cal. Sup.) 234 P. 374.

The judgment and order appealed from in each case is hereby affirmed.

We concur: WASTE, C. J.; LAWLOR, J.; RICHARDS, J.; SHENK, J.; LENNON, J.; CURTIS, J.

PEOPLE v. SHOPE. (Cr. 1319.)

(District Court of Appeal, Second District, Division 1, California. April 13, 1926.)

1. Indictment and information § 161(5).

In prosecution for violating Pen. Code, § 288, in view of section 1008, permitting amendment of defective information prior to trial to properly allege offense disclosed by preliminary examination, and for which defendant was committed, *held* not error.

2. Criminal law § 1144(3).

In absence of contrary showing in record, amended information will be presumed to state offense disclosed by preliminary examination for which defendant was committed.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

B. A. Shope was convicted of violating Pen. Code, § 288, and he appeals. Affirmed.

Pierce & Gould, of Ventura, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

YORK, J. The defendant was accused by information, filed by the district attorney of Ventura county, of the crime of violation of section 288, Penal Code, entitled "Crimes Against Children," a felony, and from the judgment of conviction defendant appeals.

The sole point raised worthy of consideration by this court is whether or not the trial court erred in permitting the district attorney to amend the information prior to the trial. The amendment was one made to make the information conform to the decision in the case of *People v. Grinnell*, 9 Cal. App. 238, 98 P. 681, and was amended before trial to charge a public offense in compliance with that decision, and at the time of trial the information did charge a single, definite public offense. The amendment placed upon the charged offense a definite limitation by adding the words, "the said act not then and there being an act constituting any crime provided for in part I of the Penal Code." According to the decision in *People v. Grinnell*, *supra*, the information without this amendment would have failed to describe a public offense under said section 288. See, also, *People v. Camp*, 183 P. 845, 42 Cal. App. 411.

Prior to the amendment the information as filed, although defective as above stated, was nevertheless an information attempting to charge the commission of a crime. The amendment completed the charge. As there is nothing to the contrary in the record, it will be assumed, in support of the order allowing the amendment, that the information as amended correctly states an offense shown by the evidence taken at the preliminary ex-

amination, and for which the defendant was committed. This being so, it was within the power of the court to allow such amendment to be made. Section 1008 of the Penal Code authorizes such order "where it can be done without prejudice to the substantial rights of the defendant." The only limitation placed thereon by the statute is that an information cannot be amended "so as to charge an offense not shown by the evidence taken at the preliminary examination." Discussing said section 1008, the Supreme Court in *People v. Foster*, 243 P. 667, 671, said:

"We think the amendment as made to section 1008, Penal Code, in 1911, is quite persuasive, if not entirely convincing, as to the intention of the Legislature to permit, in the discretion of the trial court, the amendment of informations where it can be done without substantial prejudice to the rights of the defendant, so as to correctly state the offense shown by the evidence taken at the preliminary examination."

There is nothing in the nature of the amendment, or in any circumstance of the case, that would suggest any abuse of discretion by the court in its exercise of the power thus conferred. On allowance of the amendment the defendant made no request for a continuance of time of trial, or any showing that he was entitled to a continuance. After an examination of the entire cause we are satisfied that the case was fully and fairly tried, and that there was ample evidence to authorize the conviction.

The judgment is affirmed.

We concur: CONREY, P. J.; Houser, J.

198 Cal. 473

HARRISON et al. v. CHABOYA et al.
(S. F. 10831.)

(Supreme Court of California. April 22, 1926.)

Waters and water courses $\Rightarrow$ 158½(1)—Evidence held to sustain finding that waters collected by sunken box 40 feet from box first established arose from same source and constituted part of one spring, and hence were conveyed by deed of "spring."

Evidence held sufficient to sustain finding that waters collected by sunken box 40 feet from box first established, had the same source, and were part of one spring and conveyed by deed of spring; a "spring" being a marshy area of small but definite extent, wherein underground waters find their way to the surface.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Spring.]

In Bank.

Appeal from Superior Court, Contra Costa County; J. C. Needham, Judge.

Action to quiet title by Wilfred Harrison and another against B. F. Chaboya and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

James D. Whalen, of San Francisco, for appellants.

Archibald B. Tinning, of Martinez, for respondents.

RICHARDS, J. This is an appeal from a judgment of the superior court of the county of Contra Costa, in favor of the plaintiffs and against the defendants, in an action brought by the former to quiet their title to a certain easement claimed by them to exist in certain waters which take their rise upon the land now owned by the defendants herein, and which are thence conducted by said plaintiffs to the premises owned by them and known as the Harrison place, lying near the town of Danville, in said county of Contra Costa. Plaintiffs derived their ownership of their said property from their mother, Isabella Harrison, who had obtained title thereto in about the year 1887, and who not long thereafter acquired by deed from one William Hemme a conveyance to all of the waters issuing from a certain spring located upon the land now owned by the defendants herein, but of which land said William Hemme had originally been the owner, and the title to which land had descended by mesne conveyances to the defendants herein, who had acquired the same by purchase from the then owners thereof in August, 1922. Shortly thereafter a controversy arose between said defendants and the plaintiffs herein as to the extent and definition of the easement which is the subject of the present litigation. By the terms of the aforesaid conveyance from William Hemme to Isabella

Harrison of the easement in question, the said Hemme undertook to convey:

"All of that certain spring and water flowing therefrom, situate, lying, and being in the county of Contra Costa, state of California, and particularly described as follows, to wit: 'All the water issuing from our spring, which spring is located on the west end of a certain tract of land'"—describing the land now owned by the defendants herein.

At the time of, and apparently for some considerable time prior to, the date of said conveyance there had been constructed and maintained at the place where the waters referred to therein took their rise a wooden box 4 feet square at the foot of an alder tree, which was apparently within the area of a boggy or marshy place where an amount of water which underlay and percolated through the larger tract upon which the same was situated came to the surface thereof, occupying an area upon the point of their exudation about 40 feet square. The box referred to had been sunk within this damp or marshy area with a view apparently to collect the waters which arose therein, and in order to aid in such collection wooden troughs or drains had been constructed leading into this central receptacle and out of which, by piping, the waters thus assembled were conveyed to the Harrison place.

About 26 years before the inception of the present litigation, the Harrisons, in order to augment the flow of water into this earlier receptacle, which is described in the record as "box A" or "spring A," had installed another wooden box about 2 feet square at a point lying about 40 feet southeasterly from said box A, and had led the waters collected therein by means of an iron pipe into box A. This later installed receptacle is described as "box B," or "spring B," and it is in reference to the right of the plaintiffs thereto and to the waters collected therein that the present litigation arose. It was the contention of the respondents herein that the waters collected in box A and box B were waters from one and the same source, and as such were embraced within the terms of the early grant to Isabella Harrison. It was the contention of the defendants and appellants herein that the waters thus collected from box B were from an entirely different and separate source and were not included in said original grant. It was the further contention of the respondents herein that, even if the waters thus collected in box B were not derived from the same general source as those collected in box A, the plaintiffs were nevertheless entitled to the same by prescription. The issues as thus presented by the pleadings were submitted to the trial court, and, upon the issue as to whether the waters collected in box B were included within the terms of the original grant of the easement to Isabella Harrison,

the said court made the following findings of fact, viz.:

"I. That the plaintiffs Wilfred Harrison and Ralph Harrison are the owners of all the waters issuing from that certain spring located on the west end of that certain tract of land situate in the county of Contra Costa, state of California, described as follows, to wit: Lots numbered two (2) and four (4) and the south half of the northeast quarter of section 31, township 1 south, range 1 west, Mt. Diablo Meridian, containing 172.48 acres of land, together with the right of way to lay pipes to conduct water from said spring across said last-described tract to the said Harrison place, in plaintiffs' complaint described, belonging to the said plaintiffs.

"II. Said spring is the same spring described in a deed dated the 26th day of April, 1887, made by William Hemme, to Isabella Harrison, and recorded in the office of the county recorder of the county of Contra Costa, state of California, on the 29th day of April, 1887, in volume 50 of Deeds, at page 231, and consists of the waters issuing from the earth near a clump of laurel trees located about 820 feet southeasterly from the northwest corner of the last above described tract of land, and flowing into a wooden box or catch-basin about 4 feet square, sunk into the ground, and located near the foot of said laurel trees (the same being the point A as designated on the diagram referred to in plaintiffs' testimony), and the waters issuing from the earth and flowing into a wooden box about 2 feet square sunk into the ground and located about 40 feet southeasterly from said first-mentioned box or catch-basin (the same being the point B as designated on plaintiffs' said diagram) the water from said smaller box flows through a pipe into said larger box, from which it is conducted away to said Harrison place."

It is the contention of the appellants herein that the foregoing findings of the trial court, in so far as they relate to the waters issuing from the earth and flowing into the receptacle known as box B, are entirely unsupported by the evidence in the case. The appellants' first insistence in making this contention is that the term "spring," as used in the conveyance of the original easement to Isabella Harrison, must be interpreted as having reference only to the 4x4 box described in the record as "box A" or "spring A," and that said term cannot be so extended as to embrace the entire damp, boggy, or marshy area within which said receptacle was located. We are of the opinion that this contention is without merit, for the twofold reason that the term "spring" in its common acceptance, at least in California, is a term

which in general usage has been applied to a damp, marshy or boggy area, usually of small but definite extent, wherein underground waters from a larger tract of land find their way to the surface thereof and make their presence known either by a definite outflow or by the surface presenting such a quantity thereof as will render practicable their assembling in such receptacles as those described in the record herein as box A and box B; and for the further reason that the interpretation which the trial court placed upon said term was the one apparently accepted and acted upon by the parties to the transfer of this easement, since it appears that either before or at the time of such transfer, when said box A was installed, there was also installed a radiating system of perforated troughs for the assembling of the waters of said marshy area. One of the troughs then installed, as shown by the evidence, extended in the direction of the spot where later box B was located, and, according to the evidence given by Ralph Harrison, ran through a rocky ridge of earth to the spot where box B was subsequently placed. The main insistence of the appellants in this regard is that the dry or rocky ridge above referred to constituted a distinct separation between the marshy spot where box A had been placed and the point where subsequently box B was located. We incline to the opinion, however, that the foregoing testimony of Ralph Harrison, if believed by the court, would constitute a sufficient basis for its finding that the waters issuing from the earth at both of the indicated points were waters which had a single source, and hence were embraced within the terms of the original grant of the easement to Isabella Harrison. If, therefore, the foregoing finding of the trial court was sufficiently supported by the evidence in the case, it was in itself sufficient to justify the judgment of the trial court based thereon, and, this being so, it becomes unnecessary for this court to consider or determine whether the asserted title of the plaintiffs to the waters collected in box B by prescription is or is not sufficiently supported by the evidence in the case.

For the foregoing reasons, the judgment herein is affirmed.

We concur: WASTE, C. J.; LAWLOR, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; LENNON, J.

198 Cal. 508

(245 P.)

Ex parte COLLINS. (Cr. 2902.)(Supreme Court of California, in Chambers.
April 24, 1926.)

Constitutional law $\hookrightarrow$ 270—**Courts** $\hookrightarrow$ 394(10)
—**Criminal law** $\hookrightarrow$ 1206(1)—Statute as to determining term of imprisonment held not unconstitutional as contrary to Fourteenth Amendment; application for writ of habeas corpus by petitioner whose prison term was set by prison board held to involve no federal question (Const. U. S. Amend. 14; Pen. Code, §§ 473, 1168).

Pen. Code, § 1168, authorizing prison board to determine duration of imprisonment after expiration of minimum term, does not violate Const. U. S. Amend. 14, and hence no federal question justifying writ of error to United States Supreme Court is involved in refusal of application for writ of habeas corpus by petitioner convicted of forgery, whose imprisonment was set at 12 years by prison board, after expiration of minimum term, under section 473.

Application by John L. Collins for a writ of habeas corpus. Application was denied, and petitioner applies to the Chief Justice for writ of error to the Supreme Court of the United States. Application denied.

John L. Collins, in pro. per.

WASTE, C. J. The petitioner was convicted of the crime of forgery and sentenced to be confined in the state prison, but the court in imposing such sentence did not fix the term or duration of the period of imprisonment, leaving the prison board to determine what length of time the petitioner should be confined. Pen. Code, § 1168. After the expiration of the minimum term of imprisonment provided by law for forgery (Pen. Code, § 473), had expired, the prison board fixed the term of imprisonment of petitioner at 12 years. Contending that his detention was illegal, petitioner sought his release from imprisonment through an application to this court for a writ of habeas corpus, which was denied without opinion. Application of Collins, Crim. 2902, April 5, 1926. He has now made application to the Chief Justice for a writ of error to the Supreme Court of the United States.

In denying the application for a writ of habeas corpus the court considered petitioner's contention, based on his construction of the decision in *People v. Sama*, 207 P. 893, 189 Cal. 153, that section 1168 of the Penal Code is unconstitutional, in that it violates the provisions of the Fourteenth Amendment to the Constitution of the United States, is discriminatory, reposes an arbitrary discretion in an administrative body, and vests judicial powers in the prison board. This court held, in *People v. Sama*, supra, that it was not necessary that the provisions of the sec-

tion, to be uniform in their application, should apply universally. It is sufficient, as was there pointed out, that the law bear equally, in its burdens and benefits, upon persons in the same category, and this depends upon the facts that characterize the offense. Had a written opinion been handed down in the matter of the application for a writ of habeas corpus, it would have been to the effect that the section is neither discriminatory nor unconstitutional in the manner contended for by the petitioner. *People v. Sama*, supra; in *re Lee*, 171 P. 958, 177 Cal. 690.

For the reason that I am not convinced that a federal question is involved in this matter, the application for a writ of error to the Supreme Court of the United States is denied.

198 Cal. 469

In re JOHNSON'S ESTATE.**WALLER v. EWALD et al. (S. F. 11752.)**(Supreme Court of California. April 19, 1926.
Rehearing Denied May 17, 1926.)**1. Costs** $\hookrightarrow$ 3.

Right to costs exists only where permitted by statute, and is measured by statute.

2. Wills $\hookrightarrow$ 402—In will contest, court has no jurisdiction to award costs until final determination of litigation (Code Civ. Proc. § 1720).

In a will contest, court has no jurisdiction to award costs either against the assets of the estate or against an individual until final determination of litigation, as until then court cannot exercise its discretion to award costs as justice requires in accordance with Code Civ. Proc. § 1720.

3. Wills $\hookrightarrow$ 402—In will contest, where litigation was not finally determined, that part of judgment which awarded costs against one defendant might be vacated on motion of another defendant, as it was wholly void (Code Civ. Proc. § 663).

In a will contest, where the litigation was not finally determined, that part of the judgment which awarded costs against one defendant might be vacated on motion of another defendant, as it was wholly void, and hence might be attacked by strangers who were not aggrieved parties under Code Civ. Proc. § 663.

In Bank.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Proceeding by Aurilla Mabel Waller against Emily W. Ewald and another to contest probate of the will of Aurilla Johnson, deceased. Judgment was rendered for the contestant denying probate, and the motion for a new trial was denied. From an order entered vacating a portion of the judgment

awarding costs in favor of contestant against Emily W. Ewald, the contestant appeals. Affirmed.

Rehearing denied; CURTIS, J., dissenting.

H. A. Blanchard, of San Jose (Daniel Rygel, of Oakland, of counsel), for appellant.

Maurice J. Rankin and L. H. Walker, both of San Jose, for respondent.

LENNON, J. The order appealed from vacates that portion of a judgment, in a will contest, which awarded costs in favor of the plaintiff, Aurilla Mabel Waller, and against defendant Emily W. Ewald. The contest arose over a document which purports to be the last will and testament of Aurilla Johnson, deceased, and names said Emily W. Ewald as sole legatee and devisee. This instrument was offered for probate by Amos O. Williams as public administrator of Santa Clara county, who asked for letters of administration with the will annexed. Probate was contested by Aurilla Mabel Waller, an adopted daughter of the decedent, upon the grounds that decedent was not of sound mind at the date of the execution of the instrument and that the instrument was not entirely written, dated, and signed by the decedent. In this action Amos O. Williams and Emily W. Ewald appeared as defendants. The jury returned a verdict in favor of contestant upon both grounds, judgment was entered in accordance therewith, and defendants' motion for a new trial was denied. In passing, it may be noted that the merits of the will contest are involved in an appeal which defendants have taken from the judgment itself and are not under consideration in the present proceedings.

Subsequent to the motion for a new trial, defendant Amos O. Williams moved that the judgment be set aside and vacated upon the ground that it contained an award of costs which was made and based upon an erroneous conclusion of law and which was not within the authority or jurisdiction of the trial court. The motion was granted, and an order made vacating the judgment and directing the entry of a judgment in favor of plaintiff as previously rendered, but eliminating therefrom all provisions concerning costs. From the order last mentioned plaintiff, Aurilla Mabel Waller, instituted the present appeal.

In support of her appeal, plaintiff contends that the trial court had jurisdiction to award costs against defendant Emily W. Ewald, since section 1720 of the Code of Civil Procedure authorizes the court to exercise its discretion in allowing costs in a will contest, and therefore that any error committed was merely an error in the exercise of discretion concerning a matter within the court's jurisdiction and could only be reached on a motion for new trial, and not, as in the present case, by a motion to vacate the judgment made sub-

sequent to and independently of the proceedings for a new trial.

[1,2] The right to recover costs exists solely by virtue of statute. Consequently an award of costs can be justified only if permitted by some statutory provision, and the measure of the statute is the measure of the right. *Begbie v. Begbie*, 60 P. 667, 128 Cal. 154, 49 L. R. A. 141; *Turner v. East Side Canal & Irr. Co.*, 171 P. 299, 177 Cal. 570; *Sime v. Hunter*, 202 P. 967, 55 Cal. App. 157. It is true that the statute covering and controlling the allowance of costs in a will contest instituted before probate is section 1720 of the Code of Civil Procedure, which provides:

"When it is not otherwise prescribed in this title, the superior court, or the Supreme Court, on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require. Execution for the costs may issue out of the superior court."

On several occasions this section of the Code has been before this court for interpretation, and in each instance the court has held that it does not authorize an order allowing costs until the judgment in the will contest has become final. The reason assigned for so holding is that it is not possible for the court to exercise its "discretion" in accordance with the requirements of "justice," as prescribed by the statute, until the court is apprised of the entire history of the litigation, including the ultimate fate of the disputed document.

In *Estate of Yoell*, 117 P. 1047, 160 Cal. 741, in reversing an order directing payment of costs of contestants out of the funds of the estate, the court said:

"The final determination of the litigation * * * must have a weight in influencing the court in the exercise of the discretion to award costs with which the law has vested it."

Counsel for appellant point out that the order awarding costs in the case last cited was made after a disagreement by the jury, and not as an incident to a judgment in favor of a contestant, as in the present instance. This attempt to distinguish the cases is answered by *Estate of Berthol*, 125 P. 750, 163 Cal. 343, where the order allowing costs was made subsequent to a verdict and judgment in favor of the contestant. The order was reversed upon the ground that:

"The court is simply without discretion to make any order until the final determination of the controversy."

It is immaterial whether the order awards costs from the assets of the estate or against an individual party, for in neither case can the requisite discretion be exercised until the final determination of the litigation. The case of *Estate of Jones*, 135 P. 293, 166 Cal. 147, follows the *Estate of Berthol*, supra, and

is a striking illustration of the reason underlying the interpretation accorded the statute.

By reason of these authorities we are compelled to conclude that the statute applicable to costs in will contests before probate does not authorize an allowance of costs until the final determination of the litigation, and consequently that the trial court was without jurisdiction to allow costs in rendering the judgment in plaintiff's favor in the present case.

[3] However, it is pointed out by plaintiff that the motion to set aside the order allowing costs was not made by Emily W. Ewald, the defendant against whom costs were awarded, but by defendant Amos O. Williams, who was not the "party aggrieved." Plaintiff claims that, according to the provisions of section 663 of the Code of Civil Procedure, the motion can only be made by the party injured by the erroneous judgment. It was unnecessary to comply with the terms of the section last mentioned, for, to the extent that the judgment purported to allow costs, it was outside of the jurisdiction of the court and absolutely void. Any person at any time could call the attention of the court to that fact. When a judgment or a part thereof is absolutely void and the invalidity is apparent upon the face of the record, it "may be attacked anywhere, directly or collaterally whenever it presents itself, either by parties or strangers. It is simply a nullity, and can be neither a basis nor evidence of any right whatever." *Estate of Pusey*, 181 P. 648, 650, 180 Cal. 368, 374; *Lang v. Lang*, 190 P. 181, 182 Cal. 765.

The order eliminating that portion of the judgment which allowed costs was therefore proper, and the present appeal must fail.

The order is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; CASHIN, Justice pro tem.

198 Cal. 465

QUINN v. REILLY et al. (S. F. 11073).

(Supreme Court of California. April 19, 1926.)

1. Trusts §86—Doctrine of resulting trust, where title is taken in person not paying consideration, is subject to exception that such transactions between parent and child are presumed to be gifts or advancements (Civ. Code, § 853).

Exception to doctrine embodied in Civ. Code, § 853, that resulting trust arises in favor of purchaser who pays consideration money and takes conveyance in name of a third person, exists in transactions between parent and child, in which cases gifts or advancements are presumed.

2. Trusts §86.

Presumption that parent, paying consideration money and taking conveyance in name of child, intends an advancement, is rebuttable.

3. Pleading §225(1)—Sustaining demurrer without leave to amend complaint in action to establish resulting trust, on theory that advancement to defendant was presumed, held error.

In action to establish resulting trust in property purchased by plaintiff's father, who took title in defendant, plaintiff's sister sustaining demurrer to complaint without leave to amend, on ground that parent was presumed to have intended an advancement to defendant, held erroneous, since it denied to plaintiff any right to rebut the presumption.

4. Trusts §371(2)—Plaintiff, alleging that transaction between his father and sister was not intended as an advancement, held not required to further plead acts or agreements supporting such claim.

Plaintiff suing to establish a resulting trust in property purchased by his deceased father and conveyed to defendant, his sister, alleging that transaction was not intended as a gift, advancement, or bounty, held not required to further allege specific acts or agreements supporting allegation that gift was not intended.

5. Pleading §11.

Ultimate facts only need be pleaded.

In Bank

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by William Joseph Quinn against Nellie E. Reilly and another. Judgment for defendants, and plaintiff appeals. Reversed.

Sawyer & Sawyer, of San Francisco, for appellant.

Gillogley, Crofton & Payne, of San Francisco, for respondents.

LENNON, J. This action was commenced by William Joseph Quinn against his sister, Nellie E. Reilly (her husband being joined), to have Nellie E. Reilly declared a trustee, holding certain realty and improvements for the benefit of the estate of their father, Patrick P. Quinn. It appears that in 1921 Patrick P. Quinn purchased certain property, the deed running to himself and his daughter, Nellie E. Reilly.

The lower court sustained a demurrer, without leave to amend, to appellant's second amended complaint, and the appeal is from the resulting judgment in respondents' favor.

The allegation, to which the demurrer was sustained, reads as follows:

"Plaintiff is informed and believes and therefore alleges that at the special instance and request of said Patrick P. Quinn said deed was made and executed to said Patrick P. Quinn, and said Nellie E. Reilly as grantees therein, and having said deed so made and executed

said Patrick P. Quinn intended to convey, and did have conveyed to said Nellie E. Reilly, the said interest and title in and to said property, thereby conveyed to said Nellie E. Reilly, in trust for and to the use and benefit of said Patrick P. Quinn and his said estate and not otherwise, and that said deed was so made and executed, not with any intent or purpose of conveying, nor did it convey, to said Nellie E. Reilly such interest in or title to said property or any part thereof, as a gift, advancement, or bounty from said Patrick P. Quinn, or otherwise than in trust as herein alleged, and at all times since the making of said deed Nellie E. Reilly has held such interest and title in said property in trust as alleged and as trustee for said Patrick P. Quinn and his said estate, and not otherwise."

The contention in support of the appeal is twofold: It is urged that under section 853 of the Civil Code, a resulting trust arose in favor of Patrick P. Quinn, or his estate, out of the 1921 transaction, and that the provisions of section 853 are without exception in their scope. It is also urged that, if there is an exception to the provisions of section 853—as in the case where the transaction is between husband and wife or parent and child—this exception operates to raise a presumption that is rebuttable and not conclusive.

Section 853 provides that:

"When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

[1] Section 853 of the Civil Code is but a formal declaration of the old and well-established doctrine of equity that a resulting trust arises in favor of a purchaser who pays the consideration money and takes the conveyance in the name of a third person. There are, however, exceptions to this doctrine. It is well settled that one exception to the rule is found in transactions between parent and child. *Russ v. Mebius*, 16 Cal. 350; *Hamilton v. Hubbard*, 65 P. 321, 66 P. 860, 134 Cal. 603; *Elliott v. Merchants' Bank, etc., Co.*, 132 P. 280, 21 Cal. App. 536-541. These transactions are presumed to be in the nature of gifts, advancements, or bounties. In short, the existence of the relationship of parent and child is a circumstance which prima facie establishes the presumption of an advancement and thereby rebuts the presumption of a resulting trust.

[2] Considering it as a circumstance in evidence, it follows that there must be, of course, evidence admitted on the other side; that is to say, the presumption that an advancement was intended in transactions between parent and child is itself a presumption which is rebuttable. It was so held in *Faylor v. Faylor*, 68 P. 482, 136 Cal. 92, 96.

[3] The trial court, by sustaining the demurrer to the amended complaint without

leave to amend, precluded the appellant from offering any proof which he might have at his command that the intention of his father was not that the conveyance should be a gift, advancement, or bounty, but a trust. In short, the order of the lower court sustaining the demurrer operated in effect to make conclusive a presumption which is merely rebuttable.

[4] Respondents, however, contend that, if the transaction was not in the nature of a gift, advancement, or bounty, it was not so by reason of some act or agreement of the parties to it, and that those acts or agreements should have been specifically pleaded by the appellant.

[5] With this contention we cannot agree. Ultimate facts only need be pleaded. In the instant case the ultimate fact is the intention of the deceased. Any act or agreement between the parties would be, perhaps, proof of this ultimate fact, but they would not be the ultimate fact itself. In pleading the intention of the deceased, the appellant pleaded an ultimate fact which, if it can be established by competent evidence, will rebut the presumption that the 1921 transaction was in the nature of a gift, advancement, or bounty. The appellant was not obliged to embody his proof, whatever it may amount to, in the allegations of his complaint.

Judgment reversed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.; CASHIN, Justice pro tem.

198 Cal. 477

PALO VERDE IRR. DIST. v. SEELEY,
Secretary of Board of Trustees, etc.
(S. F. 11864.)

(Supreme Court of California. April 22, 1926.)

I. Waters and water courses ⚡226—Authority for issuance of refunding bonds, payable by assessment of all lands in irrigation district, to take up bonds originally payable from taxes on property within former levee district only, held constitutional (St. 1911, p. 303, as amended by St. 1917, p. 809; Palo Verde Irrigation District Act [St. 1923, p. 1067], §§ 24, 28, 59, and section 15a, as added by St. 1925, p. 637).

Legislature, having expressly found in St. 1925, p. 637, adding section 15a to Palo Verde Irrigation District Act, that lands and improvements within such district will be uniformly benefited by works theretofore constructed by levee district, there is no constitutional inhibition against issuance of refunding bonds, for payment of which all lands and improvements thereon within irrigation district will be assessed under section 15a and sections 24, 28,

59, to take up levee district bonds, payable under St. 1911, p. 303, as amended by St. 1917, p. 809, from taxes on property within levee district only.

2. Waters and water courses ⇨224.

Under Const. art. 11, § 13, Legislature has plenary power over districts organized for reclamation purposes.

3. Constitutional law ⇨290(1)—Legislature's declaration of benefit to all lands of irrigation district by works built by former levee district and imposition of assessment for payment thereof held not taking of property without "due process" (Palo Verde Irrigation District Act [St. 1923, p. 1067] §§ 24, 28, 59, and section 15a, as added by St. 1925, p. 637).

Legislature's declaration (St. 1925, p. 637, adding section 15a to Palo Verde Irrigation District Act), that all lands of such district were benefited by works built by former levee district, included in irrigation district and assessment of all lands in latter district for payment thereof, under such section, and sections 24, 28, and 59, is not taking of property without "due process."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

4. Constitutional law ⇨290(3)—When Legislature finds property in irrigation district benefited by fixing boundaries thereof, property owners are not entitled to hearing before assessment.

Generally, hearing as to benefits must be provided before land is finally burdened by assessment, but when Legislature, by fixing boundaries of irrigation district, finds that all property therein is benefited, property owners are not entitled to hearing, being conclusively presumed to have been heard through their representatives in Legislature.

5. Constitutional law ⇨70(3) — Legislature's finding that all lands in district are benefited by levee protection works theretofore constructed is conclusive, and not reviewable unless palpably unjust and absurd.

Legislature's finding that all property in irrigation district taking over levee district is benefited by works theretofore constructed by latter district is conclusive, and not reviewable by courts unless shown to be palpably unjust and absurd.

6. Waters and water courses ⇨226 — That Legislature's finding that all lands of irrigation district will be benefited by works built by levee district included therein was made after fixing boundaries does not invalidate it.

That Legislature's finding of benefit to all lands of irrigation district by levee protection works theretofore constructed by levee district included in irrigation district was made after boundaries of latter district were fixed does not militate against validity of such finding.

7. Waters and water courses ⇨226—Board of supervisors' determination as to lands benefited by proposed works held not conclusive, so as to render Legislature's subsequent finding of benefit to other lands in subsequently organized irrigation district embracing territory of levee district unreasonable.

Board of supervisors' determination, in fixing boundaries of levee district, that only lands therein included were benefited by proposed works was not conclusive of such fact, so as to render Legislature's subsequent finding of benefit to lands outside district, within subsequently organized irrigation district, embracing territory of such levee district, unreasonable, unwarranted, and arbitrary.

8. Waters and water courses ⇨226—Refunding bonds, made charge on entire irrigation district, held not invalid because authorized to be sold to repay only part of outstanding bonds of former levee district (St. 1911, p. 303, as amended by St. 1917, p. 809; Palo Verde Irrigation District Act [St. 1923, p. 1067], §§ 24, 28, 59, and section 15a, as added by St. 1925, p. 637).

That refunding bonds, made charge on entire irrigation district by Palo Verde Irrigation District Act, §§ 24, 28, 59, and section 15a, as added by St. 1925, p. 637, are to be sold to pay only part of outstanding bonds of former levee district taken over by irrigation district, while principal and interest of remaining bonds continue to be charge only on property originally liable therefor under St. 1911, p. 303, as amended by St. 1917, p. 809, does not invalidate them.

9. Waters and water courses ⇨226—Authorizing issuance of refunding bonds by irrigation district to retire part of bonds of levee district does not necessitate imposition of obligation on all lands to pay off remaining levee district bonds (St. 1911, p. 303, as amended by St. 1917, p. 809; Palo Verde Irrigation District Act [St. 1923, p. 1067]).

As obligation imposed on levee district property, under St. 1911, p. 303, as amended by St. 1917, p. 809, was to pay off bonds by general tax, owners of property cannot complain that other lands benefited by improvements are not assessed, and authority granted to irrigation district, taking over levee district under Palo Verde Irrigation District Act, to issue refunding bonds, to retire part of levee district bonds, does not necessitate imposition of obligation on all lands in irrigation district to pay off remaining levee district bonds.

10. Waters and water courses ⇨226—Legislature could provide for continued payment of part of outstanding bonds of levee district, taken over by irrigation district by general tax (St. 1911, p. 303, as amended by St. 1917, p. 809; Palo Verde Irrigation District Act [St. 1923, p. 1067]).

It being optional with Legislature to provide for payment of levee district bonds through exercise of general taxing power, as was done by St. 1911, p. 303, as amended by St. 1917, p. 809, it could continue such method of raising funds to pay part of outstanding bonds of dis-

trict when taken over by irrigation district organized under St. 1923, p. 1067.

11. Waters and water courses ⚡226—Owners of property outside levee district consented by electing to become part of irrigation district to assume obligations imposed by statute for issuance of refunding bonds, and were bound by majority vote of electors to issue bonds (Palo Verde Irrigation District Act [St. 1923, p. 1067] §§ 57-59).

Owners of property outside levee district, taken over by irrigation district organized under St. 1923, p. 1067, consented, by electing to become part of latter district, to become subject to obligations authorized by provisions of such act for issuance of refunding bonds to take up outstanding levee district bonds (sections 57-59), and were bound by majority vote of property owners of irrigation district to issue bonds, though they voted in negative.

12. Waters and water courses ⚡226—Legislature's finding that all lands of irrigation district will be benefited by water system already constructed held not palpably unreasonable and unwarranted as matter of law (Palo Verde Irrigation District Act [St. 1923, p. 1067], and section 15a, as added by St. 1925, p. 637).

Where petition for writ of mandate to compel signing of irrigation district refunding bonds, authorized by Palo Verde Irrigation District Act, to take up outstanding bonds of water company, averred that vast extensions and improvements were contemplated to supply thousands of acres of unirrigated land, it cannot be said, as matter of law, that Legislature's finding in section 15a, as added by St. 1925, p. 637, that all lands within irrigation district are benefited by water distribution system already constructed is palpably unreasonable and unwarranted.

13. Constitutional law ⚡143—Contract of taxpayers of levee district held not impaired by issuance of refunding bonds of irrigation district to take up outstanding levee district bonds, because personal property will be released from obligation to pay taxes (Palo Verde Irrigation District Act [St. 1923, p. 1067]).

Issuance of refunding bonds by irrigation district, organized under St. 1923, p. 1067, to take up outstanding bonds of levee district, held not to impair obligation of contract, so far as taxpayers of levee district are concerned, because of release of personal property within district from obligation to pay taxes for repayment of such bonds.

14. Constitutional law ⚡143—Rights of levee district bondholders held not impaired by issuance of refunding bonds of irrigation district organized to take up outstanding levee district bonds (Palo Verde Irrigation District Act [St. 1923, p. 1067]).

Rights of holders of levee district bonds held not impaired by issuance of refunding bonds by irrigation district, organized under St. 1923, p. 1067, to take up outstanding levee district bonds, obligation thereof being satisfied if old bonds are paid, while, if not, obligation therefor remained.

In Bank.

Application by the Palo Verde Irrigation District for writ of mandate to Tony Seeley, as Secretary of the Board of Trustees of such district. Writ granted.

Chapman & Chapman, by Ward Chapman, all of Los Angeles, for petitioner.

O'Melveny, Millikin, Tuller & Macniel and Paul E. Schwab, all of Los Angeles, for respondent.

LENNON, J. Mandate to compel the respondent, as secretary of the board of trustees of Palo Verde irrigation district, to sign \$213,000 of refunding bonds, designated as "second issue" of said Palo Verde irrigation district, which were voted upon at an election held in said irrigation district on August 28, 1925.

The Palo Verde irrigation district was organized in 1923 under an act known as "Palo Verde Irrigation District Act" (Stats. 1923, p. 1067), for the purpose of taking over the properties and functions of three separate and independent agencies theretofore operating in the Palo Verde Valley, and thereby eliminating the inefficiencies and extra expenses occasioned by the independent functioning of said agencies. These independent agencies consisted of the Palo Verde joint levee district, which had charge and control of levee protection for the valley; the Palo Verde drainage district, which had charge of the drainage projects in the valley, and the Palo Verde Mutual Water System, a private corporation, which had control of the distribution of water.

The boundaries of the Palo Verde irrigation district comprise all of the territory within the old Palo Verde joint levee district of Riverside and Imperial counties, and all of the territory within the Palo Verde drainage district. Said levee district and drainage district, however, partially overlap each other, and there is an area containing some 684 acres within the old drainage district which is not within the boundaries of the old levee district and some 13,817 acres in the old levee district which are not within the drainage district.

The validity of the Irrigation District Act as a whole, and the organization of the Palo Verde irrigation district thereunder, was considered and upheld by this court in the case of *Barber v. Galloway*, 231 P. 34.

The statute under which the Palo Verde irrigation district was organized was amended in 1925 (Stats. 1925, p. 637), by adding section 15a, which deals specifically with the power of the irrigation district to issue refunding bonds to take care of the bonds already issued or to be issued of the Palo Verde levee district, the Palo Verde drainage district, and the Palo Verde Mutual Water System. In said section it was specifically declared that:

"All of the levee and other protection works or structures and all other drainage canals and other drainage works, and all of the irrigation system of the Palo Verde Mutual Water Company which have heretofore been constructed by either and all of said organizations [Palo Verde Levee District, Palo Verde Drainage District and Palo Verde Mutual Water Company], or which may hereafter be constructed, maintained and operated by the Palo Verde irrigation district, are uniformly advantageous and beneficial to all of the lands within said district [Palo Verde Irrigation District]."

In the case of *Barber v. Galloway*, supra, the question of whether or not the issuance of bonds by the irrigation district to redeem the bonds of the levee or drainage district would be illegal was expressly left open as being unnecessary to a decision of that case. Since the date of that decision the proceedings for the authorization, issuance, and sale of said \$213,000 of refunding bonds have been taken, and, respondent being one of the officers required under the statute and under the resolution authorizing the issuance of these bonds to sign the same, has refused to do so upon the ground that such bonds would, if issued, be invalid. It is the respondent's contention that the provisions relating to the issuance of these refunding bonds, and the provisions regarding the levying of assessments for the payment thereof are unconstitutional, and that the issuance of these bonds with the subsequent levying of assessments for their payment in accordance with the statutory provisions will result in the taking of property without due process of law, and will result in the unconstitutional impairment of the obligations of a contract. It is conceded that the statutory requirements regulating the proceedings for the authorization, issuance, and sale of the bonds have been complied with, and therefore no question of the regularity of said proceedings is here involved.

[1] The said \$213,000 of refunding bonds are to be issued "for the purpose of providing funds to be applied upon the payment or redemption of bonds now outstanding of the Palo Verde joint levee districts of Riverside and Imperial counties of California, the Palo Verde drainage district or the Palo Verde Mutual Water Company, the payment of which has been assumed by this district [Palo Verde Irrigation District] and which may become due and payable during the next three years." It appears that none of the Palo Verde drainage district bonds will mature within the next three years, but that \$123,000 of bonds of the Palo Verde joint levee district will mature within three years from August, 1925, and that \$90,000 of bonds of the Palo Verde Mutual Water Company will mature within three years from said date. Manifestly, therefore, the proceeds from the \$213,000 of refunding bonds are to be used for the purpose of paying or redeeming the \$123,000 of joint levee district bonds

and \$90,000 of the Palo Verde Mutual Water Company's bonds.

The bonds of the old levee district which are to be redeemed or paid off were payable from taxes upon all the taxable real and personal property in the levee district. Stats. 1911, p. 303, as amended by Stats. 1917, p. 809. Under the provisions of the Palo Verde Irrigation District Act, sections 15a, 24, 28, and 59, all of the lands and improvements thereon within the irrigation district will be assessed for the payment of the refunding bonds. The result will therefore necessarily be that a portion of the burden of the old joint levee district will be imposed upon the 684 acres of the new irrigation district, which were not any time a part of the old joint levee district which originally incurred the obligation.

Respondent insists that the board of trustees of the Palo Verde irrigation district has not the power to authorize and issue bonds of the district for the purpose of providing funds to pay or redeem bonds of the former levee district and drainage district, and thus impose an obligation by taxation upon property owners whose properties are located outside of the boundaries of the former districts for the purpose of payment of a bonded indebtedness which was not originally a lien or a charge upon their property. With this contention we cannot agree. In *Johnson v. City of San Diego*, 109 Cal. 468, 42 P. 249, 30 L. R. A. 178, and *People v. Alameda County*, 26 Cal. 641, the court upheld the power of the Legislature to make property actually benefited liable for the cost of public improvements and chargeable with the payment of a reasonable proportion thereof based upon benefits or other equitable considerations.

If the lands within the irrigation district which were not included in the original levee district are and will be actually benefited by the levee protection work already constructed by the levee district, no good reason exists why they should not be called upon to pay their proportional share of the cost of construction. That the lands and improvements within the irrigation district will be uniformly benefited by the levee protection works heretofore constructed has been expressly found by the Legislature. In the face of this express finding by the Legislature we find no constitutional inhibition against the issuance of refunding bonds whereby the whole irrigation district assumes the burden originally imposed upon the property within the levee district.

[2] It is well settled in this state that the Legislature has plenary power over districts organized for reclamation purposes. *Barber v. Galloway*, supra. By article 11, § 13, of the Constitution, the Legislature is granted unlimited power "to provide for the supervision, regulation and conduct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts or drain-

age districts, organized or existing under any law of this state."

[3-5] It cannot be said that the declaration by the Legislature of a benefit to all the lands of the irrigation district and the imposition of an assessment upon all the lands for the payment thereof is a taking of property without due process of law. The general rule on this subject is that a hearing as to benefits must be provided at some time before the land is finally burdened by the assessment. But this general rule is subject to the well-established exception that, when the Legislature itself, by fixing the boundaries of a district, finds that all of the property therein is benefited, the property owners are not entitled to a hearing, for they are conclusively presumed to have been heard through their representatives in the Legislature. *Tarpey v. McClure*, 190 Cal. 593, 604, 213 P. 983. Such a finding by the Legislature, in the absence of a showing that the action of the Legislature was palpably unjust and absurd, is conclusive and is not subject to review by the courts. *People v. Sacramento Drainage District*, 155 Cal. 373, 386, 103 P. 207.

[6] The mere fact that the finding of a benefit was made after the boundaries of the irrigation district were fixed does not, in our opinion, militate against the validity of such a finding by the Legislature. If the Legislature may make an implied finding that certain lands are or will be benefited by certain improvements within that district, it would seem to lie within its power to make express findings that certain lands already included in a district will be benefited by improvements within that district.

[7] No attempt is made by the respondent to establish the fact that the action of the Legislature in declaring the lands of the irrigation district benefited by the levee protection improvements was arbitrary and unjust by denying any of the facts set forth by petitioners to justify the findings of the Legislature. Respondent contents himself with declaring that, inasmuch as the board of supervisors, to whom was given the power of determining the boundaries of the old levee district, must have determined, in fixing the said boundaries, that the lands therein included and no others were benefited by the proposed levee protection works, such determination was conclusive of the fact that only the lands within the levee district would be benefited by such works, and any subsequent action of the Legislature finding that other lands not included within the old levee district were benefited must necessarily be unreasonable, unwarranted, and arbitrary. This does not necessarily follow. It may well happen that by the extension of the original plans lands which would not be benefited by the original construction work would derive a benefit, not only from the additional improvement, but from the original improve-

ment as well. The determination of the board of supervisors is not, therefore, a conclusive determination, and is not uncontrovertible proof that the action of the Legislature in declaring other lands benefited was unwarranted.

[8] There is nothing anomalous in the fact that the refunding bonds which are to be a charge upon the entire irrigation district are to be sold to repay only a portion of the outstanding levee bonds, namely, those maturing in the next three years, while principal and interest of the remaining bonds continue to be a charge only upon the property originally liable therefor. The Legislature has seen fit, in the exercise of its plenary power, to allow that obligation to remain against the property originally liable therefor unless refunding bonds may hereafter be issued to take them up. No injustice is done the owners of the properties within the old levee district, because they are only required to do what they were originally bound to do. The fact that the Legislature has seen fit to partially lighten the burden of the original obligation of the property owners of the old levee district does not make it obligatory upon the Legislature to permanently lessen it.

[9] Respondent argues that the Legislature, having authorized the issuance of refunding bonds, which are a charge upon all the lands uniformly benefited to retire a part of the levee district bonds, it will be necessary for the Legislature to impose an obligation upon all of the lands benefited to pay off the remaining levee district bonds. However, the obligation imposed upon the old levee district properties was not an assessment based upon special benefits, but was a general tax, not referable to special benefits. The two methods of raising revenues are entirely distinct, and therefore the property owners obligated under the imposition of a general tax will not be in a position to complain that other lands benefited by the improvements are not assessed. *S. P. Co. v. Levee District No. 1*, 172 Cal. 345, 156 P. 502.

[10] It was optional with the Legislature to provide for the redemption of the bonds through assessments based upon benefits, or provide for their payment through the exercise of its general taxing power. Since it was optional with the Legislature to cause these bonds to be discharged through the imposition of a general tax without regard to benefits, it may at its option continue that method of raising the funds for the payment of the remaining bonds of the levee district.

[11] It may also be said, we think, that the property owners within the area not originally included in the levee district, by electing to become a part of the irrigation district, consented to become subjected to the obligations authorized to be imposed by the provisions of the Irrigation District Act for the issuance of the refunding bonds. Under the Irrigation District Act, the board of trustees

had the power to issue refunding bonds to take up outstanding levee district bonds as well as the bonds of the drainage district and water company. Sections 57, 58, and 59, Stats. 1923, p. 1067. The question of whether the new district should be organized was submitted to a vote of the property owners of the district and carried. Moreover, it will be remembered that the proposal to issue the bonds was carried by an overwhelming vote at the special election called for that purpose. It may be that the owners of property in the added territory voted in the negative, but their properties formed a component part of the new district, and the voice of the majority under the provisions of the statute under which they had elected to become a part of the new district was binding upon them.

Respondent insists, however, that the facts and decision in the instant case are practically identical with the facts and decision in the case of Reclamation District No. 70 v. Birks, 159 Cal. 233, 113 P. 170, and that the instant case is therefore covered and controlled by the latter case. Respondent relies particularly upon certain language to be found in the Birks Case, which reads as follows:

"* * * Where a debt has been imposed upon the property of a quasi municipal corporation such as a reclamation district, which debt is to be paid by the owners of the property within the district in proportion to the benefits which their lands receive from the work done, it is not within the power of the Legislature to transfer and impose this debt upon property not within the district at the time the original obligation was created, and which was not benefited by the work done."

The Birks Case is not, however, closely analogous in its facts and circumstances to the instant case, and that decision does not, therefore, govern and control the instant case. The facts in that case show that there had been in existence a district known as "swamp land district No. 70." This district had issued warrants to the extent of many thousand dollars. In 1905 the Legislature created reclamation district No. 70, which reclamation district embraced all of the territory within the old swamp land district No. 70 and certain additional territory in another district. The trustees of reclamation district No. 70, upon the fallacious assumption that title to the improvements of old 70 remained in old 70 after its absorption by new 70, adopted a plan whereby the property of old 70 was to be purchased by new 70 and paid for by assessments levied upon lands in the new 70. There was no legislative finding that the lands of the new district were benefited by the improvements undertaken by the old 70, and no provision was made by the Legislature for the payment of the existing debt of the old district by the new district. The assessments levied for the payment of the properties of the old district were evi-

dently levied upon the theory that the debts of the old district became automatically the debts of the new district, and the new district was liable for such debts by operation of law. The court in its decision pointed out that beneficial title to the property of the old district was in the state, and upon the creation of the new district the title became vested in the new district; the new district could not buy what it already owned, and an assessment for the payment of the purchase of the property was therefore invalid. It was further held that, in the absence of any provision by the Legislature for the payment of the existing debt, it remained the debt of the old district, and did not become the obligation of the new district by operation of law. It was said that the debt of the old district did not become an obligation of the new district by operation of law for the reason that it might happen that the lands of the new district would not be benefited by the reclamation works of the old district, and it would be manifestly unjust for the burden to be automatically imposed by operation of law regardless of whether there was or was not any benefit. The question of what the situation would be had there been, as in the instant case, a legislative finding that the lands of the new district were benefited by the improvements of the old district was not discussed, and obviously could not have been decided for the reason that that question was not then before the court.

Even the language relied upon by respondent as specifically denying the power of the Legislature to impose the burden upon the land in the new irrigation district not originally within the levee district is not inconsistent with the theory that such a burden may be imposed if the new lands are found to be benefited by the improvements of the old levee district. The language relied upon is merely to the effect that it is not within the power of the Legislature to impose the debt upon property not within the district at the time the original obligation was created which was "not benefited by the work done." In the instant case there is an express enactment by the Legislature to the effect that all the lands within the irrigation district will be benefited by the improvements of the old drainage district, the old levee district, and the Palo Verde Mutual Water System. In the Birks Case there was no such enactment. In the instant case express provision is made for the assumption of the debt of the old levee district by the new irrigation district by means of the issuance of refunding bonds. In the Birks Case no such provision had been made. Therein lies the distinction and differentiation between the Birks Case and the present case.

[12] We have heretofore discussed only the question of the validity of the refunding bonds to redeem the bonds of the old levee district. The same arguments, however, ap-

ply with equal force to the bonds proposed to be issued to redeem the bonds of the Palo Verde Mutual Water System. Section 15a of the Statute of 1925 (Stats. 1925, p. 637) contains an express finding that all the lands of the irrigation district will be benefited by the irrigation system of the Palo Verde Mutual Water Company. Inasmuch as the petition for the mandate avers that within the next three years vast extensions and improvements are contemplated to be made so that thousands of acres of land not now under the water system can be supplied with water and placed in cultivation, it cannot be said as a matter of law that the finding of the Legislature that all of the lands within the irrigation district, including both the lands now served by irrigation and those to be served, are benefited by the water distribution system already constructed, is palpably unreasonable and unwarranted.

[13] It is also seriously urged by the respondent that the obligation of the contract entered into by the taxpayers of the Palo Verde joint levee district at the time of the issuance of the levee district bonds will be impaired by the issuance of the refunding bonds by reason of the fact that the personal property within the levee district will be released from the obligation to pay taxes for the repayment of the levee district bonds. There is no impairment of the obligation so far as the taxpayers are concerned by the change in the method of taxation. In the case of *La Mesa Lemon Grove, etc., Irrigation District v. Halley* (Cal. Sup.) 239 P. 719, it was held that the Legislature had the power to authorize changes in the method of raising revenue by such district, and expressly repudiated the idea that property owners had any contractual right to have the same method continued in force without alteration.

[14] It is, of course, obvious that the rights of the bondholders are not in any way impaired by the issuance of the refunding bonds. If the bonds are issued and sold and the proceeds applied to the payment of the old bonds as they mature, the obligation of the old bonds is satisfied, and there is no contract to impair. If the obligation of the old bonds is not extinguished by their payment from the proceeds of the refunding bonds, then the obligation of the old bonds remains, and all the property originally liable therefor continues to be liable therefor. Nowhere in the original act nor in the amendatory act of 1925 is there any attempt on the part of the Legislature to release any property from existing obligation to bondholders.

Let the writ issue, directed to Tony Seeley as secretary of the board of trustees of Palo Verde irrigation district, commanding him to sign the \$213,000 of refunding bonds designated as "second issue" of the Palo Verde Irrigation district, voted upon at the elec-

tion held in said district on August 28, 1925.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; SHENK, J.; LAWLOR, J.

77 Cal. App. 125

CAMPION v. DOWNEY. (Civ. 5375.)

(District Court of Appeal, First District, Division 2, California. March 17, 1926. Hearing Denied by Supreme Court May 14, 1926.)

1. Evidence ⇐425.

In assumpsit for goods sold, parol evidence is admissible where orders, invoices, and writings in evidence are not pleaded.

2. Evidence ⇐408(10).

Parol evidence is admissible where writings constitute mere "bill of parcels," not necessarily indicating merger of prior negotiations.

3. Evidence ⇐434(11).

Parol evidence is admissible where orders for goods were procured by fraud or misrepresentation.

4. Trial ⇐49—Court's statement, after argument on admissibility of oral testimony to vary writings, that "I cannot see there is any obligation created by these writings; I don't think it is complete"—held merely a ruling, and not error.

Court's statement, made after counsel's argument on admissibility of oral testimony after admission of writings that, "I can't see there is any obligation created by these writings introduced in evidence; I don't think it is complete in itself,"—held mere ruling on admission of testimony, and not error.

Appeal from Superior Court, Monterey County; Fred V. Treat, Judge.

Action for goods sold and delivered by E. Campion against Margaret C. Downey, doing business as the Gage Millinery. Judgment for defendant, and plaintiff appeals. Affirmed.

Laurenz J. Krueger, of San Francisco, and J. A. Bardin, of Salinas, for appellant.
C. F. Lacey, of Salinas, for respondent.

STURTEVANT, J. This is an action for goods sold and delivered. The defendant answered, and the case was tried before the trial court sitting with a jury. The jury returned a verdict in favor of the defendant, and from the judgment entered thereon the plaintiff has appealed under section 953a of the Code of Civil Procedure.

The plaintiff declared on a common count indebitatus assumpsit. The defendant interposed an answer, in which she (1) denied specifically the allegations contained in the complaint; and then she alleged (2) affirma-

tively that the agreement between the parties was that this defendant should make reasonable efforts to dispose of the goods, and that they should be paid for by the defendant as the goods were sold and paid for by the purchasers; and then she further alleged (3) that the agreement was to the effect that the defendant should endeavor to sell the goods, and if she was unable to do so then, on application, the vendor would send a special salesman from his establishment in San Francisco to the defendant's place of business at Monterey to assist her in conducting a special sale of said goods, and upon his refusal to do so that the defendant had returned the goods to the vendor, costs prepaid.

The defendant was the proprietress of a millinery store at Monterey, Cal. On the 21st day of August, 1924, Mr. Rhodes, as a traveling salesman representing Benioff Bros., wholesalers, transported the goods in question to Monterey, and thereafter called on the defendant to come into his temporary salesroom for the purpose of selling to her a stock of furs. Thereafter certain articles were selected from the stock of the salesman, and order No. 09175 was written out by Mr. Rhodes on a printed form. The order was as follows:

David Benioff	Benioff Bros.	Fred Benioff
The Wholesale Fur House of Superior Service		
742 Market St.	San Francisco, Cal. Aug. 21, 1924.	
Terms: 2% 10 days or 60 days net. Order No. 09175.		
Sold to Margaret C. Downey; Address, Monterey, Cal. Via When delivered: At once.		
Sold by B. A. Rhodes.		

No.	Quan.	Description.	Amount.
3070	1	genuine beige caracul jacquette.....	\$ 97 50
[Here follow other articles.]			
204x	1	genuine sable brown fox.....	40 00
Forw'd			\$1,493 50

Receipt of above furs hereby acknowledged, title thereto not to pass from Benioff Bros. until receipt by me from them of regular Invoice covering same.
[Signed] Margaret C. Downey.

Another paper, order No. 09176, was likewise written by Mr. Rhodes, and an immediate delivery of the goods was made. The two orders totaled \$1,800.50. On August 22, 1924, the vendor, on his letter head, wrote a letter to the defendant as follows:

"San Francisco, 8/22/24.

"Mrs. Margaret C. Downey, Monterey, Calif.
—Dear Madam: Enclosed find invoices for goods sold and delivered to you by our Mr. B. A. Rhodes. We not only wish to thank you for this valued business, but hope to always merit same. * * *

"Under separate cover by express prepaid we are sending you four or five prepared ads. All you have to do is to give them to the newspaper and tell the newspaper to insert your name under them.

"We feel that your results will be much greater if you run an ad every week. We are also sending you some fur hangers, with the prepared ads. * * *

"Assuring you of our appreciation of your

valued business, hoping for a continuance of same, we beg to remain,

"Very truly yours,

"Benioff Bros., by David Benioff.

The invoices referred to in the letter were numbered 7443 and 7444. Both papers are similar in form, and the only difference is the description of the goods and the prices. We therefore set forth one of the papers, 7443, which was in form as follows:

David Benioff	Sutter 5994	Fred Benioff
Benioff Bros., Wholesale Furriers 7443		
The Wholesale Fur House of Immediate Deliveries		
Importers	Manufacturers	Exporters
40 Geary Street		

San Francisco, Cal. August 21, 1924.

Sold to Margaret C. Downey.

Terms, 2% 10 days, or 60 days net.

Via Sold and delivered by our Mr. B. A. Rhodes, Monterey, California.

If terms and prices are not exactly as agreed upon at time of delivery, notify us at once, otherwise settlement must be made by this bill.

3070	1	genuine beige caracul jacquette.....	\$ 97 50
[Here follow other articles.]			

1303	1	genuine golden European fitch choker	11 50
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Forw'd	\$1,341 50
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Sold and delivered to you by our Mr. B. A. Rhodes, August 21, 1924.

After the goods were placed on the shelf the defendant and the plaintiff's assignor had some correspondence regarding the terms of the contract and the obligations of the respective parties, and, a disagreement arising, the defendant packed the goods and returned them by express, charges prepaid, to the vendor. The vendor declined to accept the package, and the record discloses that it is now held by the express company.

On the trial of the action the plaintiff called Mr. Rhodes as a witness, and it also called Mr. Benioff, plaintiff's assignor. During the presentation of his case the plaintiff introduced in evidence the documents above mentioned. After the above witnesses had been examined and cross-examined plaintiff rested. Thereupon the defendant took the stand in her own behalf, and the following proceedings were had: After certain preliminary questions had been propounded to the witness, her attorney asked her to state to the court and jury the conversation and the transaction that she had with Mr. Rhodes. The plaintiff objected on the ground that the invoice and copy order constituted a contract, and that such written instruments could not be varied by parol. The objection was overruled, and the witness proceeded to state in detail the probative facts sustaining the affirmative allegations alleged in her answer. At this time the appellant repeats his contention that his objection should have been sustained.

[1] As we have shown above, neither party to the action had pleaded any written instrument.

"It has been held that the rule against the admission of parol evidence to vary or contradict a written contract does not apply where the writing as to which it is sought to introduce the evidence is collateral to the issue involved and the action is not based upon such writing. "This rule has usually been applied in cases where the action was not between the parties to the instrument, in which case another exception would also apply; but it has also been applied where the parties to the action were the same as the parties to the writing. * * *" 22 C. J. 1282, § 1713; Decennial Digest, Evidence, § 425; Key No. Digest, Evidence, § 425.

An examination of the cases cited in the foregoing authorities abundantly support the contention of the respondent that the evidence was properly admitted. First Nat. Bank of Chicago v. California Nat. Bank of San Diego, 35 P. 639, 4 Cal. Unrep. C. 403, is directly in point. In that case the plaintiff pleaded his cause of action in three different counts: (1) Upon a promissory note; (2) a cause of action upon an overdraft; and (3) a cause of action on a common count as for moneys loaned. The first and third counts related to the same indebtedness. On the trial of the action the plaintiff introduced testimony in reference to the negotiations on the part of the plaintiff and the defendant of and concerning the loan. The defendant objected on the ground that such evidence tended to vary a written instrument, to wit, the promissory note which had already been admitted. Mr. Commissioner Searls, speaking for the court, said:

"We do not see that it did anything of the kind. The third cause of action was for money loaned by plaintiff to defendant. This evidence tended to support that cause of action, and the fact that defendant contended that it was not a loan by plaintiff but a purchase of the promissory note in question did not militate against the admissibility of the evidence." Moore v. Copp, 51 P. 630, 119 Cal. 429; Wintermute v. Standard Furniture Co., 102 P. 443, 444, 53 Wash. 539; National Bank of Commerce v. Gougar, 98 P. 607, 608, 51 Wash. 204.

[2] There is another reason why the evidence was properly admitted. The letter written by Benioff Bros. inclosing the invoice constituted the written contract giving to appellant's contention the broadest interpretation the facts will warrant. However, that letter and invoice constituted merely what the books term a "bill of parcels," and were not of such dignity as necessarily to indicate that all previous negotiations were merged in them. Leavitt v. Fiberloid Co., 82 N. E. 682, 196 Mass. 440, 15 L. R. A. (N. S.) 855, 864, and cases there cited. All of the courts seem to have made a distinction which is patent between a formal bill of sale and a bill of parcels when considering the rule. R. M. Davis Photo Stock Co. v. Photo Jewelry Mfg. Co., 104 P. 389, 47 Colo. 68, 19 Ann. Cas. 540, and see note, page 544. See, also, the following leading cases: Sutton v. Weber,

101 N. W. 775, 127 Iowa, 361; Rosenberg v. Capital Cut Stone & Granite Co. (Ariz.) 238 P. 330; Routledge v. Worthington Co., 23 N. E. 1111, 119 N. Y. 592; H. Leonard Simmons Co. v. Goldfarb (Sup.) 150 N. Y. S. 547; Boulware v. Victor Automobile Mfg. Co., 134 S. W. 7, 152 Mo. App. 567. A case not so similar in its facts, but nevertheless presenting the same principles, is Luitweiler, etc., Co. v. Ukiah, etc., Co., 116 P. 707, 712, 16 Cal. App. 198.

[3] Finally, there is yet another rule that has been adopted by our Supreme Court and which sustains the position of the respondent. We refer to the rule stated in the case entitled Providence Jewelry Co. v. Nagel, 108 P. 312, 157 Cal. 497. The facts in that case were much stronger in favor of the vendor than the facts in the instant case. After stating the facts, Mr. Justice Allen, speaking for the court, said:

"The testimony of the defendant's witnesses which was accepted by the court as true clearly indicates that the minds of the parties did not meet; that there was in fact no contract between them as appears in the written order, and that the same was executed under such circumstances as would estop plaintiff from claiming any benefit thereunder. It seems clear that a fraud was practiced upon defendant by this representative of plaintiff, and that his signature to the order was procured by misrepresentation and fraud sufficient to vitiate the instrument. The defendant had a right to rely upon the representations of plaintiff's agent that the written instrument presented for signature was but an order to send the goods for sale on commission and plaintiff, in an action between the original parties, is not in a position to say that, having practiced this fraud, defendant must still be bound because he did not distrust plaintiff and signed without an independent examination."

The appellant earnestly contends that he is supported by International Filter Co. v. Crystal Ice & Cold Storage Co., 157 Ill. App. 96, Hess v. Liebmann (Sup.) 84 N. Y. S. 178, and Fairbanks Steam Shovel Co. v. Holt & Jeffery, 140 P. 394, 79 Wash. 361, L. R. A. 1915B, 477. We have carefully examined those cases, and we think that each one rests on the conclusion of the court that the facts showed the writings involved to be bills of sale and not merely bills of parcels.

[4] After the appellant had made the objection above referred to, and after counsel for the plaintiff and counsel for the defendant had argued the question of law involved, the trial court said: "I can't see there is any obligation created by these writings introduced in evidence. I don't think it is complete in itself." Taking the language in connection with the context, we think it is quite clear that the trial court was merely ruling that the writings were not of that class which made it improper to receive the parol evidence which the respondent was offering. The appellant apparently so understood the

remark, because his attorney made no objection and took no exception to the remark made by the court.

The appellant also asked the trial court to give four instructions which presented the appellant's contentions regarding the admissibility of the evidence which we have discussed above. The trial court declined to give the instructions, and that ruling is assigned as error. For the reasons which we have stated above, the trial court did not commit any error in refusing to give the requested instructions.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

76 Cal. App. 763

PEOPLE v. MARTENSEN. (Cr. 910.)

(District Court of Appeal, Third District, California. March 6, 1926. Hearing Denied by Supreme Court May 3, 1926.)

Obstructing justice — Person refusing to give arresting officer name and attempting to push him from running board of automobile when arrested for speeding held guilty of resisting public officer (Pen. Code, § 148; Motor Vehicle Act, § 154, as amended by St. 1925, p. 415, § 19).

Under Pen. Code, § 148, one resisting officer by refusing to give name and pushing him off running board during attempt to obtain information necessary to give him notice to appear for speeding is guilty of resisting an officer, since, under Motor Vehicle Act, § 154, as amended by St. 1925, p. 415, § 19, arresting officer shall at such time take name and address of person and number of motor vehicle.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

J. H. Martensen was convicted of resisting a public officer, and he appeals. Affirmed.

Lilburn I. Gibson, of Ukiah, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was convicted in the superior court of Mendocino county of the crime of resisting a public officer, and was sentenced to pay a fine of \$350 and also to be imprisoned in the county jail of the county of Mendocino for the period of 30 days. Defendant appeals from the judgment, and also from the order denying his motion for a new trial. The record shows that on or about the 18th day of September, 1925, in the county of Mendocino, the defendant was traveling in an automobile along a certain public highway in the county of Mendocino at a speed exceeding 45 miles per hour: that two officers of the motor vehicle department of the state of California, M.

Holden and E. V. Pettis, observing the excessive rate of speed at which the defendant was traveling, in the performance of their duty as such officers trailed the defendant for something like half a mile, and finally overtook the defendant and required him to stop his automobile. It further appears that the officers were also traveling in an automobile. As soon as the officers had succeeded in stopping the defendant, Mr. Holden got out of the automobile in which he and Pettis were traveling and walked over to the automobile driven by the defendant. It appears also that the officers were dressed in uniform and wearing their badges of office. Upon walking over to the automobile occupied by the defendant, Mr. Holden asked the defendant for his operator's license and told the defendant he was exceeding the speed limit. The defendant refused to exhibit to the officer his operator's card. Mr. Holden asked the defendant his name. The defendant refused to disclose his name, or in any manner to reveal his identity. The officer testified in this particular as follows: "I tried to get some information in every way I could, who he was, and when I could not I told him I would place him under arrest." It appears that defendant started his motor three several times in order to get away from the officers; that the third time the defendant started his motor Mr. Holden stepped on the running board and reached over into the automobile, turned the ignition switch, stopping the motor. The defendant thereupon pushed the officer off the running board. This occurred after the officer had told the defendant that he was going to place him under arrest. After these occurrences the officers did take actual custody of the defendant and took him to the town of Ukiah, where a formal charge of speeding was placed against the defendant and also a charge of resisting an officer.

It is contended upon this appeal that at the time the defendant pushed the officer from the running board he was not attempting to resist the officer for an offense set forth in the Motor Vehicle Act or for any offense mentioned in the Penal Code of this state. This contention is based upon certain testimony given by Mr. Holden upon the preliminary examination of the defendant held on the charge of resisting an officer. This testimony is set out in the cross-examination of the witness Holden after he had testified upon direct examination that he was proceeding to arrest the defendant on a charge of speeding. These questions and answers given by the witness Holden upon the preliminary examination of the defendant are as follows:

"Q. If he had told you (referring to the defendant) who he was you wouldn't have arrested him on the speeding charge? A. No, sir; I would have given him a written warning.

"Q. What caused you to place him under arrest? A. For the simple reason he refused to give me identification.

"Q. You didn't arrest him for resisting an officer out there? A. I placed him under arrest.

"Q. On what charge? A. I wanted to see who he was and what he was.

"Q. You arrested him on no charge out there? A. I said I arrested the man upon his refusing to furnish identification.

"Q. Is that what you arrested him for? A. At that time I placed him under arrest for that, and then he illegally started the motor and tried to get away, and I reached in and turned off his switch; I did that three times, and the last time he shoved me off the running board.

"Q. That was before you placed him under arrest? A. I placed him under arrest before that; he made two more attempts before that—before he shoved me off of the car—and it was before that I placed him under arrest when he didn't give me the identification I asked for.

"Q. Did you arrest him for any other charge that day, than the speeding charge? A. Yes.

"Q. Just one charge you arrested him for out there? A. Yes.

"Q. What did you arrest him for, speeding or resisting an officer? A. I arrested him for identification, when I told him he was under arrest.

"Q. You didn't arrest him on either charge, either of speeding or resisting an officer, you arrested him because he wouldn't give any identification? A. At the time; yes, sir."

Section 148 of the Penal Code reads:

"Every person who willfully resists, delays, or obstructs any public officer, in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years."

By reference to section 154 of the Motor Vehicle Act of the state of California, as amended in 1925 (St. 1925, p. 415, § 19), and which section was in full force and effect on the 18th day of September, 1925, it will appear that the contention of the defendant upon this appeal is founded upon a misapprehension of the law relating to arrests for violations of the Motor Vehicle Act. By that section of the Motor Vehicle Act it is provided that in all cases, except for offenses constituting a felony, the arresting officer shall proceed in the following manner, after having stopped the person whom he knows to be guilty of violating the speed laws: The arresting officer shall, upon the production of the operator's license of the person arrested or from other satisfactory evidence of his identity, take the name and address of such person, the number of his motor vehicle, and notify him in writing to appear at a time and place to be specified in such notice, or, upon demand of the person arrested, take him immediately before some magistrate. It is further provided that whenever any such person refuses

to give his written promise to appear or demands appearance he shall be forthwith taken before a magistrate, etc. Referring to section 148 of the Penal Code, we find that it specifies that any person who willfully refuses, delays, or obstructs a public officer in the discharge or attempt to discharge any duty of his office, etc., is punishable, etc. Under any view of the evidence in this case, the officer was attempting to discharge the duties of his office. He had already actual knowledge of the violation of the Motor Vehicle Act by the defendant in traveling at a speed in excess of 45 miles per hour, which violation is not contested, and he was proceeding according to section 154 of the Motor Vehicle Act to ascertain the facts necessary to give the defendant the proper notice to appear and answer the charge of speeding, and while he was discharging and attempting to discharge this duty of his office the defendant pushed him from the running board and endeavored in this way to prevent the officer acquiring the information and performing his duty according to the section of the Motor Vehicle Act to which we have referred. Whether the defendant was thereafter arrested upon a proper charge is immaterial, for it appears beyond question that the officer was resisted at the time when he was attempting to discharge the duty imposed upon him by law.

The order and judgment of the trial court are affirmed.

We concur: FINCH, P. J.; HART, J.

77 Cal. App. 132

SCRANTON v. SOUTHERN PAC. CO. (Civ. 4133.)

(District Court of Appeal, Second District, Division 2, California. March 17, 1926. Hearing Denied by Supreme Court May 13, 1926.)

1. Principal and agent $\S$ 101(2)—Agent's authority to ship goods held not to include power to limit their value.

Agent's authority to ship goods held not to include power to limit their value, where such limitation did not affect carriage charges.

2. Carriers $\S$ 163—Shipper held not bound, under Interstate Commerce Act § 20, by limitation of value, where evidence failed to show that shipment was within statute (4 Fed. St. Ann. [2d Ed.] p. 506).

Shipper held not bound, under Interstate Commerce Act, § 20, by limitation of value in bill of lading, where evidence failed to show that shipment was within such statute.

Appeal from Superior Court, Los Angeles County; Thos. O. Toland, Judge.

Action by Charles E. Scranton against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

E. M. Swartz, of Los Angeles, for respondent.

WORKS, J. Plaintiff delivered to defendant, a common carrier, certain personal property to be shipped over defendant's lines of railway from Portland, Or., to Monrovia, Cal. While in transit, the goods were destroyed by fire, and plaintiff commenced this action to recover their value. The trial court found that the value of the property was \$850, and rendered judgment for that amount. Defendant appeals.

It is contended by appellant that the judgment was excessive, and, in order to lay a foundation for the discussion of the question presented, it is necessary to refer in part to the contents of the bill of lading, which was issued by appellant at the time the goods were lodged with it for shipment. The property shipped was listed in the document as follows:

"2 Bxs Canned Fruit. 1 Crt. Trunk. 1 Bx H H Gds. 1 Bdl Lumber dressed."

There was a memorandum in the bill of lading signed by an agent of respondent, but we lay aside for the present all question as to the nature or extent of the authority of the agent who appended the signature. The memorandum read:

"I hereby declare the value of H H Goods herein described as 10 cents per lb."

The trial court made various findings of fact concerning this memorandum, but it is not necessary to state their purport. They were all based upon the trial judge's view of the law, with which appellant does not agree. There is, therefore, no question presented on the appeal which involves the sufficiency of the evidence to support any finding, unless appellant's view of the law as applied to the findings is correct and the theory of the trial judge was incorrect.

We are first called upon to determine the extent to which respondent's agent, by the memorandum made upon the bill of lading, attempted to limit the value of the goods which made up the shipment. The limitation, if it was effective at all, a point later to be considered, applied only to the item, "1 Bx H. H. Gds." The memorandum purported to place a value on the H. H. Goods "described" in the bill of lading, and the item of the bill just quoted is exactly covered by the terms of the memorandum. If we either assume the abbreviated expression in the memorandum to refer to household goods, or take it as it is without attempt to assign a meaning to the initials "H H," we can by no means see that the remaining items of the bill of lading comport with it. We cannot perceive that either canned fruit, a trunk, or dressed lumber is included within the expression "H. H. Gds."

[1] The next question is as to whether the memorandum written on the bill of lading had any effect whatever. Respondent contends that his agent had no authority to write it. Appellant asserts that the authority to do so was ample. It was stipulated at the trial that respondent delivered his goods to a certain transfer company at Portland "to take charge of said goods as his agent, and to take the necessary steps, with full authority to ship said goods from" that place to Monrovia. Appellant contends that this language clothed the transfer company with power to place a limitation upon the value of the "H. H. Gds." It is our opinion that the terms of the agent's authority, as expressed in the stipulation, without anything else, were insufficient to uphold its act in attempting to limit value.

Appellant cites authority to the effect that power to ship goods, conferred upon an agent, includes the power to make a contract for special rates for carriage, but nothing is shown us which renders such a rule applicable here. We are pointed to nothing in the record which tends to prove that the limitation of value attempted to be placed upon the shipped goods was intended to operate to procure a reduction of freight charges, or even that any part of the goods was shipped at less than the maximum rates for such service.

[2] It is provided by section 20 of the Interstate Commerce Act (4 Fed. Stat. Ann. [2d Ed.] p. 506) that, if goods to be shipped by common carrier "are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper." Appellant sets forth this provision in its brief, but the enactment apparently has no bearing upon the present cause. If we concede that this statute would apply to respondent acting through his agent just as it would had respondent personally delivered his goods to appellant for shipment, we are shown nothing which indicates that it would have had an application if respondent had made such personal delivery. Specifically, nothing in the record is called to our attention which tends to prove that the "H. H. Gds." mentioned in the bill of lading were hidden from view by wrapping, boxing, or other means when they were delivered to appellant for shipment, or that appellant was not notified as to the character of the goods, or that appellant required respondent, through his agent, to specifically state in writing the value of the goods. Clearly, to our minds, the burden of proof was not upon

respondent to prove these negatives. That respondent is not bound under the statute by the attempted limitation upon value, in the absence of evidence upon the points just mentioned, is shown by *Union Pac. R. R. Co. v. Burke*, 41 S. Ct. 283, 255 U. S. 317, 65 L. Ed. 656.

We have nothing before us, as a measure of the authority of respondent's agent, except the statement contained in the stipulation entered into at the trial. We think the authority there shown was not of sufficient strength to sustain the burden which appellant seeks to impose upon it.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

77 Cal. App. 120

BRENNAN v. WEISSBAUM. (Civ. 5335.)

(District Court of Appeal, First District, Division 1, California, March 17, 1926.)

1. Appeal and error *§*957(1)—Unless record clearly shows court abused discretion, order either granting or denying application to set aside default judgment will be affirmed.

Unless the record clearly shows that the court abused its discretion, an order either granting or denying an application to set aside a default judgment will be affirmed.

2. Assignments *§*92—Assignment of claim, though for collection only, passes legal title to assignee, and, after notice thereof, debtor deals with assignor at his peril, as respects validity of settlement.

A debtor and his attorney are bound to know assignment of claim, though for collection only, passes the legal title to the assignee, and, after notice thereof, the debtor deals with the assignor at his peril as respects validity of settlement.

3. Judgment *§*138(2)—Where defendant's counsel knew case was set for trial, and that his offer of settlement was refused, and friend of defendant who informed plaintiff's counsel that settlement had been made with assignor was told settlement would not be recognized, refusal to reopen default judgment held not error (Code Civ. Proc. *§* 473).

Where defendant's counsel knew that case was set for trial, and that his offer of settlement was refused, and friend of defendant who informed plaintiff's counsel that defendant had settled with plaintiff's assignor was told by plaintiff's counsel that the settlement would not be recognized, *held* refusal to reopen the judgment under Code Civ. Proc. *§* 473, was not abuse of discretion.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Action by M. J. Brennan against G. Weissbaum. From an order denying defendant's

motion to set aside a judgment, defendant appeals. Affirmed.

James M. Thomas, of San Francisco, for appellant.

Charles Quayle, of Oakland, for respondent.

TYLER, P. J. Appeal from an order denying defendant's motion to set aside a judgment on the ground of surprise and excusable neglect.

The action in which the judgment was obtained was one brought upon an assigned claim of a Dr. Hedley Scudder for medical services rendered, which services were alleged to be of the value of \$898.

The action was commenced May 21, 1924, and appellant served and filed his answer thereto on August 14, 1924. The matter was set for hearing and came on regularly for trial on December 10th following. Defendant failed to appear, and judgment was rendered against him for the full amount prayed for, together with interest and costs of suit. Thereafter, on December 16th of the same year, a motion was made to vacate and set aside the judgment upon all the grounds provided for by section 473, Code of Civil Procedure.

In support of this motion the attorney for the defendant filed an affidavit stating, in substance, that prior to December 10, 1924, he had advised his client that the trial of said cause was set for said day, and had been informed by him that there was no necessity to prepare for trial, as he had arranged with Scudder, the assignor of the claim, to settle the same; that on the day prior to the trial, not having heard from his client as to whether or not a settlement had been made, he called on the clerk of the court where the action was pending to ascertain the condition of the calendar for the following day, and was told that the case would be reached; that he thereupon informed said clerk that he had been advised the day before by his client that the litigation would be settled, but that he had not yet heard about it; that he thereupon telephoned to the office of plaintiff's attorney, in the presence of the clerk, to ascertain as to whether or not he had heard whether a settlement had been effected, and was informed by a stenographer that plaintiff's attorney was not in; that he thereupon told the clerk of the court that he would take the matter up with respondent's attorney during the day, and advise him; that he thereafter called at the office of opposing counsel twice during the day, but failed to find him; that he left word with his stenographer that he understood that the case was going to be settled, but that he had been unable to ascertain whether the settlement had been effected, and he requested that she ascertain this fact and telephone to him that day; that he received no response to this

request, but was informed later in the day by his client that the case had been settled; that, upon receiving this information, he immediately sent a communication to plaintiff's attorney informing him of the settlement, and thereafter dismissed the matter from his mind, concluding that, in view of the settlement, no action would be taken by the court; that on December 13th following he was surprised on being advised by defendant that an execution had been issued and levied upon defendant's bank account; that he immediately asked plaintiff's attorney to set aside the judgment, but that he refused to do so.

Defendant also filed an affidavit in support of the motion to vacate wherein it is recited that some day prior to the 10th day of December, 1924, he had called upon his attorney and had advised him that there was no occasion for him to prepare the case for trial, as he intended to settle the same; that thereafter he called upon Scudder, the assignor, and made a settlement with him, and was given a letter addressed to the assignee, Brennan Mercantile Agency, informing it that the case had been settled for the sum of \$200; that on the 9th day of December, 1924, this letter was taken to the office of plaintiff, and was shown to the party in charge; that the letter was also taken to the office of the attorney for the plaintiff, and shown to his stenographer, he not being in. In reply to these affidavits, plaintiff's attorney filed his counter affidavit, which, in substance, recited that he was at all times the attorney of record for plaintiff in said action, and was conversant with all of the facts, and was the one instrumental in having the judgment entered as it was; that the action was one for medical services; that the answer filed did not deny the claim on its merits, but simply raised an issue as to the physician's qualifications; that said cause was regularly set for trial on plaintiff's motion on September 10, 1924, the day of trial fixed being December 10th following, of which fact defendant had due and proper notice; that, as the day of trial approached, defendant sought through his counsel to procure a compromise of the claim; and that on November 10, 1924, he offered affiant the sum of \$250 in settlement thereof, which was promptly refused, and a demand made in writing for the full amount with interest; that nothing further was heard from defendant or his counsel in the matter until late in the afternoon of December 9, 1924, when a Mr. Meyers, representing himself to be a friend of defendant, called at affiant's office, and announced to an attendant that

the claim had been settled with Scudder; that Meyers was at that time informed that the settlement would not be recognized, as plaintiff was the owner of the claim; that affiant at once sought Dr. Scudder, and learned what had been done; that affiant, on behalf of plaintiff, the assignee, repudiated any settlement, and refused to recognize the same as binding, and so informed Scudder, and insisted that he be present in court the following day with his books of account. This suggestion was followed, and the judgment was duly given and entered; that on his return to his office, affiant found the letter which the attorney for defendant had mailed him.

[1] Upon the showing made under these affidavits, the trial court refused to set aside the judgment. It is here claimed that the action of the court constituted an abuse of its discretion. We do not think so. Applications to set aside default judgments are addressed to the sound discretion of the court. While it has been said that the exercise of this discretion ought to tend in a reasonable degree to bring about a judgment on the merits, this observation by appellate courts has been in the nature of advice to the lower courts, and not for the purpose of compelling them to decide in that mode. Unless the record clearly shows that the court has abused its discretion, its order, whether it be to grant or deny the application, will be affirmed. *Ingram v. Epperson*, 70 P. 165, 137 Cal. 370.

[2, 3] It clearly appears from the affidavits that defendant's attorney knew that the case had been set for trial. It also appears from the affidavit of plaintiff's attorney that he repudiated the settlement, and so advised defendant's friend a day before the trial. The only reasonable inference that can be drawn from this fact is that defendant or his attorney was advised of his attitude in the matter. Then, again, they were bound to know that the assignment of a claim, though made for collection only, passes the legal title to the assignee, and, after notice thereof, the debtor deals with the assignor at his peril. *In re Kling*, 186 P. 152, 44 Cal. App. 267.

While the case may seem a harsh one from defendant's point of view, he is not entirely without a remedy, as recourse, no doubt, may be had against respondent's assignor. No abuse of discretion appearing, the ruling of the trial court is affirmed.

We concur: CASHIN, J.; KNIGHT, J.

77 Cal. App. 10

PEOPLE v. MYERS. (Cr. 1309.)

(District Court of Appeal, Second District, Division 2, California. March 10, 1926. Hearing Denied by Supreme Court May 3, 1926.)

1. Criminal law $\S$ 539(1)—**Testimony of witness at preliminary examination is not inadmissible, because objections to questions were sustained, where rulings were correct (Pen. Code, § 869, subd. 3, and section 686).**

Testimony of witness given at defendant's preliminary examination before committing magistrate, having power to rule on objections to evidence, under Pen. Code, § 869, subd. 3, is not inadmissible at trial, under section 686, because objections to questions put to witness were sustained, where rulings were correct.

2. Criminal law $\S$ 543(1)—**Testimony at preliminary examination of witness, whose attendance cannot be had during trial, is admissible, though he was served with subpoena in state before trial (Pen. Code, § 686).**

Where due diligence, exercised within proper period before trial, shows that actual attendance of witness cannot be had during trial, his testimony taken at defendant's preliminary examination is admissible, under Pen. Code, § 686, though witness was served with subpoena in state at some period before trial.

3. Criminal law $\S$ 543(2)—**Provision for securing written undertaking for appearance of witness need not be invoked as prerequisite to use of testimony taken at preliminary examination (Pen. Code, § 879).**

Pen. Code, § 879, providing that court may order witness to enter into written undertaking securing his attendance, if satisfied witness will not appear at trial, need not be invoked as a prerequisite to use at trial of testimony of witness taken at preliminary examination.

4. Criminal law $\S$ 543(1)—**Permanent absence of witness from state need not be shown to admit evidence of testimony given at preliminary examination (Pen. Code, § 686).**

Under Pen. Code, § 686, to admit evidence of testimony taken at preliminary examination, it is not necessary to show that witness' absence from state was to be permanent.

5. Criminal law $\S$ 543(2)—**Evidence that witness, whose testimony at preliminary examination is offered, is out of state, is admissible only to show he cannot be found in state (Pen. Code, § 686).**

Under Pen. Code, § 686, evidence that witness, whose testimony at preliminary examination is offered, is out of state, is admissible only to show that he cannot be found within state.

6. Criminal law $\S$ 539(1)—**Both direct and cross examination of absent witness at preliminary examination is admissible at trial (Pen. Code, § 686; Code Civ. Proc. §§ 2022, 2032).**

Under Pen. Code, § 686, both direct and cross examination of absent witness given at preliminary examination is admissible at trial, in view of Code Civ. Proc. §§ 2022, 2032; cross-examination being as much a part of testimony as direct examination.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Thomas Myers was convicted of burglary, and he appeals. Affirmed.

Otto Christensen, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

WORKS, J. Defendant was convicted of the crime of burglary, and appeals from the judgment of conviction and from an order of the trial court denying his motion for a new trial.

[1] Over the objection of appellant the trial court permitted the prosecution to read to the jury the testimony of one Bush which was given at appellant's preliminary examination before the committing magistrate. Section 686 of the Penal Code provides that evidence may be received in that form only when the defendant has "cross-examined or had an opportunity to cross-examine the witness" at the preliminary examination. Appellant contends that the right contemplated by this section is the right fully and completely to cross-examine, and that in the present instance the right was abridged because the magistrate sustained objections to proper questions put to the witness by appellant's counsel. Appellant argues thoroughly the proposition that the right to cross-examine referred to in section 686 is of the breadth for which he contends, and cites authority in support of his argument, but he presents neither argument nor authority upon the question touching the rulings of the magistrate, which he says were erroneous. We have merely the assertion that the rulings were improper. Under such circumstances we deem it more than sufficient to say that we have examined the record and that it appears to us that the rulings were correct. Granting for the sake of argument that they were not correct, we do not decide whether or not the fact would operate altogether to exclude the testimony from admission in the superior court. The magistrate, of course, had the power to rule upon objections to evidence offered during the preliminary examination. See Pen. Code, § 869, subd. 3; *People v. Riley*, 16 P. 544, 75 Cal. 98.

The next question presented by appellant also concerns the reception in evidence of the testimony of Bush taken at the preliminary examination. The cause had been set down for trial on June 22, 1925. Bush was in attendance on that day in response to a subpoena which had been served upon him. The hearing was continued to June 30 and all witnesses were instructed by the court to return at that time. When the day came Bush was not present in court, but all wit-

nesses were admonished by the court to return on July 9, to which date the hearing was then continued. On that day the trial was commenced and it proceeded without interruption to a conclusion. It is contended that under these conditions the trial court erred in receiving in evidence the testimony of Bush which was taken at the preliminary examination. The admission of testimony in that form is governed by the provisions of section 686 of the Penal Code, already mentioned. The enactment provides in part that testimony heard at a preliminary examination may be read on a trial in the superior court when it is shown that the witness "is dead or insane, or cannot with due diligence be found within the state." The prosecution endeavored to bring itself within this provision by proof that Bush left the state after June 22, and continued absent therefrom until the time when his testimony at the preliminary examination was read at the trial, and the evidence was such that the trial judge would have been justified in so finding. Appellant contends that this evidence was not sufficient as a foundation for the admission of the testimony in question. It is said that Bush, within the meaning of section 686, was found within the state when the subpoena was served upon him which required his presence in court on June 22, and that a search for him within the state was unavailing under the statute after that service, after he had appeared on the day named in response thereto, and after he had failed to appear at later sessions under instructions from the court so to do and was in contempt of court for his derelictions. It is remarked, to state appellant's contention in his own language, that "the force and effect of the statute has been spent" by the finding of a witness within the state as Bush was found at the time the subpoena was served upon him requiring him to appear as a witness on June 22.

[2] No authorities are cited upon this point by either appellant or respondent, and after a diligent search we have found none which exactly touches it. The question does not however, seem difficult of solution. The purpose of section 686 was to enable the prosecution to introduce in evidence in the superior court testimony which was taken at a preliminary examination when the witness cannot be found in the state at the time of the trial, or perhaps we had better say at a time so near the date of the trial and under such circumstances that the trial judge may determine that his attendance cannot be had at the actual trial. The beneficial end of the enactment would be largely frustrated if it were held that his presence in the state at some period before the trial, at which time a subpoena was served upon him, would render its provisions inapplicable. To make the applicability of the section depend upon the question whether or not a subpoena had

been served would seem, when the purpose of the statute is kept in view, to drag a false quantity into the argument. What difference can it make whether a subpoena is served or not if due diligence, exercised within a proper period before the trial, shows that the actual attendance of the witness cannot be had during the trial? The evidence contained in the testimony taken at the preliminary examination, when such a showing is made, is as much needed in the due administration of justice—and that is what the section is designed to promote—where a subpoena has been previously served as where one has not been served. The adoption of the rule for which appellant contends would make the applicability of section 686 depend upon the elasticity of conscience or lack of fear which might permit a witness to disregard the mandate of process which had been served upon him, and not at all on the diligent exercise, upon the part of the agents of the people, of the duty to procure, if possible, the personal attendance of the witness. We think, indeed, that the service of the subpoena, instead of closing the door upon the right of the prosecution to use at the trial Bush's testimony taken on the preliminary examination, was an important step in the protection and preservation of that right. Having found Bush in the state at a date so near that upon which the case was expected to be tried, a failure of the prosecution to serve subpoena upon him would have furnished a ground for objection to his testimony taken at the preliminary; the facts as to his disappearance under those circumstances being the same as those now shown by the record. It is clear to us, then, that the service of the subpoena, rather than militating against the right to use the preliminary testimony, was an act constituting a part of that due diligence which the prosecution was bound to show as a foundation for the exercise of the right.

[3] It is insisted that the testimony of Bush at the preliminary examination was inadmissible, for the reason that the prosecution knew that he was about to absent himself from the state and failed to secure his attendance by the means provided in section 879 of the Penal Code. The section provides that, whenever a judge is satisfied by proof on oath that there is reason to believe that a witness in a criminal case will not appear and testify at the trial, he may order the witness to enter into a written undertaking securing his attendance. We doubt if the evidence here is sufficient to show that the district attorney had knowledge that Bush was about to leave the state, and could therefore have asked for the relief contemplated by section 879. Passing that question by, however, it has been directly decided that it is not necessary to invoke the provisions of the section as a prerequisite to the use at the trial of testimony taken at a preliminary examination. *People v. Flannery*, 84 P. 461,

3 Cal. App. 41. With the conclusion there reached we are satisfied.

[4] It is also contended that Bush's testimony at the preliminary could not properly have been used at the trial, unless it were shown that his absence from the state was to be permanent, and no such showing was made. A rule to that effect has been announced in some jurisdictions, but it has never prevailed in this state. In those jurisdictions in which the rule obtains, the question has usually been discussed in the light of the provisions of Constitutions securing to an accused the right to be confronted by the witnesses against him. There is no such provision in the Constitution of this state; the right here being preserved merely by statute. Pen. Code, § 686; *People v. Hayes* (Cal. App.) 237 P. 390.

It is also to be observed that in some of the states the statutes permit the use at the trial of testimony taken at a preliminary examination or upon a former trial upon a showing that the witness is absent from the state. Also appellant relies largely upon a case decided in a state in which there is no direct statute "with reference to the introduction of testimony of a witness given upon a former trial or preliminary hearing of a case"; the question being there determinable under the rules of the common law. *Davis v. State* (Okla. Cr. App.) 201 P. 1001. Here, under section 686, the defendant enjoys the right of being confronted by the witnesses against him, except that such confrontation need not occur when under certain conditions the witnesses have testified at the preliminary examination and "cannot with due diligence be found within the state." We cannot amend the statute by holding that it must be proven before his previous testimony may be offered, that a witness is not only absent from the state, but is permanently absent.

[5] Of course, in laying the foundation for the introduction of testimony taken at a preliminary examination, evidence is often received showing that the witness is actually outside the state, but, considering the form of our statute, such evidence is admissible only for the purpose of showing that he cannot be found within the state. The specific question now presented by appellant apparently has never been considered in this jurisdiction. However, the views above expressed find some support in cases which have held

that a showing of due diligence was sufficient where there was evidence that the witness was out of the state at the time of the trial; there being no evidence as to how long the absence was likely to continue. These cases are: *People v. Grill*, 91 P. 515, 151 Cal. 592; *People v. Edwards*, 111 P. 263, 14 Cal. App. 128; *People v. Lederer*, 119 P. 949, 17 Cal. App. 372; *People v. Poo On*, 192 P. 1090, 49 Cal. App. 219. In one case the showing was held sufficient where it was testified that the absent witness had said that he "wanted to take a trip around on a boat and did not know how long he would be gone—perhaps five or six months." *People v. Ramos*, 199 P. 544, 52 Cal. App. 491.

[6] When the testimony of Bush given at the preliminary examination was offered, appellant attempted to withdraw the cross-examination which his counsel had conducted at the hearing, but he was not allowed to do so. The prosecution was then permitted, over appellant's objection, to read the cross-examination to the jury along with the direct examination. Appellant now contends that in its two rulings the trial court erred. We think the rulings were correct. Section 686 of the Penal Code provides for the admission in evidence of "the deposition" of a witness given at a preliminary examination, not merely of a part of it; that expression being used in the enactment instead of the words "the testimony." A further guide to the solution of the question here presented is found in a rule of evidence governing in civil cases. Sections 2022 and 2032 of the Code of Civil Procedure provide that a deposition taken pursuant to the requirements of that Code may be read by either party at the trial. It was said in an opinion construing this provision that—

"The only authority for the use of depositions is in the provisions of the Code which provide that 'the deposition' may be used; * * * but it is not said that portions of them can be used, nor can it be inferred that such was the intention." *Bank v. Finnell*, 65 P. 976, 133 Cal. 475.

A cross-examination is as much a part of testimony given by a witness, or of a deposition in which it is found, as is the direct examination. The point made by appellant is therefore without merit.

Judgment and order affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

76 Cal. App. 734

(245 P.)

MITCHELL v. SUPERIOR COURT OF CALIFORNIA IN AND FOR FRESNO COUNTY et al. (Civ. 5611.)

(District Court of Appeal, First District, Division 2, California. March 4, 1926. Hearing Denied by Supreme Court May 3, 1926.)

1. Indictment and information $\S$ 159(1)—Indictment at common law, depending on finding of grand jury on oath for validity, cannot be amended in any matter of substance without grand jury's concurrence.

At common law, indictment being finding of grand jury on oath, and depending on such fact, among others, for its validity, cannot be amended by court or prosecuting officer in any matter of substance without concurrence of grand jury which presented it.

2. Indictment and information $\S$ 159(2), 161(5)—Indictment cannot be amended to change offense charged or information so as to charge offense not shown by evidence at preliminary hearing although either may be amended within such limits by district attorney without leave of court before defendant pleads, and thereafter by leave of court, where not affecting substantial rights.

Indictment cannot be amended so as to change offense charged or information so as to charge offense not shown by evidence taken in preliminary examination, although either indictment or information may be amended within above limits by district attorney without leave of court at any time before defendant pleads, or thereafter by leave of court, where not affecting substantial rights of accused.

3. Indictment and Information $\S$ 159(1), 161(1)—Trial court, and not district attorney, has power to determine whether change in accusation is such as to affect substantial rights of defendant.

Trial court, and not prosecuting officer, has power to determine whether change in accusation by amendment to indictment or information is of such nature as to affect substantial rights of defendant.

4. Statutes $\S$ 200.

Punctuation, though it may be of assistance, does not necessarily control in interpreting statute.

5. Indictment and Information $\S$ 153—Accused held not entitled to dismissal, where demurrer to indictment was sustained, and matter ordered resubmitted to grand jury, because amendment was not properly made; resubmission not being for purpose of amendment (Pen. Code, $\S$ 1008).

Where demurrer to indictment is sustained, and matter directed to be resubmitted to grand jury, accused is not entitled to order of dismissal, under Pen. Code, $\S$ 1008, because indictment was not promptly amended; resubmission not being for purpose of amendment.

Mandamus by W. D. Mitchell against the Superior Court in and for the County of Fresno and Charles R. Barnard, Judge, to

compel the dismissal of an indictment. Writ denied.

Geo. Cosgrave, of Fresno, for petitioner.

George R. Lovejoy, Dist. Atty., and Ernest Walling and O. M. Ozias, Deputy Dist. Attys., all of Fresno, for respondents.

STURTEVANT, J. This is an application by the petitioner against the respondent as the superior court to obtain a writ of mandamus. Among other things, the petitioner alleged that on the 22d day of December, 1925, the grand jury of Fresno county returned an indictment against him; that on December 31, 1925, the petitioner was arraigned, and at said time he demurred to the indictment; that thereafter, on the 4th day of January, 1926, the court made an order "that the demurrer be, and it is hereby, sustained, and that the matter be submitted to the present grand jury"; that no amendment of said indictment was sought, and no amendment was allowed; that on January 9, 1926, the petitioner moved the trial court for an order dismissing the first indictment; and that on the 27th day of January, 1926, the trial court made an order denying said motion. As an exhibit attached to the petition the petitioner sets forth a copy of said indictment and from said copy it appears that said indictment was filed on December 22, 1925, and purported to charge that the petitioner did, on the 20th day of April, 1923, commit a felony, to-wit, violate the provisions of section 561 of the Penal Code. In the prayer to his petition the petitioner asks that this court direct the respondent court to enter a judgment of dismissal. A determination of the case involves an interpretation of section 1008 of the Penal Code.

[1-3] Before taking up the provisions of the statute, it is necessary to bear in mind certain historical matters none of which may be questioned and yet all of them throw much light on provisions of the statute which are particularly before us. At common law an indictment, being the finding of a grand jury upon oath and depending upon this fact, among others, for its validity, cannot be amended by the court or the prosecuting officer in any matter of substance without the concurrence of the grand jury which presented it. The use of an information as an accusation in a felony case did not exist at common law. In 1850, and continuously since, the law has provided that, when the trial court sustains a demurrer to an indictment, the court can order the case resubmitted. Whether the particular offense was prosecuted by indictment or by information the power of the trial court or of the prosecuting officer to amend it was not by express language conferred prior to the year 1911. However, commencing with the year 1880, legislation has been adopted for the purpose of preventing an entire miscarriage of justice because of

defects in pleading. At the present time, giving full allowance to all of the new statutes, an indictment cannot be amended so as to change the offense charged or an information so as to charge an offense not shown by the evidence taken at the preliminary examination. An indictment or information may be amended within above limits by the district attorney without leave of court, at any time before the defendant pleads. Such amendment within above limits may also be made at any time thereafter, in the discretion of the court, where it can be done without prejudice to the substantial rights of the defendant. That the provisions of the statute shall not be so followed as to trespass upon any of the rights of the defendant, the power to determine when a change in the accusation is of such a nature as to affect the substantial rights of the defendant has been given to the trial court and not to the prosecuting officer. *Copeland v. Superior Court*, 217 P. 573, 62 Cal. App. 316, and cases there cited. When a demurrer is interposed to the indictment or information, one of several different defects may appear. It may appear from an examination of the face of the accusation: (1) That the offense pleaded is barred by the statute of limitations; (2) that there has been made a typographical or other minor mistake not going to the substantial rights of the defendant; (3) that there has been an omission to plead some material element in the alleged offense, and which does go to the substantial rights of the defendant; and (4) there may arise other situations and conditions not necessary to enumerate at this time. If in a given case the contingency first enumerated arises, and it is not claimed that the dates have been incorrectly pleaded, it may be assumed that the demurrer will be sustained, and, as no amendment or change is possible which will avoid the dilemma, it is clear that it will be an idle act for the trial court to direct an amendment, or to direct that a new information be filed, or to direct that the cause be resubmitted to a grand jury. If the second contingency arises, it is equally patent that, if the trial court is of the opinion that a defect can be cured by an amendment, and the amendment will not go to the substantial rights of the defendant, then and in that event the trial court will make its order allowing the amendment in accordance with the justice of the case as the facts may appear. *People v. Olsen*, 220 P. 444, 64 Cal. App. 126. In the third contingency above stated, as we have already shown, no amendment, in the proper use of that expression, can be made, as it will affect the substantial rights of the defendant, and the statute provides that the trial court may order the cause resubmitted to the grand jury, and in that event the statute authorizes the prosecuting officer so to proceed as to get another indictment returned, or cause another examination to be held and later file an-

other information. *People v. Cockrill*, 62 Cal. App. 22, 216 Pac. 78, 81. But in no proper sense can it be said that, when the second pleading comes in, it is within the contemplation of the statute an amended indictment or an amended information, but it is a new indictment or a new information.

The record before us does not disclose what was claimed to be the defect in the first indictment filed against the petitioner. However, from the allegations of the petition, it appears that no amendment was asked or allowed. We may assume, therefore, that the defect, if any, was at least claimed to be one which went to the substantial rights of the defendant. This assumption is fortified by the terms of the order sustaining the demurrer, and which directed the case to be submitted to the grand jury. The court was therefore considering an instance where, in its judgment, a change was necessary, but which change, if made, was one of those changes which must be made with the authority first obtained from the grand jury. The court was considering a new indictment, not an amendment. To such a change the petitioner would apply that sentence contained in the section, which reads as follows:

"If a demurrer is sustained, and an amendment is not allowed, or if allowed, is not made, within such reasonable time as the court may fix, the court shall give a judgment of dismissal, which shall be a bar to another prosecution for the same offense."

That sentence, standing alone, is limited to amendments, and not to new indictments, and is not helpful under the facts of this case. However, we think that the remaining portion must also be applied. It is as follows:

"The defendant shall thereupon be discharged, unless the court directs the case to be submitted to the same or another grand jury, or directs a new information to be filed; provided, that after such order or resubmission, the defendant may be examined before a magistrate, and discharged or committed by him, as in other cases."

The whole section must be so interpreted as to give some force and effect, if possible, to each and every clause therein contained. The very purpose of the amendments to the section was to prevent miscarriage of justice—not to create them. The section clearly provides that in a proper case it will be the duty of the trial court to direct the case to be submitted to the same or another grand jury, or to direct a new information to be filed. The contention made by the petitioner will give no force or effect whatsoever to that part of the section just quoted.

[4] In short, the position of the petitioner rests on the assumption that the phrase "unless the court" limits the antecedent "discharged." In this behalf the petitioner confidently asserts the statute is so punctuated. The vice of his position rests on the conclu-

sion that punctuation is a cardinal rule of interpretation. It may be of assistance, but punctuation does not necessarily control in interpreting a statute. In *French v. Teschemaker et al.*, 24 Cal. 518, commencing on page 553, Mr. Chief Justice Sanderson, speaking for the court, said:

"To construe a statute, is to search after the legislative intent as expressed in the language of the statute. 'The end of construction is to find what was the intent and meaning, and to clear up that meaning, when obscure; to ascertain the sense of ambiguous words; to determine the design when imperfectly expressed.' Smith's Commentaries, 692. The search, if need be must not be confined to the doubtful passages or words, but may be extended to every provision of the act. In interpreting the letter of the statute, punctuation may be entirely disregarded, and the rules of grammar need not be strictly followed. * * * Statutes are to be read without breaks or stops, and we have therefore omitted the punctuation. The foregoing is but one clause, and has but one subject, viz. exemption from personal liability. In order to get its full meaning, we read all that is said upon that subject, aided by the legal presumption that no word is idle or useless, and that each has its office to perform in giving expression to the legislative intent; * * * And so in *City of Covington v. McNickle's Heirs*, 18 B. Mon., 286, say the Court of Appeals of Kentucky: 'A well known rule for the construction of statutes—which, though ancient, is always adhered to—is that the general words in one clause of a statute may be restrained by the particular words in a subsequent clause of the same statute.' See, also, *Dwarris on Statutes*, 765."

In *People v. Sassovich*, 29 Cal. 480, on page 484, the same able jurist speaking for the court said:

"A qualifying phrase does not always bear relation to a single word, noun or pronoun, as its antecedent; on the contrary, it may, and frequently does, have another phrase or sentence as its object of relation. Treating the question, then, as a question in grammar only, may it not be claimed with equal certainty that the entire phrase 'fourteen judicial districts' is the antecedent of the phrase 'subject to be altered'?"

In *Randolph v. Bayue*, 44 Cal. 366, at page 369, Mr. Justice Rhodes, speaking for the court, said:

"The first section of the act of 1868 is in the same words as the first section of the act of 1850, except that the word 'seven' is inserted in the act of 1868 in place of the word 'ten,' in the act of 1850; but in the act as printed in the statutes of 1867-8, semicolons are in two places inserted where commas are found in the act of 1850. These are obviously clerical or typographical errors; but if such were not the

case, the punctuation would not be permitted to have the effect to render the statute absurd."

In *Joseph B. Dunn & Sons v. Brager*, 81 A. 516, at page 519, 116 Md. 242, the Supreme Court of Maryland stated its conclusion and the reasons therefor as follows:

"This purpose will be made clear by striking out the period after the word 'counties,' changing the capital 'E' in the word 'every' to a small 'e,' and inserting a comma after the word 'same.' The period and the capital 'E' following break into two sentences what was evidently designed to be one sentence, and destroy what would otherwise be the clear meaning of the language used. Almost the identical change now proposed was made in *Manger v. Board of Examiners*, 45 A. 891, 90 Md. 659, Judge McSherry saying: 'Neither bad grammar nor inaccurate punctuation can alter the obvious sense of a legislative enactment. This is necessarily so. The statutes in England are not punctuated in the original rolls; but more or less marks of punctuation appear in them as printed, by authority. With us, the punctuation is the work of the draftsman, the engrossers, or the printers. In the legislative body, the bills are read, so that the ear, not the eye, takes cognizance of it. Therefore the punctuation is not, in either country, of controlling effect in the interpretation.' The same view is held by other courts of high standing. In *Martin v. Gleason*, 29 N. E. 664, 139 Mass. 183, the court said, 'Punctuation may sometimes be properly disregarded.' In *Gyger's Estate*, 65 Pa. 311, Judge Sharswood said, 'No punctuation ought to control a statute;' and in *Randolph v. Bayue*, 44 Cal. 366, the court said, 'Punctuation cannot be permitted an effect which would lead to absurdity.'"

And see 10 Ann. Cas. page 1083.

[5] Being guided by the foregoing rules, the latter half of section 1008 of the Penal Code should be read as though it were worded as follows:

"If a demurrer is sustained and an amendment is not allowed, or, if allowed, is not made, within such reasonable time as the court may fix, the court shall give a judgment of dismissal, which shall be a bar to another prosecution for the same offense, and the defendant shall thereupon be discharged, unless the court directs the case to be submitted to the same or another grand jury, or directs a new information to be filed; provided that after such order of resubmission, the defendant may be examined before a magistrate, and discharged or committed by him as in other cases."

So construing the statute, it is clear that the petitioner was not entitled to have any dismissal entered as of the date he made his motion.

The writ is denied.

We concur: LANGDON, P. J.; NOURSE, J.

MEMORANDUM DECISIONS

198 Cal. 453

PEOPLE of the State of California, Plaintiff and Respondent, v. Earl J. CLARK, Defendant and Appellant. (Cr. 2818.) (Supreme Court of California. April 7, 1926.) In Bank. Motion to dismiss appeal by defendant from a judgment of the Superior Court of Los Angeles County, Sidney N. Reeve, Judge, of conviction of murder of the first degree, with sentence of death. Motion granted. Buel R. Wood, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Erwin W. Widney, A. A. Linney, and John L. Flynn, Deputy Attys. Gen., for the People.

WASTE, C. J. The defendant, Earl J. Clark, was convicted in the superior court of the county of Los Angeles of the crime of murder in the first degree, and judgment was pronounced and entered against him, sentencing him to be hanged. An appeal from that judgment to this court has been submitted, and is pending decision herein. It now appears from the affidavit of William I. Traeger, sheriff of the county of Los Angeles, that the defendant, Clark on or about the 16th day of March, 1926, escaped from the county jail in the county of Los Angeles, wherein he was confined. He has not since been apprehended, and is now a fugitive from justice. Supported by the affidavit of the sheriff, in whose custody the defendant was held, relating these facts, the Attorney General, by motion, asks this court to dismiss the appeal upon the ground that the defendant, Clark, has escaped from custody and is now at large. Upon the authority of *People v. Redinger*, 55 Cal. 290, 36 Am. Rep. 32, and *People v. Elkins*, 122 Cal. 654, 55 P. 599, it is ordered that the appeal of said Earl J. Clark in this case be and the same stand dismissed unless the defendant, within 30 days from this date, return to the custody of the sheriff of the county of Los Angeles, state of California. It is further ordered that a copy of this order be served upon the attorney for the defendant within five days hereof.

We concur: SEAWELL, J.; SHENK, J.; RICHARDS, J.; CURTIS, J.; NOURSE, J. pro. tem.

recalled. Writ granted. Ross & Ross, of Redwood City, and J. W. Coleberd, of South San Francisco, for petitioner. Leo R. Friedman, of San Francisco, John F. Davis, of South San Francisco, and A. J. Scampini, City Counsel, of San Francisco, for respondents.

KNIGHT, J. Mandamus. A petition purporting to have been signed by the required number of qualified voters of the city of South San Francisco was filed and presented to respondents, as the members of the board of trustees of said city, demanding that a special election be called to determine whether the members of said board should be recalled. Said board of trustees refused to act upon said petition, and thereupon application was made to this court for a writ of mandate to compel said board to call said special election as demanded in said recall petition. An alternative writ was issued, in response to which respondents filed a demurrer and an answer. The demurrer was overruled, and the legal questions involved in the proceeding were disposed of at that time (*Ratto v. Board of Trustees of the City of South San Francisco* [Cal. App.] 243 P. 466); but the affirmative allegations of the answer raised issues of act upon which findings were necessary to be had before the proceeding could be finally determined. Those issues of fact were referred to the superior court of the state of California in and for the county of San Mateo for trial and determination. Written findings thereon have since been made and filed, and it appears therefrom, and from the matters decided on demurrer, that said recall petition is legally sufficient in form and in substance and is signed by qualified voters of said city exceeding in number 25 per cent. of the entire vote cast within said city at the last election for the office of trustee. We therefore conclude that a peremptory writ of mandate should issue as prayed for in the petition on file herein; and it is so ordered.

We concur: TYLER, P. J.; CASHIN, J.

76 Cal. App. 276

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D. W. RATTO, Petitioner, v. BOARD OF TRUSTEES OF CITY OF SOUTH SAN FRANCISCO and Carl Blank, Hugh McCaffrey, Hugh Felix McNellis, F. A. Cunningham, and A. J. Eschelbach, as Members of the Board of Trustees of the City of South San Francisco, Respondents. (Civ. 5441.) (District Court of Appeal, First District, Division 1, California. Jan. 21, 1926. Rehearing Denied Feb. 20, 1926. Hearing Denied by Supreme Court March 22, 1926.) Application for writ of mandate, prayed to be directed to respondents as Board of Trustees of the City of South San Francisco, to compel them to call a special election to determine whether or not they shall be

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198 Cal. 525

HOWE v. KEY SYSTEM TRANSIT CO. et al.
(and three other cases). (S. F. 11872,
11888-11890.)

(Supreme Court of California. April 27, 1926.)

1. Trial ⚡3—Separate parties in court's discretion may litigate controversy separately and proceed to final judgment without waiting for judgments as to other parties.

Separate parties, if court in its discretion so directs, may litigate their controversy separately, and proceed to final judgment without waiting for judgments as to other parties.

2. Appeal and error ⚡76(1)—Question as affecting right of appeal from judgment is not what form of order or judgment may be, but what is its legal effect (Code Civ. Proc. §§ 577, 963).

Question as affecting right of appeal, under Code Civ. Proc. § 963, authorizing appeals from final judgments, is not what form of order or judgment may be, but what its legal effect is, although section 577 defines a judgment as the final determination of rights of parties in action or proceeding.

3. Appeal and error ⚡81—Right of appeal from orders rests on theory that it is in effect final judgment in collateral proceeding growing out of action, and so independent as to be substantially final decree for purpose of appeal (Code Civ. Proc. § 963).

Right of appeal from orders not resting on express provisions of Code Civ. Proc. § 963, is sustained on theory that order, is in effect, a final judgment against party, in collateral proceeding growing out of action, and so far independent of suit itself as to be substantially final decree for purpose of appeal.

4. Appeal and error ⚡79(1)—Although particular judgment may not be binding on all parties, it may yet be final as to appeals (Code Civ. Proc. § 963).

That particular judgment may not be binding on all parties to action does not prevent it from being final judgment within Code Civ. Proc. § 963, relating to appeals.

5. Appeal and error ⚡79(1)—Order striking cross-complaints of railroad employees in action against railroad for injuries held appealable (Code Civ. Proc. §§ 442, 963).

Where, in action against two railroad companies and numerous employees for injuries in collision, employees of one road cross-complained against other railroad company for injuries in same collision, under alleged authority of Code Civ. Proc. § 442, order dismissing the cross-complaints was such final judgment as was appealable within section 963.

In Bank.

Appeals from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Separate actions by Olga Howe, by Marvin Howe, by Helen Lawry, and by Lester Miller, a minor, by R. J. Miller, his guardian ad litem, against the Key System Transit Company and others, wherein J. E. Compton, A. M. Hobson, H. Hamma, and T. V. Van Dalsem, respectively, cross-complained. Motions striking cross-complaints were granted, and cross-complainants appeal. On motion to dismiss appeals. Motions denied.

In No. 11872:

Daniel A. Ryan, of San Francisco, for plaintiff and respondent.

Dunne, Brobeck, Phleger & Harrison and A. B. Dunne, all of San Francisco, for defendant Key System Transit Co. and appellant Compton.

Jesse H. Steinhart and Bradley & Supple, all of San Francisco, for defendants, cross-complainants (defendant San Francisco-Sacramento R. Co.).

In No. 11888:

Daniel A. Ryan, of San Francisco, for plaintiff and respondent.

Dunne, Brobeck, Phleger & Harrison and A. B. Dunne, all of San Francisco, for defendants Key System Transit Co. and appellant Hobson.

Jesse H. Steinhart and Bradley & Supple, all of San Francisco, for defendants, cross-complainants (defendant San Francisco-Sacramento R. Co.).

In No. 11889:

Daniel A. Ryan, of San Francisco, for plaintiff and respondent.

Dunne, Brobeck, Phleger & Harrison and A. B. Dunne, all of San Francisco, for defendants Key System Transit Co. and appellant Hamma.

Jesse H. Steinhart and Bradley & Supple, all of San Francisco, for defendants, cross-complainants (defendant San Francisco-Sacramento R. Co.).

In No. 11890:

Dunne, Brobeck, Phleger & Harrison and A. B. Dunne, all of San Francisco, for appellant Van Dalsem and for defendant Key System Transit Co.

Jesse H. Steinhart and Bradley & Supple, all of San Francisco, for defendant San Francisco-Sacramento R. Co.

Daniel A. Ryan, of San Francisco, for respondents.

WASTE, C. J. The plaintiffs and respondents in the four actions above entitled have moved to dismiss appeals, taken by a different defendant in each case, from an order striking out the particular defendant's cross-complaint. All the motions were before the

court, and were argued and submitted at the same time. The actions are for damages for personal injuries, and grew out of the same accident. The pleadings are the same, in so far as any question presented by the motions is concerned. The complaint in each case charged that the plaintiff, while a passenger on a train of the Key System Transit Company, was injured by reason of a collision between that train and a car of the defendant San Francisco-Sacramento Railroad. The collision happened on the tracks of the Key System Transit Company, and is alleged to have occurred by reason of the negligence of each of the two railroad companies defendant in the operation and maintenance of their railroads and railroad systems, and in the operation of the train and car involved in the accident. Each plaintiff joined with the railroad companies defendant some 40 fictitious defendants, designated as First Doe to Fortieth Doe. Eleventh Doe to Twentieth Doe, inclusive, it is alleged, were in charge of, and were negligent in the operation of, the train of the Key System Transit Company upon which plaintiff was a passenger. The two railroad companies appeared separately in the actions, and filed answers to the complaints. Four members of the train crew of the Key System train were injured in the collision. They also appeared in the actions, and answered, alleging themselves to be designated Doe defendants. They were Compton, who answered and cross-complained in the case in which Olga Howe is plaintiff; H. Hamma, who did the same in the case of Helen Lawry, plaintiff; T. V. Van Dalsem, in the case of Lester Miller, plaintiff; and A. M. Hobson, in the case in which Marvin Howe is plaintiff. These defendants not only answered the complaint in the action in which each appeared, denying its material allegations, but cross-complained against the defendant San Francisco-Sacramento Railroad. It is alleged in each of the cross-complaints that the cross-complainant was employed by the Key System Transit Company, and, as such employee, was engaged in operating the train upon which the plaintiff in the action was a passenger; that, due to the negligence of the San Francisco-Sacramento Railroad in the operation of its car, that car collided with the train of the Key System Transit Company, and, as a result, the cross-complainant was injured. Each cross-complainant, therefore, prayed for damages against the defendant San Francisco-Sacramento Railroad.

The plaintiffs in the four cases served on the cross-complaining defendants notices of motion to strike the cross-complaints from the files. The grounds of the motion were that the cross-complaints were not, and did not purport to be, cross-complaints against the plaintiffs; that the same were not in fact cross-complaints; and that a cross-complaint does not lie in such actions. Before the motion came on to be heard the cross-

complainants were granted leave to and did amend their cross-complaints to make it more fully appear that the accident relied upon in the cross-complaints was the same accident which formed the basis of the plaintiffs' causes of action. The court granted the motions of the plaintiffs, and the cross-complaints, as amended, were stricken from the files. The orders were duly entered in the minutes of the court, and the cross-complainants filed notices of appeal. No other form of judgment was entered, and the actions are still undetermined. The plaintiffs in the various actions now move to dismiss the appeals on the ground that an appeal does not lie from an order striking a cross-complaint from the files.

[1] Section 963 of the Code of Civil Procedure provides that an appeal may be taken from a superior court (1) from a final judgment entered in an action, or special proceeding; (2) from certain specified orders; (3) from certain judgments or orders in probate proceedings. An order striking out a cross-complaint is nowhere designated in the section as an appealable order, and respondents insist, in support of their motion, that such an order is not a final judgment within the meaning of subdivision 1, but is, rather, an interlocutory order from which no appeal is provided. The "final judgment," from which an appeal may be taken under the section, they contend, is "the ultimate or last judgment which puts an end to the suit or proceeding"—citing *In re Smith's Estate*, 33 P. 744, 98 Cal. 636, 640, *Gianelli v. Briscoe*, 181 P. 105, 40 Cal. App. 532; *Nolan v. Smith*, 70 P. 166, 137 Cal. 360; *Doudell v. Shoo*, 114 P. 579, 159 Cal. 448. They have placed much stress upon the language of this court in *Stockton, etc., Works v. Glen's Falls Insurance Co.*, 33 P. 633, 98 Cal. 557, where the court held the judgment or decree denying to the defendant the relief demanded, "in what is termed its cross-complaint," was not a final judgment, and the separate appeal therefrom was dismissed. The court said (page 577 [33 P. 637]):

"There can be but one final judgment in an action, and that is one which in effect ends the suit in the court in which it is entered, and finally determines the rights of the parties in relation to the matter in controversy."

But that case, and others cited by respondents to the same effect, can only have application to parties to an action whose interests are identical. Separate parties, if the court in its discretion so directs, may litigate their controversies separately, and may proceed to final judgment without waiting for judgments as to other parties. *Baxter v. Boege*, 160 P. 1072, 173 Cal. 589, 592; *Rocca v. Steinmetz*, 208 P. 964, 189 Cal. 426.

In the *Baxter* Case, supra, the plaintiff brought an action against a number of defendants. Three of them demurred to plaintiff's amended complaint. Their demurrers

were sustained, and, the plaintiff declining to amend, judgment was entered against him in favor of the three demurring defendants that, as to them, the action be dismissed. Another defendant filed a demurrer, and answers were filed by a number of others. The plaintiff appealed from the judgment dismissing the three defendants from the action. The respondents moved to dismiss upon the ground that the appeal was not taken from an appealable judgment. They insisted that no judgment will be regarded as final, unless all necessary issues of law and fact have been determined and the case completely disposed of (citing Freeman on Judgments in support of their contention). In denying the motion to dismiss, this court distinguished *Stockton, etc., Works v. Insurance Co.*, supra, relied on by respondents, saying (160 P. 1073, 173 Cal. 592):

"It will appear at a glance that the question there presented was not like the one before us here. In that case there were but two parties to the action, and it was, of course, necessary to determine all of the matters in litigation between them. In the case at bar the controversy between the plaintiff and the respondents was adjudicated and determined upon issues of law, and it does not necessarily follow that because the matters between plaintiff and defendants, other than these respondents, remain undetermined, respondents must therefore await trial of all issues involved between plaintiff and all other defendants before any final judgment may be entered and an appeal from it taken."

The case of *Nolan v. Smith*, supra, also relied on by the moving parties here, was distinguished as merely applying the rule "that any set of parties whose interests are identical must have the controversy as to them settled before any final judgment may be entered." The court cited section 579 of the Code of Civil Procedure to the effect that, in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper, and held that the judgment dismissing the three demurring defendants from the action was a final judgment from which an appeal would lie, and the motion to dismiss was denied.

The case of *Rocca v. Steinmetz*, supra, more recently decided, has a close bearing on the case now before us, in that no formal judgment was entered, the order appealed from being, as our records show, merely an order of the trial court dismissing an action as to one of the defendants after demurrer to complaint sustained and refusal of the plaintiff to amend. The plaintiff appealed from the order, and the respondent moved to dismiss on the ground that an appeal does not lie from a judgment against one of two joint tort-feasors before the final trial of the action on its merits. It was held (208 P. 965, 189

Cal. 428) that the action was unquestionably of a character in which a joint or several judgment could be rendered, and where the trial court, upon finding that one of the parties was not liable in the action, could render a judgment in his favor, and then leave the action to proceed against the other parties; and that to hold the plaintiff bound to wait until the final judgment against the party remaining in the action before taking an appeal from the judgment against the first defendant already rendered is wholly unreasonable, and finds no warrant in any provision of the Code. "Such a judgment," said the court, "is final within the meaning of that term, as given in section 963." The motion to dismiss the appeal was accordingly denied.

[2] It was originally provided in this state that no appeal should lie to the Supreme Court from any but a final judgment. Practice Act, § 258 (Stats. 1850, pp. 428, 451). Section 144 of the Practice Act of 1851 adopts the provision of section 245 of the New York Code of Procedure, and defines a judgment to be "the final determination of the rights of the parties in the action or proceeding," which is the exact definition now found in section 577 of the Code of Civil Procedure. Yet as early as the first volume of the reports, and continuing down to the more recent decisions of this court, the rule has been held to be that the question as affecting the right of appeal is not what the form of the order or judgment may be, but what is its legal effect. *Belt v. Davis*, 1 Cal. 135; *Zoller v. McDonald*, 23 Cal. 136; *Phillips v. Pease*, 39 Cal. 582; *Dollenmayer v. Pryor*, 87 P. 616, 150 Cal. 1; *Estate of West*, 122 P. 953, 162 Cal. 352; *Baxter v. Boege*, supra; *Rocca v. Steinmetz*, supra. "The question is not to be determined by technical definition and verbal criticisms on the terms and phrases in which judgments have been or may be expressed, but is to be determined by the substance and effect of the adjudication in question." 2 Cal. Jur. 137; *Los Angeles v. Los Angeles City Water Co.*, 66 P. 198, 134 Cal. 121; *Anglo-Californian Bank v. Superior Court*, 96 P. 803, 153 Cal. 753; *Hildebrand v. Superior Court*, 159 P. 147, 173 Cal. 86.

[3] The theory upon which the decisions sustain the right of appeal from orders, where that right does not rest upon the express provisions of section 963, is that the order is in effect a final judgment against a party in a collateral proceeding growing out of the action—is so far independent of the suit itself as to be substantially a final decree for the purpose of an appeal, although there has been no final decree in the suit. *Anglo-Californian Bank v. Superior Court*, 96 P. 803, 153 Cal. 753, 755; *Los Angeles v. Los Angeles City Water Co.*, supra; *Hildebrand v. Superior Court*, supra. In *Dempsey v. Underhill*, 106 P. 73, 156 Cal. 718, it was held that an order dismissing an "action and the whole

thereof" constituted a final judgment within the meaning of the provisions of the Code touching appeals, in that it finally and entirely disposed of the whole case. To the same effect is *Marks v. Keenan*, 73 P. 751, 140 Cal. 33, where it was held that, as an order dismissing an action on the ground that service of summons had not been made in time was "essentially a final judgment, it should be so treated for the purpose of appeal." An order dismissing an action in ejectment as to certain defendants was held to be, when entered, "a final judgment in the cause, which was itself appealable." *Tripp v. Santa Rosa St. R. R.*, 11 P. 219, 69 Cal. 631. In *Sharon v. Sharon*, 7 P. 456, 463, 67 Cal. 185, at page 196, the court said, referring to an order for the payment of alimony and counsel fees, "a final judgment is not necessarily the last one in an action. A judgment that is conclusive of any question in a case is final as to that question. The Code provides for an appeal from a final judgment, not from the final judgment in an action."

In *Dollenmayor v. Pryor*, supra, the respondent objected to the consideration of an appeal from an order of the superior court denying an application for leave to intervene. The contention was that the appeal was premature, and that the party seeking to appeal from the order should await final judgment between the original parties and appeal from that judgment; or, at all events, should procure the entry of a more formal judgment denying the motion and appeal after such entry. The court said (87 P. 616, 150 Cal. 3):

"We can perceive no merit in this objection. The record shows that the order, or judgment, denying the application to intervene was entered before the appeal was taken. It clearly shows that the court had determined the right of the intervener, and declared that [he] should not intervene in the action, and that his proposed complaint should not be filed therein. The most verbose statement could not state the determination more accurately or effectually. So far as the intervener and his rights in that action were concerned, it was final. We see no good end to be secured by requiring him to await judgment between the other parties after a trial in which he could not participate. It ended the litigation as to him, and he should be allowed an immediate appeal"—citing cases.

See, also, *Stich v. Goldener*, 38 Cal. 608, 610.

The principles which govern cross-complaints are, to a great extent, those which apply to matters in intervention. *East Riverside, etc., Dist. v. Holcomb*, 58 P. 817, 126 Cal. 315, 319.

[4, 5] The circumstance that a particular judgment may not be binding upon all the parties to the action does not prevent it from being a final judgment within the Code provisions relating to appeals. 2 Cal. Jur. 141. In the present case, the issues tendered by the cross-complaints, which were stricken

from the files, are entirely severable from the issues made by the complaints and answers. As a practical matter, however, a scrutiny of the pleadings in the cases will show that proof of the facts put in issue between the plaintiffs and defendants would, if the cross-complaints were in the cases, support all the allegations of the cross-complaints with the exception of those with reference to the injuries suffered by the particular cross-complainant. Appellants have filed their cross-complaints under the authority found in section 442 of the Code of Civil Procedure as amended in 1923, which provides that—

"Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the * * * happening or accident upon which the action is brought * * * he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint."

They contend that the section gives them the right to cross-complain in order that they may take care of the situation in which they find themselves in the present cases; that, to avoid a multiplicity of litigation and duplication of trials and issues and facts, they have the right to follow the procedure which the lower court, by its order, has prevented; that, unless they have the right to an immediate appeal, their rights are lost, for, if they must wait until a final determination of the whole action in the lower court before taking the appeal, a reversal of the order striking their cross-complaints from the files would, in effect, amount to only a hollow victory. We are of opinion that the situation presented here is not one in which the interests of the parties to the action are identical, but is one falling reasonably within the application of the rule of construction adopted in *Baxter v. Boege*, supra. The filing of the cross-complaints were proceedings in the actions commenced by the filing of the complaints, and, it is contended, were authorized by statute, the design, of which is to enable all matters in dispute between the parties, relating to or depending upon the happening or accident upon which the actions were brought, to be determined in a single action, and by a single judgment which shall give the defendants seeking it such affirmative relief as they are entitled to. By its action the trial court has, in effect, dismissed the appealing defendants from the actions in so far as they have a right to have their claims for affirmative relief determined therein and adjudicated by single judgments. In that regard the cases are ended as to them, and they are no longer before the court. In effect, their dismissal is complete. To hold that they are bound to wait until the final judgment in the respective actions before taking appeals from the orders, which are substantially final judgments as to them, seems to be as wholly unreasonable as the same contention was declared to be in *Rocca v. Steinmetz*, supra.

The motions to dismiss the appeals are denied.

We concur: SHENK, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LENNON, J.; LAWLOR, J.

198 Cal. 579

GRAGG et al. v. CULP. (S. F. 11195.)

(Supreme Court of California. April 30, 1928.
Rehearing Denied May 27, 1928.)

1. Boundaries ⇨37(1)—In action to quiet title, evidence as to boundaries held sufficient to support finding that plaintiffs were owners in fee of lot containing 81.66 acres instead of 42.81 acres as stated in government survey (Code Civ. Proc. §§ 318-325 [omitting section 320], and section 343).

Evidence as to boundaries held sufficient to support finding of court that plaintiffs were owners in fee of lot containing 81.66 acres instead of 42.81 acres as stated in government survey, in view of Code Civ. Proc. §§ 318-325 (omitting section 320), and section 343.

2. Boundaries ⇨40(1)—Question of survey mistaking gulches for certain creek, which was natural monument and identification of other points, held for trial court.

In action to quiet title, questions of surveyor mistaking gulches or canyons for a creek, which was a natural monument or tributaries thereof and identification of other points, held for trial court.

3. Boundaries ⇨3(5)—Where land is conveyed by metes and bounds, all included within those bounds will pass, whether more or less than quantity stated in deed.

Where land is conveyed by metes and bounds, all included within those bounds will pass, whether more or less than quantity stated in deed.

In Bank.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action to quiet title by Harriet M. Gragg and another against Charles Culp. Judgment for plaintiffs, and defendant appeals. Affirmed.

C. F. Lacey, of Salinas, for appellant.

Zabala & Sargent and Russell Scott, all of Salinas, for respondents.

SEAWELL, J. [1, 2] An appeal from a decree rendered in favor of the plaintiffs, quieting title to 38.85 acres of land situate within township No. 17 south, range No. 2 east, M. D. M., county of Monterey.

By letters patent, June 10, 1875, the United States of America granted to Jonathan Roberts, plaintiffs' predecessor, full payment therefor having been made by said Jonathan Roberts to the United States, grantor,

lot No. 2 (27.35 acres), section 19, lot No. 6 (42.81 acres), section 29, and lot No. 1 (30.57 acres), and lot No. 2 (32.27 acres), and the northeast quarter of the southeast quarter (40 acres) of section 30, and, as enumerated in said patent, "containing 178 acres according to the official plat of the surveyor of the said lands returned to the general land office by the surveyor general."

In February, 1900, the United States, by patent, granted to Virginia E. Ball, defendant's predecessor, the following land: The southwest quarter of the southwest quarter (40 acres), section 29; southeast quarter of the southeast quarter (40 acres), section 29; southeast quarter of the southeast quarter (40 acres), section 30; northeast quarter of the northeast quarter (40 acres), section 31, and lot No. 5 (48.35 acres), section 29, containing in the aggregate 168.35 acres.

The township map from which the above areas and locations are taken purports to conform to the field notes of the surveys on file in the surveyor general's office. It was made in 1884 and bears the certificate of the department of the interior, general land office, to the effect that it is a true and correct copy of the plat or survey of the lands to which it relates on file in that office. The section of the township in which the lands in controversy are situate and those adjacent thereto are mountainous, rough, and precipitous. The rock formations are so abundant that the surveyors, as shown by their notes, found pit excavations, as a means of indicating section corners, to be impracticable in some places. The land, as such, is listed as being inferior in quality. The country is sharply broken with gulches, ravines, and canyons, and portions of the land are so heavy in brush as to be impenetrable. San Clemente creek, regarded as an important natural monument, has its source in this locality, and its several branches meander a wide area of country. A few of the ancient monuments were not discoverable, but sufficient in number and position were found to make reasonably certain the location of section and quarter section lines as originally established. It could not reasonably be expected under the circumstances of the situation that accuracy as to courses and distances, or as to the establishment of section or quarter section monuments would mark the results of the surveyor's efforts, or that pits dug more than 50 years prior to the recent surveys would continue, in all cases, to remain open.

The complaint, in describing said lot 6, does so by reference to certain monuments, courses, and distances, and alleges it to contain 81.66 acres. Defendant's claim of ownership of said 39.05 acres, as set forth in his answer, is placed upon the open, notorious, uninterrupted, exclusive, and adverse posses-

sion and claim of ownership of himself and his predecessors in interest for a period of more than 20 years immediately prior to the commencement of the action and "upon a written instrument purporting to convey said real property." As a further defense to the action the bar of the provisions of the Code of Civil Procedure, §§ 318 to 325 (omitting section 320), both inclusive, and section 343, are separately pleaded. The trial court found that plaintiffs were the owners in fee simple of said lot 6 described in the complaint as containing 81.66 acres, and found that none of the allegations of defendant's answer and separate defense were true. Judgment was accordingly entered in favor of plaintiffs.

The principal matter for determination of the trial court was the ascertainment of the actual acreage contained in said lot No. 6, notwithstanding the fact that said township map, which purports to have been made conformable to the field notes of early surveys of sections 29, 30, 31, and 32, and upon which said lot 6 is marked as containing 42.81 acres. Said early surveys were made by deputy United States surveyors in chronological order as follows: F. L. Ripley in 1872; John Gilchrist, 1877; John D. Hall, 1882-83. Field notes of the survey of the Rancho San Francisquito, which partly lies in sections 19, 30, and 29, as made and recorded by James E. Terrill in 1859, and a re-survey of said rancho made by Lou D. Hare in 1903-04, are also carried into the record. The last survey made of portions of sections 29 and 30 and upon which survey respondents rely to establish the claim that the figures "42.81," representing acreage as indorsed upon said map, was erroneous and said lot at all times contained 81.66 acres, was made by William Davies in 1923. In addition to the introduction in evidence of the field notes of said surveys considerable oral evidence was taken.

It is not claimed that lot 6, when granted to Jonathan Roberts by patent in 1875, was, according to the original survey, in the irregular shape which it must assume if defendant's claim should be sustained. The southerly boundary line, as shown upon the plat made from the field notes of Surveyor Ripley, is a straight, unbroken line, while, if defendant prevails according to his contention, it would begin at the 4x4 inch post marked " $\frac{1}{4}$ S. 29 S. 30 S.," running thence east 890 feet; thence south 22 degrees 30 minutes east 425 feet; thence east 475 feet to a point; thence south, etc. It is the claim of defendant, however, that the line which originally marked the southerly boundary of lot 6 has been dropped so as to include the 40 acres lying contiguous to it on the south. From an inspection of the map made from the Ripley field notes it is very apparent that there has been no dropping of said line. By a comparison of the easterly line of said lot 6 with the

other lines of said lot it is obvious that in the shape as platted it could not have contained more than about the acreage shown upon its face, to wit, 42 acres. In order to give it the added acreage contended for by respondents the fence line which marks the southerly limits of the Rancho San Francisquito rather than the grant line as indicated by the Ripley survey must be taken as the common boundary line of said rancho and lot 6. The acreage lying between the fence line of said rancho and the line shown by the Ripley survey as being the boundary line of said rancho practically accounts for the excess which forms the basis of the claim of the respective parties to the suit. Surveyor Davies surveyed the land upon the ground in order to determine the location and acreage of lot 6. Undoubtedly the original monument establishing the common corner of sections 29, 30, 31, and 32 was plainly distinguishable and it was accepted by him as such corner. It consisted of a post placed in a rock mound. Besides, there was parol evidence to the effect that it was accepted by Mr. Culp, his predecessors in interest, and, in fact, was commonly regarded by others as the ancient monument marking the section corner. With the aid of the government field notes, the verity of which was confirmed by the actual discovery of monuments, connections were made with other section corners of the township, thus enabling the surveyor to reproduce the exterior boundaries of said section. Thus the common corner of sections 25, 30, 36, and 31 was verified. On the line dividing sections 29 and 30, north 30 degrees west, 2,630 feet from the common corner of sections 29, 30, 31, and 32, another old rock mound bearing indications of a post having formerly been placed in it, and which agreed with the field notes, was discovered and accepted as the quarter section corner. The distance between this quarter and the section corner was divided and a 4x4 inch post set as marking the southwesterly corner of lot 6. The newly marked point was 50 or 60 feet east of an old fence built parallel with the section line, but which was not connected with any other fence. From the last-named point the witness proceeded to the quarter corner between sections 20 and 29 and there found a post and a government bearing tree, which corresponded with the calls of the government field notes. This point was connected with the common corner of sections 20, 21, 28, and 29, which was evidenced by four bearing trees. The old post was found lying on the ground and it was reset. The distance from the section corner of the quarter section measured 2,640 feet. From the section corner the surveyor ran south along the section line between sections 28 and 29 to an "old line tree." A projection of the section line from this point south 25 chains (according to the original field notes) would, or should, connect the northeast and southeast sections' corners

of section 29. The position of the common corner of sections 28, 29, 32, and 33 and the length of the southerly line of section 29 was obtained by traversing. The distance of the southerly boundary line of section 29 was calculated to be 6,100 feet, and therefore contained an excess of 820 feet. This excess was apportioned between the quarter sections by allotting to each an additional width of 205 feet.

The length of the west line of section 19, according to the field notes of the Ripley survey, is given as 50.2 chains or 3,313.2 feet, while the Davies survey shows it to be 4,280 feet, leaving a discrepancy of 969 feet between the two surveys. The excess, as shown by the Davies survey, exists in that portion of the section line lying north between the quarter section line and the point at which said line cuts into the southerly line of the San Francisquito rancho. The quarter section line extending southerly from said quarter section point is definitely determinable and precludes the theory of apportionment south of said lots. The southerly boundary line of said rancho is also the northerly boundary line of lot 6 for a distance of about 2,000 feet and connects the westerly boundary line of said lot (which is also the westerly boundary line of section 19) with the easterly boundary line of said lot 6. From the point of intersection of the westerly line of section 19 with the southerly boundary line of said rancho, according to the Ripley map, the course is south $49\frac{1}{4}$ degrees east. There can exist but little doubt that the discrepancy in the acreage of lot 6 is to be accounted for by mistaking the position of the southerly boundary line of said rancho. It is very apparent that the map platted from the Ripley field notes fixed the southerly line of said rancho along the course indicated upon said map as south $49\frac{1}{4}$ degrees east and not along the fence line which Davies established as the southerly boundary line of said rancho and the northerly boundary of said lot 6. As above stated, by running north to said fence line the excess acreage is accounted for. If this be true, the southerly boundary line of said lot 6 remains practically where it was originally fixed and the excess acreage in the northerly portion of said lot would be of no interest to or concern of the defendant. The questions of Ripley mistaking gulches or canyons for the San Clemente creek or tributaries thereof and the identification of other points were questions to be determined by the trial court, and, while there may be room for disagreement as to the conclusion that may be drawn from a number of material matters in controversy, we can not say that the court's findings are without evidentiary support.

[3] It is the invariable rule, early adopted in this state—

"that when a piece of land is conveyed by metes and bounds, or any other certain description, all included within those bounds, or that description, will pass, whether it be more or less than the quantity stated in the deed. * * * The quantity, being the least certain part of the description, must yield to the boundaries or number, if they do not agree." *Stanley v. Green*, 12 Cal. 148.

The figures "42.81," entered on the face of the map, must give way to the more definite description, to wit, lot 6; and its boundaries, having been defined by the court, will control as to the quantity of land contained in said lot.

We have considered the claim of ownership by prescription and adverse possession made by defendant, and think that he has not sustained either issue. He received the full acreage of his purchase measured by whatever rule may be applied to the situation. Neither appellant nor his predecessors paid taxes upon any portion of the land in controversy, nor has his possession, which was but 3 years' duration, or the possession of his predecessors in interest, been of the kind and character which the law requires in order to transfer the title of real property. Plaintiffs and their predecessors have paid taxes upon said lot 6, whatever its acreage may be. We have examined the entire record, including all the evidence in the case, and feel satisfied that the trial court committed no prejudicial error.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; LENNON, J.; LAWLOR, J.

198 Cal. 520

STONE v. SERIMIAN et al. (S. F. 11120.)

(Supreme Court of California. April 27, 1926.)

1. Mechanics' liens $\S$ 281(4).

Evidence held not to show "cost price" of materials "offered to contractor," within contract measuring his right to recover therefor.

2. Mechanics' liens $\S$ 271(6)—Complaint, in action foreclosing mechanic's lien, need not aver existence of essential requirements of statute in precise terms of statute itself.

It is not necessary, in complaint in action to foreclose mechanic's lien, to aver existence of essential requirements of the statute in its exact language, it being sufficient if, from a reading of complaint as a whole, it can fairly be deduced that plaintiff has conformed to requirements of statute in respect that materials under his agreement with defendants were to be furnished for designated structure, and that such materials were actually furnished in construction.

3. **Mechanics' liens** ⚡271(6)—Complaint, in action to foreclose mechanic's lien, though omitting direct averment of statute, held sufficient, in absence of special demurrer for uncertainty, where it enabled proof to be made that materials were furnished and used in designated building.

Complaint, in action to foreclose mechanic's lien, omitting direct averment that materials alleged to have been furnished were furnished to be used, and were actually used, in reconstruction of designated building, held sufficient, in absence of special demurrer for uncertainty, where it enabled proof to be made that materials were furnished for, and were actually used in, reconstruction of such building.

4. **Mechanics' liens** ⚡157(1)—Claim of lien for materials furnished in building held not invalidated by erroneous statement of payment, in absence of fraud and showing that innocent third party was misled (Code Civ. Proc. § 1203).

Claim of lien for materials furnished in reconstruction of theater building was not invalidated, in view of Code Civ. Proc. § 1203, because it did not contain an exact or correct statement of agreed terms of payment, where it was not made with intent to defraud, and no innocent third party was misled.

5. **Mechanics' liens** ⚡254(2)—Owners can set off, against contractor's lien claim for labor and materials furnished in reconstructing building, amount they have been compelled to pay to relieve their property from liens filed thereon to secure contractor's debts, including attorney's fees and costs in suits to enforce liens (Code Civ. Proc. § 1193).

In suit to foreclose lien for labor and materials furnished in reconstructing theater building, defendants held entitled to set off against claim of plaintiff his counter obligation to indemnify them for any amount that they have been compelled to pay to relieve their property from liens filed thereon to secure plaintiff's debts, including attorney's fees and costs in suit to enforce liens, in view of Code Civ. Proc. § 1193.

In Bank.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by F. J. Stone against Martin Serimian and another, in which defendants filed a cross-complaint. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

C. K. Bonestell, of San Francisco (L. M. Hoefler, of San Francisco, of counsel), for appellants.

Harris & Hayhurst and W. D. Crichton, all of Fresno, for respondent.

WASTE, C. J. The plaintiff brought this action to recover the sum of \$6,581.85, alleged to be the reasonable value of labor and materials furnished by him at defendants' request for the reconstruction of a certain theater building of which the defendants

were the owners. There were three counts in the amended complaint. In the first two foreclosure of a mechanic's lien was sought. The third was in the form of a common count for labor performed and materials furnished in and about the construction, alteration, and repair of the building. The defendants, answering, denied the various allegations of the complaint, and, at the same time, interposed a counterclaim in the sum of \$3,800 for labor and materials required to be furnished by the defendants by reason of the failure of the plaintiff to perform and furnish the same. They also interposed a cross-complaint for \$6,000 damages, alleged to have been caused by reason of the delay occasioned by the plaintiff in the reconstruction of the building.

By the terms of the written contract, which the court found was made, the plaintiff agreed with the defendants to do certain designated work of, and to furnish the materials for, the reconstruction of the old building of the defendants for 10 per cent. of the cost of such reconstruction; the entire cost, including the builder's 10 per cent., not to exceed the sum of \$12,500. The contract did not contain the whole agreement between the parties, but it was verbally agreed between the plaintiff and the defendants that the sum of \$12,500, which was to be the outside figure for the construction of the building, should be paid in three installments; \$4,000 when the walls of the building were up; \$4,000 when the roof was on; and \$4,500 when the work was completed. The plaintiff commenced the work, but did not fully complete the contract, for the reason that, prior to its completion, the defendants repudiated the transaction and refused to pay the second installment of \$4,000 when the roof was on, and did not make any further payments. By reason of the failure of the defendants to make payment, the plaintiff was compelled to cease work on the building. The court found that the plaintiff fully complied with all the terms and provisions of his contract until prevented by the defendants, and that the reasonable value of the labor and materials rendered and furnished by the plaintiff under the contract was the sum of \$6,581.85, after deducting the payment of \$4,000 made when the walls of the structure were up. Certain items of cost and expenditure claimed by the plaintiff were eliminated from the account, and the court entered judgment in favor of the plaintiff for the sum of \$5,344.85 and foreclosing the contractor's lien for the amount.

[1] The first contention of the appellants is that there is no evidence to justify the finding of the trial court as to the reasonable value of the labor and materials rendered and furnished by plaintiff under the contract. It was alleged in the amended complaint that the labor and materials were

of the reasonable value of \$6,581.85. This allegation was denied by the answer. It was stipulated in the contract, with reference to price of materials, that the cost of the entire work should not exceed the sum of \$12,500, and that the cost price of materials should be figured at the cost price offered to the contractor. There is no evidence on the question of the value of labor and materials other than that of the plaintiff, who testified that "the entire cost" up to the time he quit the work was \$9,889.56, and that 10 per cent. of that amount was the reasonable value of the services performed by him as general contractor. He also testified that he incurred certain debts and paid for certain items contained in the claim of lien. Other items were not paid for. Assuming that here was an attempt to show the "cost price" of materials "offered to the contractor," which was the measure of plaintiff's right to recover, the evidence does not have that effect.

Certain items, viz. for plumbing, millwork, and lathing, claimed by the plaintiff, were not allowed by the trial court. Complaint is here made that other items should have been disallowed, but we find no error in their inclusion in the aggregate amount found due and secured by the plaintiff's lien.

[2,3] It is contended that the court should not have decreed foreclosure of the lien, for the reason that the complaint did not allege, nor was there any finding, that the materials were furnished to be used, and were actually used, in the reconstruction of the building. It is not necessary in a complaint in an action foreclosing a mechanic's lien to aver the existence of the essential requirements of the statute in the precise terms or language of the statute itself. It is sufficient if, from a reading of the complaint as a whole, it can fairly be deduced that the plaintiff has conformed to the requirements of the statute in the respect that the materials under his agreement with the defendants were to be furnished for the designated structure, and that such materials were actually used in the construction. *Ensele v. Jolley*, 204 P. 1085, 188 Cal. 297, 300. The complaint in this action omits the direct averment, but we are satisfied that it fairly appears therefrom that the materials alleged by the plaintiff to have been furnished were furnished to be used, and were actually used, in the reconstruction of the building by the plaintiff for the defendants under the contract. The claim of lien was attached to the amended complaint, and expressly made a part of it. In the absence of a special demurrer upon the ground of uncertainty, the complaint is sufficient to enable proof to be made that the materials in question were agreed to be furnished for, and were furnished for, and were actually used in, the construction of the designated structure upon the premises of the defendant sought to be charged with

the lien. *Ensele v. Jolley*, supra. The finding is subject to the criticism urged against the complaint. It should have been more definite and certain, but sufficiently covers the point.

[4] While the claim of lien does not contain an exact or correct statement of the agreed terms of payment, it is not claimed, as we understand the appellants' position, that the incorrect statement was made with intent to defraud. It does not appear, either, that any innocent third party has been misled. The claim of lien was, therefore, not invalidated by the erroneous statement. Code Civ. Proc. § 1203.

[5] Appellants contend that plaintiff should not have been permitted to include in his claim of lien the item of \$1,975.61 for lumber, for the reason that a judgment had been rendered against these defendants in an action brought by the Citizens' Lumber Company to recover the price of the lumber, and to foreclose a lien for the amount. The minutes of the court were introduced in evidence, but showed merely that judgment had been rendered in favor of the plaintiff in that case. It was the duty of respondent to protect the appellants' property against any lien preferred by the lumber company. The owners are entitled to set off against their obligation to pay plaintiff so much as the labor he performed, and the materials he furnished are reasonably worth the counter obligation of plaintiff to indemnify them for any amount they have been compelled to pay to relieve their property from liens filed thereon to secure plaintiff's debts, including the attorney's fees and costs in the suits to enforce the liens. Code Civ. Proc. § 1193; *Clancy v. Plover*, 40 P. 394, 107 Cal. 272, 275; *Covell v. Washburn*, 27 P. 859, 91 Cal. 560, 563. See, also, *Holden v. Mensinger*, 165 P. 950, 175 Cal. 300, 305. We have no way of arriving at these amounts. Consequently, the cause must be remanded to the lower court in order that that may be done and the owners be protected against the possibility of being forced to make double payment.

Appellants also contend that the trial court erred in denying them relief on their cross-complaint. They claim that the evidence is insufficient to support the finding that plaintiff, up to the time he quit the work, had performed all the terms and conditions of his contract. The evidence was conflicting, and the trial court decided the issue presented by the cross-complaint in favor of the plaintiff.

Because of the errors we have noted, the judgment is reversed.

We concur: SHENK, J.; SEAWELL, J.; RICHARDS, J.; CURTIS, J.; LENNON, J.; LAWLOR, J.

198 Cal. 352

In re SHAW'S ESTATE. (Sac. 3524.)

(Supreme Court of California. March 30, 1926. As Amended April 29, 1926.)

1. Wills ⚡470.

In determining testatrix's intent, court must look to entire body of will and give effect if possible to every portion thereof.

2. Wills ⚡617—Rules that unequivocal gifts of life estates are not to be limited by later doubtful clauses relating to management thereof held inapplicable, where the extent of life interest devised is limited to the income of testatrix's estate, and control of corpus is reposed in other than devisees (Civ. Code, § 1322).

Where testatrix in immediate context in will wherein she devised life interest in her estates limited such interest to the income thereof, and in other parts of will reposed exclusive control of corpus in others, rule in Civ. Code, § 1322, that clear and unequivocal gifts of life estates will not be limited by later and doubtful clauses relating to management of properties thus devised is inapplicable.

3. Wills ⚡617—Will devising life interest in one-half of testatrix's estate to each of two devisees, followed by limitation that interest which is devised is a life interest only, and not an interest in fee, held to have invested devisees only with a life interest in income of testatrix's estate.

Under will devising life interest in one-half testatrix's estate to each of two devisees, immediately followed by statement that interest thus devised is a life interest only and not an interest in fee, followed by clear language reposing control of corpus in others than devisees, held that only life interest which testatrix intended to devise in devisee was a life interest in income of testatrix's estate.

4. Trusts ⚡25(1)—Whether or not trust has been created depends rather on powers or duties with which named persons have been invested than on titles bestowed on them or terms employed in defining nature and extent of their estate.

There is no magic in mere words "trust" or "trustee" in an instrument, and whether or not a trust has been created by such instrument depends rather on powers and duties persons named have been invested with than on titles bestowed on them or terms employed in defining nature and extent of their estate.

5. Wills ⚡676—Powers and duties invested in executors, giving them control and dominion over whole estate during period far exceeding time occupied in administering estate, held such as to constitute them trustees, when their powers as executors drew to a close.

Where persons named as executors in will were given such control and dominion over whole properties of estate, coupled with such exclusive possession as is usually exercised by trustees, for a period far exceeding time occupied in administration of an estate, and occupying entire lives of devisees of life interest

in estate, held that powers and duties with which such executors were invested were such as to constitute them trustees of the property of decedent when their powers and functions as executors drew to a close.

6. Wills ⚡681(2)—Will declaring that estate should be "managed and handled" by named executors held to create an active trust and not "dry trust."

Will creating trust by express "wish, will and intent" of testatrix that her estate be "managed and handled" by named executors held to have created an active trust and not a "dry trust"; "dry trust" referring to trust wherein trustees have no actual responsibilities as such and no active duties to perform.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dry Trust.]

7. Wills ⚡681(2)—That will creating trust contained provisions, not compulsory, for turning of properties into money and deposit thereof in banks held not to make trust a dry or naked trust.

That will creating a trust contained provisions for deposit of trust funds if turned into money did not create a dry trust, where it was not compulsory to turn properties into money, but only discretionary, but even if properties were turned into money and deposited, trust would not become a dry or naked trust, since equity would require an active supervision over such mon. by the trustees.

8. Trusts ⚡159—Contention that trust was void because president and secretary of bank were named as trustees, thus making bank trustee, held without merit, trustees' official relation to bank being merely descriptio personæ.

Contention that because will creating trust named president and secretary of bank, named as depository of estate funds, as trustees, trust was void because bank is in fact trustee, held without merit, since officers of bank were named as trustees, their official relation to bank being merely descriptio personæ.

In Bank.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

In the matter of the estate of Emily Pixley Shaw, deceased. From a judgment and decree of final distribution, Catherine Gray Peterson appeals. Affirmed.

Wyckoff & Gardner, of Watsonville, for appellant.

George F. McNoble, of Stockton, for respondents.

RICHARDS, J. This appeal is from a judgment and decree of final distribution in the matter of the administration of the above estate and in the course of probate of the last will and testament of Emily Pixley Shaw, deceased. The decedent died testate in the county of San Joaquin, state of California, on or about June 5, 1921, leaving an estate

mainly, if not wholly, situate in said county, amounting in value to approximately \$115,000, and consisting almost entirely in money and personal property in the form of notes, stocks, and bonds. The terms of her last will and testament which have direct reference to her disposition of her said estate are those which read as follows:

"Thirdly: I give, devise and bequeath unto my adopted daughter, Catherine Gray Peterson, formerly Catherine Gray Shaw, and now the wife of Fred A. Peterson, of Santa Cruz, California, a life interest in and to one-half of the rest, residue and remainder of my estate after my debts are all paid, the income on said life estate to be paid quarterly to her by my executors, promptly on the first day of each and every quarter during the term of her natural life; and the remainder in fee interest in and to the same, upon the death of said Catherine Gray Peterson, is to go to and become the property of her daughter, Helen Peterson Lightfoot, and in case of the death of said person last mentioned, to Catherine Lightfoot, the daughter of said Helen Peterson Lightfoot.

"The interest of the said Catherine Gray Peterson herein devised is a life interest only, and not an interest in fee simple.

"Fourthly: I give, devise and bequeath unto Helen Peterson Lightfoot, daughter of said Catherine Gray Peterson, an undivided one-half interest in and to all the rest, residue and remainder of my estate, to hold and enjoy the same for the term of her natural life, and no longer; and at her death, the remainder in fee interest in and to the same is to go to and become the property of her daughter, Catherine Lightfoot.

"The said Helen Peterson Lightfoot is to receive the income on said undivided one-half rest, residue and remainder of my said estate, quarterly, the same to be paid to her by my executors promptly on the first day of each and every quarter during the term of her natural life.

"The interest herein devised to said Helen Peterson Lightfoot is a life interest only, and not an interest in fee simple.

"I desire that all of the debts, charges and expenses of administration of my estate, and all the expenses of my last illness and funeral expenses, be paid in full before said estate be distributed, and before said shares go to the respective devisees mentioned herein.

"Lastly: I hereby nominate and appoint J. B. Cory and W. H. Lorenz the executors of this, my last will and testament, to serve without bonds being required of them, or either of them, and I hereby revoke all former wills by me made; and I request that no bonds shall be required of the successors in office of my said executors, or either or any of them.

"I hereby direct that my executors, if they deem it advisable and for the best interest of my estate and for all concerned, to cause all of the real and personal property of my estate to be sold and converted into cash, and that after all necessary legal disbursements have been made in the administration of said estate, that the funds of said estate be kept on deposit in the First National Bank of Lodi and in the Central Savings Bank of Lodi, and that during the lives respectively of said life tenants, men-

tioned herein, said funds, and all funds in my estate, remain in said banks.

"I further hereby appoint as the successor of either or both of my executors, in case of their deaths, their successors, respectively, in office as president and secretary, or either or both, of the said First National Bank of Lodi; it being my wish, will and intent that my estate shall be managed and handled by the president and secretary of the said First National Bank of Lodi, and in case of the death of either of them, that his successor in such case shall take the place of such present executor—that is to say, in case of the death of said J. B. Cory that his successor as president of said bank shall serve as one of my executors, and in case of the death of W. H. Lorenz, that his successor as secretary of said bank shall serve as one of my executors."

The questions which are presented upon this appeal involve the interpretation to be placed upon the foregoing provisions of the decedent's last will and testament. The trial court upon the petition for distribution of the decedent's estate pursuant to the said terms of her last will and testament, and upon the opposition thereto presented by Catherine Gray Peterson and Helen Peterson Lightfoot, the two devisees of life interests in said estate under said will, made certain findings of fact and conclusions of law upon which the said court predicated the judgment and decree appealed from. The above-named devisees of life interests under said will, and each of them, appealed from said judgment and decree, but subsequently thereto the appeal was, by the District Court of Appeal in which the matter was then pending, dismissed as to the appellant Helen Peterson Lightfoot without prejudice to the appeal of the other appellant. The remaining appellant assails upon this appeal certain of the findings of fact and conclusions of law of the trial court, wherein the latter in interpreting the provisions of the last will and testament of said decedent above set forth determined that said decedent had by the foregoing terms of her said will devised to each of said appellants a life interest in the income only of the properties of her said estate; and as to the corpus thereof had created a trust and had invested the executors named therein with the powers and functions of trustees and with the right to have distributed to themselves as such the said corpus of said estate and to hold the same as such during the lifetime of said appellants and each of them for the purposes declared in said will. We are asked to review and reverse the findings, conclusions, and decree of the trial court in the foregoing regard.

[1, 2] The primary question presented for our consideration is as to whether the testatrix intended by the foregoing terms of her last will to invest the two persons, who are named therein as being each entitled to a life interest in an undivided one-half of her said estate, with such right to the possession and

control of her respective proportion of said properties as to entitle each of said persons to have the same distributed directly to her in lifetime under the decree of final distribution of said estate. In determining this question it is conceded by both the appellant and the respondents herein that we are to look to the entire body of the decedent's said last will and to give effect, if possible, to every portion thereof. The appellant, however, argues and cites authority for her insistence that when a will contains clear and unequivocal gifts of life estates the vesting of such estates will not be limited or controlled by later and doubtful clauses in the will relating to the management of the properties thus devised or of the income thereof. There can be no doubt as to the correctness of this rule, since it is embodied in section 1322 of the Civil Code, but, conceding that the rule would be as appellant states it in respect to an appropriate situation, we are satisfied that it cannot be given application to the instant case, for the reason that the testatrix by the very terms of her devise of the life interests in question has embodied her intended limitation upon the right of the devisees thereof to the possession and control thereof during the life of the term thereof. In the immediate context wherein the testatrix devised the so-called life interest in the undivided one-half of her estate to each of said devisees, she limited the extent of the domination, receipt, possession, and control of the interest thus devised to the income thereon in each instance; and in other parts of her said will by words equally clear and distinct reposed the exclusive domination and control over and possession of the corpus of each of said undivided and indivisible portions of her said properties and estate in persons other than the aforesaid devisees, during the entire life of each of them and of the term of their interest in said properties and estate. It is to be noted as of prime significance in this connection that the properties of said testatrix consisted almost wholly of personal property, together with her small holding of real estate, which the executors of her said will were given discretion to turn into money, retaining the corpus thereof, and delivering the income thereof only to said devisees during their lives. To properties of this character the terms "life estate" and "life tenants" could have only a limited significance; and, since the whole of the corpus was devised in remainder, the chief value to the devisees of a life interest therein consisted in their right to the income or usufruct thereof.

[3] Reading the will thus as a whole and finding no doubt or uncertainty as to the foregoing terms thereof, we therefore arrive at the conclusion that the only life interest with which the testatrix intended these particular devisees to be invested was thus declared to be a life interest in the income of

her said properties and estate. The cases to which we are referred by the appellant as supporting her interpretation of the terms of this will do not go to the extent of requiring us to uphold that interpretation. In *Estate of Pforr*, 77 P. 825, 144 Cal. 121, no attempt was made by the testator to create a limited estate, nor were his executors invested with any powers inconsistent with their functions as executors or which were not to be exercised in that capacity and within the period of two years which would be a reasonable period within which to complete the administration of the estate. The case furnishes no parallel to the case at bar. In the *Estate of Campbell*, 87 P. 573, 149 Cal. 712, there was no limitation upon the estates devised by the will of the testator, nor, as this court held, was there any power with which the executrix was invested except such as pertained to her office. In the case of *Benalack v. Richards*, 48 P. 622, 116 Cal. 405, all that was decided was that the investment of the executors with the naked power of sale of the properties of the estate did not operate of itself to create a trust in said executors nor to invest them with any estate or with powers other than those conferred by law upon executors. In the case of *Sheehan v. Sullivan*, 58 P. 543, 126 Cal. 192, the sole question involved was as to whether the mere verbal and indefinite declarations of the grantor as to an intended trust affecting the property embraced in a deed absolute in form were sufficient to amount to the creation of a trust in the grantee. This court properly held that they were not. In each of the foregoing cases also it is to be noted that the devisees were in the main of real estate to which the law applicable to the creation of particular estates and of trusts in real estate would have a more especial application. We shall discuss certain other cases to which we have been referred in a later portion of this opinion, but upon the branch of the case under immediate consideration we are satisfied that it was not the testatrix's intent as expressed in her said will to invest the appellants herein with a greater estate than that of a life interest in the income to be derived from her said properties in their present form or when turned into money according to the direction of her will.

[4] The next question presented for our consideration is as to whether the trial court was justified by the terms of the decedent's will in distributing the entire corpus of her said estate to the executors named in her said will and to their successors to be selected in the manner designated therein as trustees of an express trust for the purposes and period designated in the last will of said decedent. It is urged by the appellant herein that the said will of said decedent does not create a trust in said persons or in the successors of them, for the reason that there is no mention or use of the words "trust" or "trustee" in

said will, nor are there any appropriate words therein indicating an intent to create a trust. As to the use of the words "trust" or "trustee" in an instrument, it has been frequently held that there is no magic in mere words of this character, and that the question as to whether or not a trust has been created by such instrument depends rather upon the powers and duties with which the persons named therein have been invested than upon the titles bestowed upon them or the terms employed in defining the nature and extent of their estate. The rule in this regard is perhaps most clearly stated in the case of *Colton v. Colton*, 8 S. Ct. 1164, 127 U. S. 300, 32 L. Ed. 138, which was a case arising in California and which made its way through the federal courts to the court of last resort. The words of the will in that case were:

"I give and bequeath to my said wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seized, possessed, or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such provision for them as in her judgment will be best."

It was held that a trust was imposed upon the surviving wife to make suitable provision for the mother and sister. The court said:

"No technical language, however, is necessary to the creation of a trust, either by deed or by will. It is not necessary to use the words 'upon trust' or 'trustee,' if the creation of a trust is otherwise sufficiently evident. If it appear to be the intention of the parties from the whole instrument creating it that the property conveyed is to be held or dealt with for the benefit of another, a court of equity will affix to it the character of a trust, and impose corresponding duties upon the party receiving the title, if it be capable of lawful enforcement. No general rule can be stated that will determine when a conveyance will carry with it the whole beneficial interest, and when it will be construed to create a trust; but the intention is to be gathered in each case from the general purpose and scope of the instrument."

The foregoing language was quoted with approval by this court in the case of *Estate of Reith*, 77 P. 942, 144 Cal. 314, 318, in which, also, the language of the Supreme Court of New York in the case of *Tobias v. Ketchum*, 32 N. Y. 319, received the approval of this court. In the last named case—

"The testator did not use the word 'trustee' or 'trustees', but gave the executors power to rent, lease, repair, and insure his real estate, until sold or divided, and out of the rents and profits to pay the provision made for the widow, and to at a certain time divide the property among the children or other heirs. It was held that the will created a trust in the executors. The court said, quoting from *Hill on Trustees*: 'It is by no means necessary that the donee should be expressly directed to hold the property to certain uses or in trust, or as trustee. * * * It is one of the fixed

rules of equitable construction that there is no magic in particular words; and any expressions that show unequivocally the intention of the parties to create a trust will have that effect. It was said by Lord Eldon, that the word "trust" not being made use of is a circumstance to be alluded to, but nothing more; and if the whole frame of the will creates a trust, the law is the same, though the word "trust" is not used."

Many other cases might be cited in support of the same doctrine, but we deem their further review unnecessary in view of the holding of this court in *Estate of Reith*, supra.

[5] Turning to the terms of the will of the testatrix in the instant case, we find the clearly expressed intention on the part of the decedent to invest her executors in their capacity as such with the power and duty in their discretion of converting her entire estate into money. This they might have done within the period usually occupied in administering estates of like amount to this one. Thus far the exercise of no trust function other than that which the statutory office of executor imposes would be required. But this will goes much further than that by the provisions thereof which postpone the final disposition of the corpus of this estate in whatever form until the termination of the lifetime of both of the two devisees who are to receive the income thereof during the lives of each of them and of the survivor. The record herein discloses that in the year 1919, at the time of the execution of said will, Catherine Gray Peterson, one of said devisees, was of the age of about 53 years, that her daughter, Helen Peterson Lightfoot, the other of said devisees, was at said time of the age of under 30 years, and that Catherine Lightfoot, the devisee of the remainder of said estate after the termination of both of the aforesaid life interests therein, was of the age of about 4 years. It will thus be evident without any close computation based upon mortality tables that the persons named in said will as the executors thereof have, by the terms thereof, been invested with the possession, management, and control of the entire corpus of said estate for a period of time far outreaching the ordinary period to be occupied in the administration of such an estate. During such period thus extending far beyond the scope and need of administration and occupying the entire lives of the two devisees of said life interests in said estate, the said persons designated as executors in the decedent's said will are to exercise a degree of dominion over the whole of the properties of said estate, coupled with such exclusive possession and power of management thereof as is usually exercised by trustees and as ought to be surrounded by such safeguards as the law imposes upon trustees under like conditions. The provisions of this will which thus define the powers, duties, and

responsibilities of the persons named therein or their successors, and designated as executors therein, are not doubtful or uncertain in any other respect except in the fact that their prescribed powers and functions are not expressly denominated a "trust," nor are they called therein "trustees"; but this, as we have seen, is not vital (*Estate of Reith*, supra, and cases cited) to the determination that such persons are in fact trustees and their function and office that of a trust, if their control of the properties with which they are invested and the performance of their duties with respect thereto are such as in the nature of things require that the mantle of a trusteeship shall be cast upon their shoulders. The decisions are uniform to this effect. In the case of *Mee v. Gordon*, 80 N. E. 353, 354, 187 N. Y. 400-407 (116 Am. St. Rep. 613, 10 Ann. Cas. 172), the court aptly says:

"The duty of investing and administering the share in question it is true is imposed upon persons who are designated as executors rather than trustees, but it is a very familiar rule that the duties imposed upon a person rather than the name applied to him in the will should measure his office and position."

In the case of *In re Bartholemew's Will*, 143 N. Y. S. 695, 82 Misc. Rep. 1, involving the interpretation of a will in which, as in this case, the words "trust" and "trustee" did not appear, the court, after reciting the terms of the will, said:

"To carry out these intentions, while no trust was in terms created, one should be implied to enable the executrix or her successor to perform the duties imposed; that is, the executrix, or whoever might administer the estate, was a trustee of the corpus of the estate, the income of which was to be applied as hereinabove expressed. *Matter of Young*, 40 N. E. 226, 145 N. Y. 535, 537. No particular formula of words need to be used to create a trust. To create a trust it is not essential that the words 'trust' or 'trustee' should be used, or that there should be a direct devise in terms to the trustee, or that the authority to receive the rents and profits should be conferred in express language. It is sufficient if the intention to create a trust * * * can be fairly collected from the instrument, and what is implied from the language used is, as in other instruments, deemed to be expressed."

The same doctrine is laid down in many cases from other jurisdictions which but reinforce the rule set forth in the *Reith* Case above cited. We have no hesitancy, therefore, in holding that the powers and duties with which the persons named in the said will of the decedent with respect to their dominion over and management and control of the corpus of the testatrix's estate during the lifetime of the appellants herein were such as to constitute them trustees of the properties of the decedent when their powers and functions as the executors of her said

will would draw to a close and the time would arrive in the usual order of procedure for the distribution in probate of her said estate.

[6] The appellant herein, however, insists that the trust thus sought to be created is void for the following several reasons: First, that said trust is a so-called "dry trust." The term "dry trust" refers to a trust wherein the trustees would have no actual responsibilities as such and no active duties to perform. But this trust is not of that character, but is rather of the character referred to in the case of *Gray v. Union Trust Co.*, 154 P. 306, 171 Cal. 637, 640, wherein the duties of the trustee were to so manage, invest, and handle the trust property as to give to the beneficiary the usufructuary benefit thereof during her lifetime, and upon her death to see that the property goes to the nominees under her will. The court in that case held that such a trust was not a dry, naked trust, since active duties were imposed upon the trustee during the lifetime of the beneficiary entitled to the income thereof. In like manner in the instant case an active trust was created by the expressed "wish, will and intent" of the testatrix, as she declares, "that my estate shall be managed and handled" by her named executors, who are respectively the president and secretary of the First National Bank of Lodi, or, in case of their death, by their successors in that official relation to said bank.

[7] The appellant herein makes the further insistence that said trust, if created at all, is a dry trust because of the provisions in said will with respect to the deposit of the funds of said estate, if turned into money, in the two banks named in her said will. But the answer to this contention is that it is not made compulsory upon those who are thus to have charge of the properties of her said estate to turn the same into money, but is only discretionary upon them to do so. The executors of her said estate and who are to be the trustees thereof have thus far maintained the entire property in the original form in which they received it, and they may in their discretion continue to manage and handle said properties in such form, which is mainly that of stocks, notes, and bonds; in which event it could hardly be contended that a trust involving the management and handling of such properties would be a dry or naked trust. But even if said properties should be turned into money and deposited in the banking institutions named in the will of said testatrix, the trust would not thereupon or for that reason become a dry or naked trust, since equity, which is the guardian and ultimate administrator of all trusts, would require of said trustees such an active supervision over the properties or moneys thereof, whether in the hands of these or of other depositaries, as would result in carrying out the expressed purpose of its creator with relation to the provision and payment of

a suitable income regularly to those having a life interest in such income.

[8] The final contention of the appellant that said trust is void for the reason that the trustees of said trust are, in point of fact, the banks who are named as the depositories of the funds of said estate, and which said banks are not authorized by law to do a trust business, is devoid of any real merit. The persons named in said will as the executors thereof were, it is true, the president and secretary of the First National Bank of Lodi, but it was said persons and not said bank who were to be the executors of the decedent's will. Their official relation to said bank was merely *descriptio personæ*, and it is reasonable to assume that it was her intention that this would continue to be so when their relation changed to that of the trustee of her properties. The trial court so interpreted her will, and we are satisfied with interpretation. It is therefore our conclusion that the trial court was not in error in the interpretation which as a whole it placed upon the will of said decedent, and hence did not err in making and entering its judgment and decree of distribution in accord therewith.

The judgment and decree are therefore affirmed, the respondents to recover their costs herein, to be paid out of the assets of said estate.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; LENNON, J.; CURTIS, J.; LAWLOR, J.

198 Cal. 500

FROST v. HANSCOME et al. (S. F. 10934.)

(Supreme Court of California. April 29, 1926.)

1. Conspiracy $\S$ 1—"Conspiracy" requires concert of action between two or more to accomplish unlawful purpose or lawful purpose by unlawful or fraudulent means.

"Conspiracy" to defraud requires concert of action between two or more persons to accomplish unlawful purpose or lawful purpose by unlawful or fraudulent means.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conspiracy.]

2. Conspiracy $\S$ 14—Each participant in conspiracy is responsible as joint tort-feasor for all damages from wrongful act.

When purpose of conspiracy is accomplished, each participant in wrongful act is responsible as joint tort-feasor for all damages from wrongful act.

3. Conspiracy $\S$ 19—Evidence held to show that real estate operator who lost own funds in operation of ranch with plaintiff was not guilty of attempt to defraud plaintiff.

Evidence held to show that real estate operator, with whom plaintiff was associated in

purchase and operation of ranch, and who lost considerable of own funds in enterprise, was not a party to conspiracy to defraud plaintiff.

4. Fraud $\S$ 20.

Seller of ranch, dealing at arm's length with experienced ranchman, who inspected premises and accepted price requested, held not guilty of attempt to defraud.

5. Fraud $\S$ 52—Statement by stranger to purchaser that he paid too much for ranch is incompetent evidence of misrepresentation by seller.

Statement to purchaser of ranch by stranger to transaction that he paid too much for ranch is not competent evidence of misrepresentation by seller, nor is it evidence that ranch was not worth what was paid for it.

6. Fraud $\S$ 58(2)—That seller of ranch had been compelled to take property back previously is not proof of misrepresentation or fraud by seller.

That seller of ranch had theretofore sold it, or thought she had sold it, and had been compelled to take it back, is not proof of misrepresentation by seller, nor does it show transaction to be permeated with fraud.

7. Fraud $\S$ 28—Lessee, not shown to have received more than his interest in ranch was worth, held not guilty of attempt to defraud plaintiff, to whom he sold stock received for his interest.

Lessee selling interest in ranch and other property in exchange for one-third of capital stock of corporation taking over ranch, and receiving 10 per cent. of sale price as commission for surrendering his lease, held not guilty of attempt to defraud plaintiff to whom he sold the stock, where interest conveyed was not shown to be worth less than amount received.

8. Attorney and client $\S$ 112—Attorney not exercising diligence in representing plaintiff in action to which he had no meritorious defense is not liable for damages.

Attorney failing to exercise diligence in representing plaintiff, resulting in embarrassment and inconvenience to plaintiff, held not liable for damages, where plaintiff had no meritorious defense to action.

9. Judgment $\S$ 447(1).

Equity will not afford relief against final judgment unless extrinsic fraud and meritorious defense be both alleged and proved.

10. Judgment $\S$ 461(5)—Evidence of fraud in obtaining judgments held not to warrant their annulment.

Evidence of alleged fraud in obtaining judgments against plaintiff on note given by him in transaction to acquire ranch held not to warrant annulment of judgment.

11. Judgment $\S$ 463—Proof of fraud necessary to afford relief against final judgment must raise reasonable inference that fact exists, and, if insufficient, court may grant nonsuit.

Proof of fraud necessary to afford relief against final judgment must be such that a rational mind can reasonably draw therefrom conclusions that fact exists, and when evidence does

not justify such inference court may grant nonsuit.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Herman Frost against Alpheus L. Hanscome and others. Judgment for defendants, and plaintiff appeals. Affirmed.

I. I. Brown and Samuel T. Bush, both of San Francisco (L. Seidenberg, of San Francisco, of counsel), for appellant.

J. R. Cunyningham, of San Francisco, for respondent Hanscome.

J. E. White, of San Francisco, and N. J. Barry, of Susanville, for respondents Turner and Wood.

SHENK, J. The plaintiff brought this action to annul two judgments obtained against him by the defendants Wood and Turner, respectively; also to compel the surrender of certain securities pledged by him to the said defendants; also for \$30,000 actual damages and additional damages in the sum of \$20,000 by way of punishment. The complaint charges the defendants with fraud in obtaining said judgments, and with a conspiracy to abstract from him his money and property by fraud and deceit. At the conclusion of the plaintiff's case defendants moved the court for a nonsuit on the ground that there was no evidence to show a conspiracy or fraud on the part of any of the defendants, and that there was no evidence to show that the plaintiff in any way lost any money or suffered any damage. The motion was granted, and from a judgment in favor of defendants the plaintiff appeals. The only question presented on the appeal is whether the trial court was justified under the evidence in granting the motion for a nonsuit.

For some 20 years the plaintiff, Herman Frost, had been engaged in the sheep raising and ranching business in Eastern Oregon. In 1915 he removed with his accumulated savings to San Francisco, where he engaged in the saloon and café business at No. 920 Market street. In 1916 he became acquainted with Milton S. Hamilton, who was made a party defendant in this action, but was never served with process. Hamilton was an attorney at law and represented Frost in numerous actions and other matters during the course of several years. Hamilton early acquired the habit of borrowing money from Frost and of recommending that he loan money to others, among whom was Patrick L. Flanigan, a real estate operator residing in Reno. Acting on the advice of Hamilton, Frost loaned Flanigan various sums aggregating, in March, 1917, the sum of \$6,000, which was repaid in the manner presently to be related.

The defendant Sallie C. Turner was the owner of a grain and live stock ranch in the Surprise Valley in Modoc county, consisting

of 2,580 acres of land, which she and her husband had acquired during the course of 20 years' residence in that locality. Her son, Raymond Turner, since 1913 had been leasing 740 acres of the ranch on a lease from year to year. On December 1, 1916, the defendant Charles E. Wood, a real estate dealer and promoter, entered into a written lease with the Turners, husband and wife, covering 2,044 acres of the ranch for a term of five years from the 4th day of January, 1917, on a rental of one-half of the crops and one-half of the increase of the live stock. Wood also owned a contract to purchase the Hedgpeth ranch, located three miles south of the Turner ranch. Flanigan was an acquaintance of Hamilton, and through the influence and advice of the latter aroused the interest of Frost in the purchase of the Turner ranch. Frost made a trip to the ranch in September, 1917. On that trip he met Flanigan, Wood, and Mrs. Turner. After spending several hours on the ranch and examining it in a superficial way, so he claims, and after conversations between Frost, Flanigan, and Wood it was agreed that they would purchase the Turner ranch, take the title thereto, and operate the same in the name of a corporation thereafter to be formed under the laws of the state of Nevada, and to be called the Surprise Valley Land & Livestock Company. The documents preparatory to the incorporation and organization of the company were shortly thereafter prepared by the defendant Hanscome, who had practiced law in an eastern state, but had not been admitted to practice in this state. Hanscome was an acquaintance of Hamilton, and on a prior trip to Modoc county had met Mrs. Turner and the defendant Wood. After negotiations for the purchase of the ranch had been concluded it was agreed between Flanigan, Wood, and Frost that a contract of purchase should be entered into with Mrs. Turner, that Flanigan should be the nominal purchaser, and that he should thereafter assign the contract of purchase to the proposed corporation. Wood was to surrender his lease on the Turner ranch and transfer his contract of purchase covering the Hedgpeth ranch to the corporation. Frost was to advance \$10,000 in cash as the first payment on the purchase price of the Turner ranch and receive the corporation's note for \$10,000 in consideration of such advancement. The three were to share equally in the capital stock of the corporation, which was to consist of 100 shares of the par value of \$100 each.

The Surprise Valley Land & Livestock Company was incorporated in October, 1917, and upon organization Flanigan was elected president, Wood secretary, and Frost treasurer of the company. The capital stock was issued as agreed. Wood surrendered his lease on the Turner ranch and transferred to the corporation his interest in the Hedgpeth ranch. By the agreement of purchase and sale, which bears date January 4, 1918, Mrs. Turner

agreed to convey to Flanigan the 2,580 acres of land in the Turner ranch free and clear of all incumbrances and a miscellaneous lot of farm machinery, tools, and equipment used in the operation of this extensive ranch. The agreement also covered the purchase of live stock consisting of 70 head of mules, 31 head of horses and brood mares, 250 head of cattle, 175 hogs, 58 sheep, one jack, and a half interest in a French Percheron stallion. The purchase price was \$219,385, \$10,000 payable on the execution of the contract, \$10,000 on the first days of November, 1918, 1919, 1920, and 1921, respectively, and \$58,692.50 on the 1st day of November, 1922, after which payments Mrs. Turner agreed to convey title to the real property, execute a bill of sale of the personal property, and take a note or notes for the balance of the purchase price secured by a mortgage on the premises. On the day of its date the contract of purchase was assigned by Flanigan to the corporation. Frost did not advance the first payment of \$10,000 on the contract as he agreed to do under the arrangement between the three men, but insisted that Flanigan pay thereon the said \$6,000, owed by Flanigan to Frost, plus interest on the same. After considerable negotiation the sum of \$6,500 was paid by Flanigan to Mrs. Turner in discharge of his indebtedness to Frost, and the latter paid to Mrs. Turner the balance of the first payment on the contract, to wit, the sum of \$3,500. Under date of December 5, 1917, Frost received the corporation's note for \$10,000 on account of his agreed advancement of the initial payment. The corporation entered into possession and commenced farming operations. In order to finance the enterprise the corporation made application for a loan to the Fort Bidwell Bank. To carry on his operations under his lease Wood had theretofore obtained a credit at that bank of \$5,000, of which he had drawn \$1,000. The bank agreed to loan the company \$5,000 provided the \$1,000 was paid. The company accordingly executed a note to the bank for the sum of \$5,000, and \$4,000 was placed to its credit. The obligation of Wood to the bank, which was extinguished in that transaction, was included in the terms of the sale by Wood of his interest in the company to Frost. In the latter transaction Wood surrendered his stock in the company and received two promissory notes signed by Frost and Flanigan, one in the sum of \$7,000 and the other in the sum of \$2,000. The \$7,000 note was transferred by Wood to Mrs. Turner in partial satisfaction of his indebtedness to her, her son Raymond, and her daughter, on account of money loaned to him in operating the ranch under his lease and before the advent of Frost on the scene. This note was not paid when due, whereupon Mrs. Turner commenced an action in the superior court in and for the county of Modoc against Frost and Flanigan, and on the default of Frost to appear within the time prescribed by

law a default judgment was entered against him in the sum of \$8,393.50. Later on Frost moved the court to set aside the default and permit him to answer, and upon a denial of that motion took an appeal from the judgment. The judgment was affirmed. *Turner v. Frost*, 51 Cal. App. 196, 196 P. 290. On proceedings supplementary to execution and on what must be conceded to have been questionable advice on the part of Hamilton, Frost failed to appear, whereupon he was cited for contempt, and upon his failure to appear was arrested and taken before the court. He was released on \$1,000 bail pending the determination of his application to set aside the default. Frost paid \$400 on the \$2,000 note held by Wood, and on his default in the payment of the balance Wood commenced an action against him in the city and county of San Francisco. It does not appear that he had any defense to that action, but through the negligence of his attorney, Hamilton, so Frost alleges, a default judgment was obtained against him for the sum of \$1,848.97. The foregoing judgments are sought to be set aside and annulled in this action.

On June 10, 1919, H. Raymond Hall, as assignee, and for the benefit of Frost, commenced an action against Wood in the superior court of the city and county of San Francisco for \$3,333.33 as the alleged proportionate share of Wood's stockholders' liability on the note for \$10,000 issued to Frost by the live stock company. On the same day Frost commenced an action against Wood in the same court to enjoin the defendant therein named from enforcing his judgment against Frost. In that complaint Frost recited the pendency of the action filed on the same day, entitled *Hall v. Wood*, and sought to establish an equitable set-off against Wood to the extent of the latter's alleged stockholders' liability. In both of the actions last mentioned Hamilton appeared as attorney for the plaintiff. Shortly thereafter a settlement of all the differences between Mrs. Turner, Wood, and Frost was proposed. To that end, and under date of June 17, 1919, an agreement in writing was executed by them and witnessed by their respective attorneys. In this agreement it was recited that Mrs. Turner held the judgment for \$8,393.50 against Frost in Modoc county, that Wood held the judgment for \$1,848.97 against Frost in the city and county of San Francisco, and the pendency of the actions of *Frost v. Wood* and *Hall v. Wood* in said city and county. In this compromise agreement Frost agreed to pay at the time of the execution thereof the sum of \$750 in partial satisfaction of the judgment in the action of *Turner v. Frost*, and the further sum of \$750 in partial satisfaction of the judgment in the case of *Wood v. Frost*. In addition, Frost agreed to pay Mrs. Turner and Wood the further sum of \$8,085.72, being \$671.75 less than the balance due on said judgments, on or before August 16, 1919, and Mrs. Turner

and Wood agreed to accept the reduced amount in full satisfaction of their claims provided said payments should be made when agreed. As security for his performance of the agreement Frost assigned and transferred to Mrs. Turner and Wood three promissory notes owned by him, aggregating \$12,100, with a stipulation that if he should fail to make the payment on August 16, 1919, the said securities should be sold to satisfy said judgments, any balance remaining to be paid to Frost. It was further agreed that proceedings of any kind or nature in all of said actions should be suspended to and including the 16th day of August, 1919. In conclusion the said agreement of compromise provided as follows:

"This agreement is intended and is hereby declared to be a full and complete settlement of all claims of whatsoever character or nature that Charles E. Wood and Sallie C. Turner now have or ever have had against Herman Frost, and all claims of every character and nature that Herman Frost now has or ever had had against Charles E. Wood or Sallie C. Turner, and upon a compliance with the terms and conditions of this agreement in the manner and at the times herein specified will be a full release and discharge of all such claims."

In negotiating this compromise agreement the parties thereto were represented by their respective attorneys, Mr. J. E. White, representing the defendants Turner and Wood, and Milton S. Hamilton, representing Herman Frost. Frost failed to make the payment due August 16, 1919, and nearly two years thereafter, to wit, on July 5, 1921, commenced the present action to annul said judgments, cancel the assignments, and compel the surrender of said securities on the ground of fraud and deceit.

The agreement for the purchase of the Turner ranch contained a provision that on or before the 1st day of March of each year the purchaser should execute a chattel mortgage on the crops of that year in the sum of \$10,000 as security for the payment of the ensuing installment of the contract price. Early in the year 1918 it was foreseen by Flanigan, who was in the actual charge of the ranching enterprise, that it would be impossible to raise the necessary money for such operations if the chattel mortgage due March 1, 1918, were executed. In lieu of the requirements of the contract and with Mrs. Turner's acquiescence Flanigan caused his wife to hypothecate certain laundry stock owned by her for the sum of \$10,000, and deposited the same in the First National Bank of Alturas in the place and stead of the required chattel mortgage. For default of the purchaser in making further payments on the contract price Mrs. Turner repossessed the ranch in February, 1919, and about two months thereafter commenced an action against the bank to recover the deposit made in lieu of the chattel mortgage. That suit was compro-

mised, and in the settlement Mrs. Turner received the sum of \$4,000 in cash. Before she repossessed her property she had received \$14,030 on account of payments required by the contract of purchase, which was much less than she would have received had the contract been complied with. The live stock company had taken the 1917 and 1918 crops from the ranch, and had removed \$10,000 worth of produce and other property from the Hedgpeth ranch. Frost, as treasurer of the live stock company, received as returns from the ranches from December, 1917, to November, 1918, the sum of \$17,951.30, and out of his own funds he paid out in financing the enterprise the sum of \$18,008.15, including the \$10,000 for which he received the company's note as reimbursement.

The foregoing is an outline of the principal transactions disclosed by the plaintiff's evidence. Upon these facts, and additional matters hereinafter adverted to, he predicates his inferences that the defendants were acting in concert with a design to separate him from his money and property by fraudulent means.

[1-3] In a conspiracy there must be the concert of action between two or more persons to accomplish an unlawful purpose, or a lawful purpose by unlawful or fraudulent means. *Parkinson v. Building Trades Council*, 154 Cal. 581, 593, 98 P. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165. When the purpose of the conspiracy is accomplished each participant in the wrongful act is responsible as a joint tort-feasor for all damages ensuing from the wrongful act. *Revert v. Hesse*, 184 Cal. 295, 193 P. 943. Unlawful concerted purpose and action is charged by the plaintiff against Flanigan, Turner, Wood, Hanscome, and Hamilton. It appears that Flanigan died before the commencement of this action, which accounts for the fact that he was not made a party defendant herein. His actions, however, are called in question, and concerning them it must be said that his participation in the enterprise appears to have been entirely consistent with his good faith, and that no reasonable inference of bad faith on his part may be drawn from the evidence. All of the money which he borrowed from the plaintiff was repaid. In order to safeguard the contract of purchase acquired by the live stock company, two-thirds of whose stock the plaintiff was the owner, Flanigan caused the laundry stock of his wife to be hypothecated for a loan of \$10,000 to be used in satisfying the requirements of the contract of purchase. It would be unreasonable to suppose that if he were actuated by a purpose to defraud the plaintiff he would risk \$16,500 of the funds of himself and wife in endeavoring to carry on the enterprise. This amount, together with his own time and energy, appear to have been wholly lost.

[4-6] Concerning Mrs. Turner's part in the transaction, it appears beyond question that

she was dealing at arm's length with Flanagan and Frost and her codefendants herein. She was represented at all times by an attorney, whose conduct appears to have been diligent in her behalf. She made no representations as to the value of the ranch. The fact that some stranger to the transaction told Frost after the purchase that "he had paid too much for the ranch" was not competent evidence of misrepresentation on her part, nor was it evidence that the ranch and personal property sold were not worth what was agreed to be paid for the same. Frost was a ranchman, and on his first visit to the Turner ranch he stated, in the presence of Mrs. Turner in response to an inquiry as to what he thought of the ranch, that he had made his money ranching and could see the possibilities of the Turner ranch. The fact that the Turners had theretofore sold the ranch, or thought they had, and had been compelled to take back the property, was not sufficient proof of misrepresentation, nor does it give rise to a rational inference that the transaction was permeated with fraud. Mrs. Turner was the owner of a large ranch. Her husband had recently died, and she desired to sell. She placed upon the ranch a price which the purchasers agreed to pay. There is no evidence that the agreed price was not the reasonable price of the property. The corporation went into possession and remained in possession for more than a year, and when it failed to fulfill its agreement she terminated the lease.

[7] As to the defendant Wood: He was in possession of the Turner ranch and personal property under a lease beginning January 4, 1917, with an unexpired term of four years. He also owned a contract to purchase the Hedgpeth ranch, from which about \$10,000 worth of produce and other personal property was removed by the live stock company while it was in possession of the same. For his interest in both ranches Wood received one-third of the capital stock of the corporation. This stock he sold to Frost for \$10,000, taking his promissory notes to the extent of \$9,000, the corporation assuming an indebtedness of Wood to the extent of \$1,000. There is no evidence to show that Wood's interest in the ranches which was transferred to the corporation was not worth all he received for the same. The plaintiff stresses the fact that under date of January 4, 1918, an agreement was entered into between Mrs. Turner and Wood whereby Wood was to receive for and on account of his surrender of his lease and his participation in the sale theretofore consummated the sum of 10 per cent. of the contract price when the same should be paid. The plaintiff insists that this contract is an indication of conspiracy as between Mrs. Turner and Wood to defraud him. The contract is somewhat ambiguous, but it is reasonably susceptible to the construction, and

the undisputed evidence supports the contention, that under it Wood was to receive the said percentage as compensation for surrendering his leasehold interest and thus permitting the sale to become effective with right of immediate possession in the purchaser. From an examination of the record we find nothing to support the contention of plaintiff that the defendant Hanscome was guilty of any unfair dealing with the plaintiff or with any of the parties to the transaction.

[8] Concerning the conduct of the defendant Hamilton, it appears that he was acting as the attorney for Frost in all actions and matters in which Frost was interested from a time antedating the contract of purchase of the Turner ranch until the final agreement of compromise was consummated. There is sufficient in the record to indicate that he was lacking in diligence in representing Frost in the cases of *Turner v. Frost* and *Wood v. Frost*, as a consequence of which inconvenience and embarrassment were suffered by Frost in being cited for contempt in response to a citation to appear before the superior court of Modoc county to be examined as a judgment debtor, but it does not appear that he had any meritorious defense to either of said actions. The difficulties in which Frost found himself from time to time appear under the evidence to have been attributable to his failure to discharge his obligations at the time appointed in his agreements.

[9-11] Equity will not afford relief against a final judgment unless extrinsic fraud and a meritorious defense be both alleged and proved. *Amador C. & M. Co. v. Mitchell*, 59 Cal. 178; *Sohler v. Sohler*, 135 Cal. 323, 67 P. 282, 87 Am. St. Rep. 98; *Silva v. Santos*, 138 Cal. 542, 71 P. 703; *Parsons v. Weis*, 144 Cal. 417, 77 P. 1007. Assuming that the allegations of the complaint herein were sufficient, the proof fell far short of establishing either requirement. The proof must be sufficient to raise more than a mere conjecture or surmise. "It must be such that a rational, and well-constructed mind can reasonably draw from it the conclusion that the fact exists, and when the evidence is not sufficient to justify such an inference," the court may and should grant a motion for a nonsuit. *Janin v. London & S. F. Bank*, 92 Cal. 14, 27, 27 P. 1100 14 L. R. A. 320, 27 Am. St. Rep. 82.

From a consideration of the record we are satisfied that neither the facts standing alone nor any rational inferences to be drawn therefrom were sufficient to support a judgment for the plaintiff upon the allegations of the complaint. The trial court therefore properly granted the motion for an nonsuit.

The judgment is affirmed.

We concur: WASTE, C. J.; LENNON, J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.; LAWLOR, J.

198 Cal. 510

SILVEIRA v. SMITH et al. (S. F. 11220.)

(Supreme Court of California. April 27, 1926.)

1. Easements ⇨16—Purchaser of tenement or portion of estate sold by owner of two tenements or entire estate takes with all apparent benefits as between land purchased and property retained by vendor.

Where owner of two tenements sells one, or owner of entire estate sells part of it, purchaser takes land sold with all benefits apparently belonging to it at time as between it and property retained by vendor.

2. Easements ⇨14(3)—Reservation of only limited easement for benefit of particular parcel should not outweigh intention to reserve, for benefit of other parcels retained by grantor, right to use roadway and landing place as easement appurtenant to all.

That grantor of parcel of land expressly reserved only limited easement for benefit of particular parcel retained by him should not outweigh intent to reserve, for use and benefit of other parcels retained, right theretofore existing and thereafter continuously asserted to use roadway and landing place as easement or quasi easement appurtenant to all parcels.

3. Easements ⇨16—That roadway across land conveyed ended in public highway separating it from tracts retained by vendor held not to militate against easement for benefit of such tracts.

That roadway across land conveyed did not lead entirely to tracts retained by vendor, but ended in public highway separating them from such land, held not to militate against existence of easement therein for benefit of such tracts.

4. Easements ⇨32—Fencing of land conveyed and establishment and maintenance of gate across roadway did not destroy easement appurtenant to lands retained by vendor, where gate was never locked, and owners of dominant tenement continued to use roadway.

That grantee and its successors fenced land conveyed shortly after acquiring it and established and maintained gate where roadway across it entered highway did not constitute such interference with exercise of easement appurtenant to parcels retained by vendor as to destroy it, where gate was never locked, and owners of dominant tenement continued to use roadway without obstruction.

In Bank.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Antonio F. Silveira against Sam Smith and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Roy C. Lewis and Thos. P. Boyd, both of San Rafael, for appellants.

George H. Harlan, of San Rafael, for respondent.

RICHARDS, J. This appeal is one prosecuted by the defendants for the purpose of assailing and overthrowing a judgment entered herein in favor of plaintiff, whereby the latter was decreed to be entitled to an easement over a certain roadway leading from what is known as "Lucas Embarcadero" and up Gallinas creek, in Marin county, to the public highway between San Rafael and Petaluma, together with a right to use said Embarcadero with sufficient convenient space around the landing place thereon for the shipment or transshipment of supplies, goods, produce, etc., to and from certain parcels of land held in tenancy by the plaintiff. These parcels of land are denominated in the record as parcels A, B and C, and are subdivisions of a larger tract of land, originally known as the rancho San Pedro Marguerita y Las Gallinas, comprising an area of five leagues, being a rancho granted to one Timothy Murphy in the year 1844. The parcel of land owned by the defendants and upon which the rights and easements claimed by the plaintiff are sought to be imposed is designated in the record as parcel I (one) and was also a subdivision of said original rancho. The said original rancho lay to the northward of the city of San Rafael. Extending from San Pablo Bay to the easterly boundary line of the rancho was a body of water, known as Gallinas creek or slough, upon which small vessels were accustomed to ply, and upon the bank of which there came very early to be established a landing known as Lucas Embarcadero, which was the landing place for supplies coming in and for products going out, for the convenient use of the entire rancho and its occupants, and which was connected with the public highway leading through said rancho to Petaluma by a private roadway extending on up Gallinas creek, and which was also used for the convenience of the entire rancho and its occupants in connection with said Embarcadero. The rancho was early subdivided into the parcels or tracts of land above referred to, and parcel I thereof was the parcel bordering upon the slough and upon which the said Embarcadero was located, and from which the aforesaid private roadway extended across said parcel I (one) to the public highway. In the year 1851 Timothy Murphy conveyed parcel A to James Miller, the predecessor in interest of the plaintiff herein. In January, 1853, Timothy Murphy by his last will and testament bequeathed parcels B, C and I to John Lucas, and these parcels were thereafter held by said Lucas as one ranch under the name of Lucas Rancho, until December, 1863, at which time John Lucas, through his trustee, James Dickson, conveyed parcel I and parcel C to John Thomas Code. Said conveyance contained a reservation to the party or parties of the first part of a perpetual right of way to the Embarcadero, known

as Lucas Landing, for the benefit of parcel B, over the private road leading from said Embarcadero to the highway; the said right of way being used and to be used "only for hauling wood, timber, lumber, and farm produce from other portions of said Lucas ranch to said Embarcadero, together with the right to pile and store convenient for shipping 100 cords of wood and 1,000,000 feet of lumber and timber at said Embarcadero." In March, 1870, one Martin Miller acquired the title from Code to said parcel I, subject to the reservation of the easement contained in said former deed; and in October, 1870, Martin Miller conveyed to James Miller, who was then the owner of parcels A, B, and C, said parcel I, subject to the same easement. By virtue of said latter conveyance James Miller thus became the owner and holder of the title to parcels A, B, C, and I of said original rancho. In March, 1876, said James Miller conveyed parcel I to a corporation known as the Patent Brick Company, and in said conveyance embodied the following reservation:

"This grant is made subject to a certain right of way reserved in said deed from James Dickson et al. to J. T. Code, dated December 2, 1863, recorded," etc.

Thereafter said parcel I by mesne conveyances became the property of the defendants and appellants herein.

The foregoing recitals as to the original ownership and subsequent transfers of the title to these several parcels of land are summarized from the findings of the trial court and are entirely undisputed. The matters which are in dispute upon this appeal are those which are embodied in certain portions of findings V, VI, VII, VIII, and IX of said findings of the trial court, and which, according to the contention of the appellants herein, are unsupported by the evidence in the case. The portion of said findings of the trial court thus objected to refer to the use or uses which from time to time were made of that certain roadway extending from the Lucas Embarcadero to the public highway by the owners, tenants, and inhabitants of said rancho and of the foregoing subdivisions thereof from the time of the original acquisition of said rancho by Timothy Murphy continuously down to a date shortly prior to the institution of the present action in connection with the use and right to use the navigable waters of Gallinas slough and the space occupied by the Embarcadero situate thereon. With respect to these uses of said roadway and Embarcadero during the period when Timothy Murphy was the owner of the entire rancho and thereafter and during the period when James Miller was the owner of parcel A thereof, and when John Lucas was the owner of parcels B, C, and I thereof, and when, subsequently, James Miller became the owner and holder of the title to each and all

of said separate parcels of said rancho, and during the time of his said ownership thereof and thereafter and during the time when the ownership of the title to parcel I thereof was in the Patent Brick Company and its successors down to and after the inception of its ownership by the defendants and appellants herein, we are satisfied from a careful examination of the record that the findings of the trial court with respect to the foregoing use or uses of said roadway and Embarcadero are fully supported by the evidence in the case. The dispute between the parties to this appeal is not so much over the insufficiency of the evidence as showing the foregoing uses as it is over the conclusion which the trial court has deduced therefrom as to the rights from time to time of those who thus made use of the said roadway and Embarcadero.

It is the contention of the appellants herein that when, in the year 1870, James Miller, who had theretofore become the owner of parcels A, B, and C of said tract, became also the owner of parcel I thereof, there was thereby worked an extinguishment, not only of whatever easement had been referred to and reserved in the deed from James Dickson et al. to John Thomas Code, but also of whatever other easement or rights of user had theretofore existed in connection with each or any of said parcels of said tract, and which were thus joined in his common ownership of parcels A, B, C, and I thereof. On the other hand, it is the contention of the respondent herein that, even though it be true that there was thus united in James Miller the several titles to these separate tracts and that they, thus, came under his single ownership, nevertheless, the use or uses of said roadway and Embarcadero continued in connection with these several parcels of land in the form of a quasi easement for the benefit thereof, and that, when the said James Miller undertook to convey the title to these several and separate tracts of the original rancho and of his united ownership for a time thereof, he thereby revived into a full easement the former right of the owners and occupants of these separate parcels of land in and to the use of said roadway and Embarcadero to the full extent of the continuous use and enjoyment thereof during the entire period wherein these several changes in the title and ownership of the several tracts were taking place.

Each of the parties to this appeal makes, respectively, their foregoing contentions and each urges in support thereof a decision of this court which it is contended is on all fours with the instant case. The appellants herein rely upon the case of Taylor v. Avila, 165 P. 533, 175 Cal. 203, as fully sustaining their contention, and hence requiring a reversal of this case. In the case of Taylor v. Avila, the plaintiff brought suit to establish and quiet title to her alleged right to main-

tain and use a certain water ditch extending from a main canal through the lands of the defendant to and over the plaintiff's land. It appeared that in the year 1903, at or about the time of the construction of said water ditch, the plaintiff was the owner of an 80-acre tract of land adjoining land owned by the defendant or his predecessors, and the ditch in question was so constructed as to run along the eastern edge of defendant's land to and into the plaintiff's 80-acre tract for use in irrigation thereof. In that year plaintiff conveyed to another the 25 acres of her tract adjoining the defendant's land without reservation, but, notwithstanding said conveyance, continued to use the ditch as before for the irrigation of her remaining land and by so doing acquired, as the court found, a prescriptive right as against her said grantee to maintain and use said ditch as before. In 1913 the plaintiff and her said grantee united in conveying the said 25-acre tract to the defendant and in their deed of conveyance not only described and conveyed said land, but also embraced therein an express grant of "all water rights, ditch right, or interest in ditches, canals, water, or water rights made use of for the purpose of irrigating or draining said land or any of said land above described." Notwithstanding such express grant, the plaintiff in that case continued her former use of said ditch for the purpose of irrigating her remaining 55 acres of land and, such use being interfered with by the defendant, brought suit to quiet title to her alleged right to continue to maintain and use said ditch. This court, upon appeal, denied her that right upon the ground that its exercise would be a use in direct opposition to the express terms of her grant. The distinction between the case of *Taylor v. Avila*, supra, and the instant case is thus made clear. In the case as presented to us upon the present appeal the plaintiff is not seeking to have established and maintained an easement in and to the use of the roadway and Embarcadero, which are the direct subject of this litigation, in opposition to his express grant of such easement to another. What the plaintiff herein was seeking to have the trial court do and is now seeking to have this court approve upon appeal is to establish the continued existence of an easement in and to the use of said roadway and Embarcadero existing and inuring to the benefit of the several parcels of land above referred to as an easement and as a corresponding servitude upon parcel I of said entire tract, notwithstanding the several changes in ownership of said respective parcels of land, and notwithstanding the fact that for a time the ownership of all of said parcels of land had been reunited in a single person.

This contention on the part of the plaintiff herein may be more specifically illustrated by reference to the foregoing undisputed facts in this case. Originally and prior to

1851 Timothy Murphy was the owner of the entire Rancho San Pedro, and while such owner established upon the bank of Gallinas slough the Embarcadero in question and also created the roadway in question leading to the various parcels of said rancho above designated as parcels A, B, C, and I thereof for the use and benefit of the occupants of each of said parcels of land. In 1851 Timothy Murphy conveyed parcel A to James Miller. In 1853 Timothy Murphy bequeathed parcels B and C and I to John Lucas. In 1863 John Lucas, through his trustee, James Dickson, conveyed parcels I and C to John Thomas Code. During this period, and down to the year 1870, the use of said roadway and Embarcadero, as the evidence abundantly shows, continued on the part of the several owners of each of said parcels of land and was unquestionably an easement inuring to the benefit of parcels A, B, and C thereof and a corresponding servitude upon parcel I thereof. In 1870 the title to these four parcels of land came to be within the ownership of James Miller, but, notwithstanding such reuniting of title thereto, the uses of said roadway and Embarcadero for the benefit of each of said respective parcels continued as before. In 1876 James Miller conveyed parcel I to the Patent Brick Company and in said deed embraced only a reservation of the right of way over said roadway, which had theretofore been reserved in the deed from Dickson et al. to Code, and which beneficially affected only parcel C. Aside from said reservation, he did not attempt in said deed to reserve to himself any easement in favor of tracts A and B, but, notwithstanding this fact, he and his successors in the ownership of parcels A and B, as well as parcel C, continued the use and exercise of an easement over said roadway and Embarcadero in the same manner and to the same extent as the same had been used and exercised during all of the previous years and such use and exercise, as the record shows, continued down to a time shortly before the institution of the present action.

[1] To such a situation the plaintiff and respondent herein contends that the case of *Cheda v. Bodkin*, 158 P. 1025, 173 Cal. 7, has a direct and controlling application. The litigation in that case arose out of a controversy over the right to use a portion of the water flowing from certain springs on a tract of land known as the Molinari ranch to and over an adjoining property known as the Foster ranch. One Marie L. Velasco in her lifetime owned both ranches and, while such owner, built dams to impound and laid pipes to convey the water from said springs upon the upper or Molinari ranch to various lower portions thereof, and from thence permitted said water to continue its flow to and over that portion of her property which was later to be known as the Frank Foster ranch. By her will Mrs. Velasco devised to her grand-

daughter, Frances O. Pacheco, said Foster ranch, and devised and distributed among her four sons the Molinari ranch. Thereafter the use of said water continued as before in the various parties who had become the owners of said respective tracts of land down to the year 1903, when the title to both the Molinari and Frank Foster ranches came to be in Frances O. Pacheco and so continued for about two years, when the latter sold the Molinari ranch to Julia C. Bodkin, who has since been the owner thereof, and a year later sold the Frank Foster ranch to the predecessor of Silvio H. Cheda, the plaintiff in said action. The use of said water upon these ranches had continued notwithstanding these changes in title up to the time of these last-named transactions and thereafter continued as before down to the year 1909, when Julia C. Bodkin, as the owner of the Molinari ranch, undertook to cut off the flow of water therefrom to the Frank Foster ranch, and it was this interference with the use of said waters which gave rise to the litigation in the case of Cheda v. Bodkin, supra. This court, in dealing with the foregoing facts, applied the doctrine of a quasi easement thereto as the same had been theretofore developed and applied in the case of Cave v. Crafts, 53 Cal. 135, and Quinlan v. Noble, 17 P. 69, 75 Cal. 250, and in so doing stated the principle underlying said doctrine to be this:

That, "where the owner of two tenements sells one of them, or the owner of the entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and with all the burdens that appear at the time of the sale to belong to it as between it and the property which the vendor retains."

In the application of said principle to the case then in hand, this court further stated:

That, "where the owner of one heritage consisting of several parts has so adapted them that one derives a benefit from the other, when he sells one of them without making mention of the incidental burdens of one in respect to the other, an implied understanding arises that the burdens and correlative advantages shall continue as before the separation of the title"—citing in support thereof *Powers v. Heffernan*, 138 Ill. App. 12; *Denton v. Leddell*, 23 N. J. Eq. 64; and the notes of *Rollo v. Nelson*, 96 P. 263, 34 Utah, 116, 26 L. R. A. (N. S.) 315.

The following additional cases from our own tribunals uphold the same doctrine: *Jersey Farm Co. v. Atlanta Realty Co.*, 129 P. 593, 164 Cal. 413; *Kallenburg v. Long*, 179 P. 730, 39 Cal. App. 731; *Nay v. Bernard*, 180 P. 827, 40 Cal. App. 364; *Palvutjian v. Terkanian*, 190 P. 503, 47 Cal. App. 47. The foregoing doctrine as enunciated in *Cheda v. Bodkin*, supra, would seem to have direct application to the facts of the instant case as found by the trial court and which facts, in so far as they were matters in dispute during

the trial of this cause, we think, were fully established by the evidence in the case.

[2] It is true, as insisted by the appellants, that James Miller, in his conveyance of parcel I to the Patent Brick Company, expressly reserved but one easement therein; that one being a limited easement for the benefit of parcel B of said tract referred to in the deed from Dickson et al. to Code. This fact, however, ought not, in our opinion, to outweigh the intention of the grantor in said conveyance to reserve for the use and benefit of the several other parcels of said tract retained in ownership by him the right theretofore existing and thereafter continuously asserted to the use of said roadway and Embarcadero as an easement or quasi easement appurtenant to all of said parcels of land and a continuing burden and servitude, both before and after said conveyance, upon parcel I thereof.

[3] It is the further contention of the appellants herein that the undisputed fact that the roadway in question did not lead entirely to the said several tracts of land to which said Miller after his conveyance to the Patent Brick Company retained the title, but only ran up to and ended in the public highway which separated parcel I, the servient tenement, from the other parcels in said tract, militates against the existence of any such easement as the plaintiff has insisted upon in this action. We do not perceive any particular merit in this contention. The public highway referred to was in existence and use during that early period when Timothy Murphy was the owner of the entire rancho; and, when he conveyed or devised the respective parcels thereof to those who became the separate owners thereof prior to the reuniting of the title to the several tracts of land in James Miller in 1870, the easements then created and thus existing in said several parcels of land inured to the benefit of said several tracts, notwithstanding the existence of said highway, and continued so to do after the uniting of title in Miller, and, so existing and so continuing as easements or quasi easements appurtenant to said several tracts of land, must be held to have been from their inception unaffected by the circumstance that a public highway separated said dominant tenement from the servient tenement after the same had passed under the separate ownership of said corporation and its successors.

[4] The final contention of the appellants herein seems to be that, since the Patent Brick Company and its successors in the ownership of parcel I not long after the acquisition thereof fenced the exterior boundaries of said parcel of land and established and maintained a gate at the point where said roadway entered the highway, its action in these regards constituted such an interference with the exercise of the easement which the plaintiff herein seeks to have established

as to operate to destroy the same. This contention would have a considerable, if not, a controlling, persuasiveness, were it not for the fact that after the inclosure of said servient tenement by the owners thereof and the establishment and maintenance of the gate above referred to such gate was never locked and the owners of said dominant tenement continued as before in the use of said roadway and Embarcadero in the same manner and to the same extent as their predecessors had anciently used and enjoyed the same and that such unobstructed use and enjoyment continued down to a period shortly before the institution of the present action.

In view of the foregoing facts and of the law applicable thereto as applied by the trial court under the authority of *Cheda v. Bodkin*, supra, we are satisfied that no error was committed by the trial court in awarding its judgment in the plaintiff's favor.

Such judgment is therefore affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; CASHIN, Justice pro tem.

198 Cal. 534

PEOPLE v. CARMICHAEL. (Cr. 2748.)

(Supreme Court of California. April 29, 1926.)

1. Homicide ☞250.

Conflicting evidence *held* to warrant conviction for manslaughter.

2. Criminal law ☞1166½(6)—Refusal to permit defendant to interrogate prospective juror, afterwards excused, as to his belief in right of self-defense, held not prejudicial, where defendant was permitted to examine all accepted jurors on such question.

Refusal to permit defendant to interrogate a prospective juror whether he believed in right of self-defense, which juror was afterwards excused, *held* not prejudicial, where defendant was permitted to fully examine all jurors on such question, who were finally accepted to try the case.

3. Criminal law ☞1166½(6)—Refusal to permit defendant to ask certain jurors whether they would compromise upon a verdict, and find defendant guilty of lesser offense, held not prejudicial, where question was permitted as to eight jurors accepted, and defendant did not further interrogate other jurors accepted, on such question.

Refusal to permit defendant to ask certain jurors whether they would compromise upon a verdict and find defendant guilty of a lesser offense, as long as they had a reasonable doubt of his guilt, *held* not prejudicial, where same question was answered without objection by eight of jurors who were finally accepted to try the case, and defendant expressed no desire to further interrogate the other four jurors accepted on such question.

4. Jury ☞131(8)—Defendant, if desiring to interrogate jurors tentatively passed by him, and to whom question had not been propounded as to their attitude regarding compromise verdict, should have done so, where court, in permitting question to be answered by other jurors, indicated that its previous attitude that question was improper had changed.

Where court, in permitting certain jurors to be questioned whether they would compromise upon a verdict and find defendant guilty of a lesser offense as long as they had a reasonable doubt of his guilt, indicated that it had changed its previous attitude that question was improper, defendant was required, if he desired to further interrogate four jurors tentatively passed by him, and to whom question had not been propounded, to have asked permission of court or to have proceeded without such permission to examine such jurors as to their attitude regarding a compromise verdict.

5. Criminal law ☞1186(4)—Refusal to permit defendant to interrogate jury as to what influence failure of former jury to agree upon a verdict would have upon their verdict held prejudicial error, since answer to question would have tended to show existence or non-existence of bias (Const. art. 6, § 4½).

Refusal to permit defendant to interrogate jury relative to failure of former jury to agree upon a verdict, and what influence action of such jury would have upon their verdict, *held* prejudicial error, not harmless under Const. art. 6, § 4½, since answers would tend to show existence or nonexistence of bias, it being immaterial that defendant did not attempt to use any further peremptory challenges for purpose of excusing jurors finally sworn to try the case after exhausting all challenges allowed him by law.

6. Criminal law ☞1166½(6)—Error of court in refusing defendant permission to examine jurors as to result of former trial held not cured by answers of jurors to general questions.

Error of court in refusing defendant permission to examine jurors as to result of former trial *held* not cured by answers of accepted jurors to questions whether they had formed or expressed any opinion regarding defendant's guilt or innocence, whether they could give him a fair and impartial trial, and whether they had talked with any person purporting to be a witness in the case or a member of former jury.

7. Criminal law ☞304(2)—That result of jury failing to agree on a verdict becomes topic of general conversation within community held matter of general knowledge.

It is a matter of general knowledge that frequently result of a jury failing to agree upon a verdict becomes topic of general conversation within the community, and is subject of much comment and discussion.

8. Witnesses ☞268(1)—Cross-examination of witness as to threatening remarks of deceased held proper, where it was apparent that they were made in presence of defendant.

Cross-examination of witness, testifying on direct examination as to boisterous and threatening attitude of deceased towards other men,

whether deceased did not say on afternoon of day that he was shot by defendant that night before he had been in a fight, and broken two ribs of a man, and smashed his nose, *held* proper, where it was apparent that remark was made in presence of defendant.

9. Criminal law $\S$ 1170(2)—Error in refusing to permit defendant to cross-examine witness for prosecution as to threatening statement by deceased held not cured by admission of defendant's own testimony as to same statement.

Error in refusing to permit defendant to cross-examine witness for prosecution whether deceased did not say on afternoon of day that he was shot by defendant that night before he had been in a fight, and injured a man, *held* not cured by admission of testimony of defendant himself that such statement was made by deceased in presence of defendant and others on same afternoon.

10. Criminal law $\S$ 829(1).

Refusal of defendant's proposed instructions *held* not erroneous, where covered by court's instruction.

11. Homicide $\S$ 300(5)—Instruction that to justify person killing another in self-defense it must appear that killing was "absolutely" necessary should omit word "absolutely" to avoid tendency to mislead.

Instruction that, to justify a person in killing another in self-defense, it must appear that killing of deceased by defendant was "absolutely" necessary *held* objectionable in use of quoted word, since there may be a justifiable homicide, where actual necessity for killing is not present.

In Bank.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Thomas Carmichael was convicted of manslaughter, and he appeals. Reversed.

W. E. Duncan, Jr., and Mrs. Alta Duncan Hengy, both of Oroville, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

CURTIS, J. The appellant was charged with the crime of murder. The jury found him guilty of manslaughter. He appeals from the judgment, and also from the order denying his motion for a new trial. The district Court of Appeal reversed the judgment, and the case comes before this court after an order granting a hearing herein. The facts in the case show substantially that the deceased met his death from a gunshot wound inflicted by the appellant on the 18th day of December, 1923. The homicide occurred at a place known as Bidwell Bar Canyon in the county of Butte. In this canyon the deceased, just prior to his death, was residing with his father, Thomas Lucas, in a small house owned by the latter. Appellant at the same time was living with one Joseph Bukal, in Bukal's house located near the Lucas place. The shooting occurred in the evening. On

this day Bukal had been engaged in killing hogs in a shed or slaughterhouse belonging to Thomas Lucas, and located in the near vicinity of the respective houses of Lucas and Bukal. Besides Bukal, the appellant, the deceased, and Thomas Lucas, there were also present Oscar Carlson and a man named Stillwell. With the exception of Carlson, these men were all assisting Bukal in the slaughtering of the hogs. About 2 o'clock in the afternoon they finished their work and went up to the Bukal house for lunch. There, in addition to eating their lunch, they drank some wine furnished them by Bukal. They had also had a pitcher of wine at the slaughterhouse before lunch. The appellant drank very little of the wine, and Carlson did not drink any. The others imbibed more or less freely, especially the deceased and his father, who became to a perceptible extent under the influence of the wine. After lunch there was considerable boisterous conduct, called by some of the witnesses "horse play," in which the deceased unquestionably took the leading part. For some reason, probably from the effects of the wine, the deceased became quite boastful and demonstrative. He was a large man, over six feet three inches in height, and he appeared bent upon demonstrating his physical prowess. This was apparently done in a spirit of good feeling, and received by the other men in the same spirit. While many oaths and much foul language was employed, both by the deceased and his companions, there is nothing to indicate that the use of such oaths or language was for the purpose of expressing any ill feelings or anger on the part of any of the men. About 5 o'clock in the afternoon the men returned to the slaughterhouse for the purpose of preparing the hogs killed in the early part of the day for domestic use. Here the deceased continued his boisterous conduct towards other members of the party. This lasted for some time, but without any serious results, although some of the men, including the appellant, had been rather roughly handled by the deceased. In the meantime the appellant returned to the Bukal house. While in the house he could hear the men at the slaughterhouse, including the deceased, as he continued his threatening conduct towards the others. After listening to them for a short time, he armed himself with his pistol, and returned to the place where the men were. At the time of his arrival there, or shortly thereafter, the deceased had turned his attention to Bukal, who was a much older and smaller man than the deceased. Bukal had a lantern in his hand, and, fearing that it might be broken by the deceased, handed it to the appellant and started on a run towards his house. The appellant followed him, and behind both of them came the deceased. The latter was swearing and cursing the men in front of

him, and Bukal, probably in a milder vein, replied to deceased in language far from complimentary. Finally the deceased said: "Go on, go on, go on to bed," and almost immediately thereafter four shots were fired in rapid succession. These shots, the evidence shows, were fired by the appellant, and resulted in the death of the deceased. No one saw either the appellant or the deceased at the precise time the shots were fired. Bukal, who was from 10 to 12 feet from the appellant at the time, testified that he heard three shots. When he heard the first shot, he turned around, and saw the deceased "tumble down at the side of the road, and then Carmichael run into the house." He also testified that the shots were "right one after the other," and that he did not see the appellant shoot, but the shots had all been fired when he turned around. Carlson, who was also only a short distance from the place where the men were at the time of the shooting, heard the deceased say: "Go on, go on, go on to bed," and, after a lapse of some seconds during which a few words were spoken that he could not understand, "rapidly after that three shots were fired right close together, one after another." All the witnesses, testifying on the subject, except the appellant, stated that they did not see the deceased have any weapon in his possession on that day. The appellant testified that the deceased during the day had a knife in his hand. The appellant, however, made no mention of the knife in the hand of the deceased to the sheriff or to the deputy sheriff of the county to whom he told his story a few hours after the shooting. He admitted, however, that he had fired four shots at the deceased, and claimed that the latter just before the shots were fired had rushed upon him and threatened to kill him, and that he shot deceased in defense of his own life. Dr. Whiting, who examined the body of the deceased about 10 hours after the shooting, testified that he found five bullet wounds upon the body. Two of these were in the right arm, and were caused by a bullet entering the back of the arm, and, passing along the axis of the arm, sharply downward, came out along the surface of the arm about 3 inches from the point of entrance. Another wound on the body was caused by a bullet entering the right side of the body about on the level of the tip of the twelfth rib. A bullet was found on the corresponding left side of the body at about the same level up and down and from the back to the front as the wound made by the bullet entering the right side of the body. This bullet was pointed in the outer direction, and was embedded next to the skin. The doctor could not say that this bullet was the same one that caused the wound just described. A fourth wound was found in the back of the body, and was caused by a bullet entering the body at a point about 2½ inches

to the right of the middle of the spinal column, the middle of the back, in other words, and about 5 inches above the crest or tip of the hip. This bullet passed right through the body from backward to forward and to the left, and cut a crease in the front portion of the backbone at a level of the fourth lumbar or loin vertebræ, fracturing the body of the vertebræ, and cut into, and almost severed, the large aorta artery which lies in front of the vertebræ, and which carries the blood from the heart to the abdomen. The exit of this bullet was evidently the fifth wound found by the doctor upon the body of the deceased. The bullet found in the body was a 44 caliber steel jacket missile. Either of the wounds made by the two bullets last mentioned, in the opinion of the doctor, was sufficient to cause death, but the one made by the bullet entering the body from the back and cutting the aorta artery would cause death more rapidly. It would have caused death inside of 20 seconds. There was evidence given by the defendant himself, which, if believed by the jury, tended strongly to justify the appellant in slaying the deceased in self-defense. He also introduced depositions and other evidence from men of standing in the community in which he had lived, testifying to his good reputation.

[1] Appellant's first contention is that the evidence is not sufficient to justify the verdict of conviction. It is true that he tells a story to the jury which, if accepted by them at its full face value, would have justified a verdict of acquittal. But the evidence of other witnesses heretofore set forth is not such that this court can say that as a matter of law it fails to show the appellant blameless in the killing of the deceased. The jury, who heard all the evidence, both that in favor, and that against, the appellant, concluded that he was guilty of the crime of manslaughter. Their verdict, in our opinion, was based upon competent evidence adequate to support it, and should not be disturbed by this court on the ground of its insufficiency.

[2-4] The next contention of appellant is that the court erred in refusing to permit him to ask certain questions of prospective jurors upon their voir dire examination. Various assignments of error are made under this contention. Some of these assignments are entirely without merit. For instance, appellant assigns as error the refusal of the court to permit him to ask a prospective juror whether he believed in the right of self-defense. This question was asked juror Prince, the first juror interrogated regarding his qualifications to act in the case. An objection to this question was made by the prosecution, and sustained by the court, and thereupon the appellant stated to the court that he wished it understood that he desired to ask this question of each and every juror examined in the case, and in reply the court stated that it

would be so understood. The juror Prince was subsequently excused, as were a large number of other members of the panel upon their voir dire examination. The twelve jurors, however, who were finally accepted to try the case, and who actually did so, notwithstanding the sustaining of the objection to the question asked of the juror Prince and the understanding between the court and counsel following said ruling, were all questioned fully by appellant, without objection, upon the subject of self-defense and as to their belief in this right by a person in danger of either death or great bodily injury. It is evident, therefore, that appellant was not in any way prejudiced by the refusal of the court to permit him to interrogate a prospective juror, afterwards excused, upon a matter concerning which he was permitted to fully examine all the jurors who were finally accepted to try the case. It is not even claimed by appellant that he was forced to use any of his peremptory challenges for the purpose of excusing juror Prince or any other juror whom the court refused to permit him to examine as to his belief in the right of self-defense. Another instance in which appellant claims that he was unduly limited in his voir dire examination of prospective jurors was the refusal of the court to permit him to ask certain jurors whether they would compromise upon a verdict and find the appellant guilty of a lesser offense as long as they had a reasonable doubt of his guilt. This question was also asked the juror Prince, and, upon objection, the court refused to permit him to answer it. A like understanding was had as that relating to the previous question that it might be understood that appellant desired to ask the same question of each and every juror examined in the case, and that the court would refuse to permit the same. While the court sustained an objection to this question when asked the juror Prince, subsequently, and after the voir dire examination of four of the jurors (finally accepted to try the case) had been concluded, the same question was asked and answered without objection by a number of other jurors called in the case, including eight of the jurors who were finally accepted to try the case. It must have become apparent to appellant that the court, in permitting this question to be answered by a large number of jurors during the progress of the trial, but subsequent to the examination of the juror Prince, had changed its attitude as to the propriety of asking this question. It was appellant's duty, therefore, if he desired to further interrogate the four jurors tentatively passed by him, and to whom this question had not been propounded, to have asked permission of the court, if any such permission were necessary, and if it were not, to have proceeded without such permission to examine these jurors as to their attitude regarding a compromise ver-

dict. As the court, at least during the latter portion of the examination of the jury, was permitting this question to be asked of the jurors generally, it is not unreasonable to suppose that he would have granted appellant permission to have asked it of the four remaining jurors. No claim is made by appellant that he asked said question or any question similar thereto of any of said four jurors, or that he had sought leave of court so to do, or that the court refused him this right, except in so far as the court had expressed its attitude in this respect when it sustained the objection to a like question propounded to the juror Prince. It would be highly technical under these circumstances to hold that appellant was denied any substantial right to which he was entitled by the refusal of the court in the first instance to permit examination of the jurors in the respect complained of. His failure to further interrogate the four jurors must be taken as a waiver on his part of his right to do so, and he has now no just reason to complain. In a number of other instances, objections to questions asked by appellant to prospective jurors upon their voir dire were sustained by the court. We have carefully considered the rulings of the court in this respect and the claim of the appellant that he was prejudiced thereby. With one exception, which we will deal with at length hereafter, we are unable to agree with appellant that he sustained any substantial damage by the failure of the court to permit him to so examine said jurors.

[5] The one exception above referred to presents a more difficult, and, to our minds, a more serious, question. This was the second trial of the defendant upon the charge stated in the information. Upon the first trial the jury had disagreed, and for this reason they had been dismissed and the case reset for trial. Upon the present trial, after the first twelve persons summoned as jurors in the case had been called to the jury box, the attorney for the appellant sought to interrogate them relative to the failure of the former jury to agree upon a verdict, and what influence, if any, the action of the former jury would have upon their verdict. An objection to such inquiry was made by the prosecution and sustained by the court. Furthermore, the court forbade appellant from further mentioning the former jury to the members of the present jury, and, upon appellant's attorney stating to the court that he desired to ask certain questions of the jury relative to said subject, the court refused to permit him to ask any of such questions, but suggested that he might submit such questions in writing, as he desired to ask, to the reporter in the absence of the jury. The following proceedings show the action taken:

"Mr. Duncan (attorney for appellant): I wish it understood that I desire to ask these questions of each and every juror that may be

called in the case, and I assume the court's ruling will be the same in each case?

"The Court: The same in each case.

"Mr. Duncan: And it may be understood for the purpose of the record?

"The Court: Yes.

"Mr. Duncan: And we may file with the reporter such questions as we may wish to ask?

"The Court: You may."

Some two weeks after the jury rendered its verdict, the attorney for appellant, pursuant to the above understanding, filed with the reporter the following list of questions:

"Do you know, or have you heard, that this case has already been tried before a jury in this court?

"Would the fact, if it be such, that the former jury trying the case had failed to agree prejudice you against the defendant?

"Did you know or have you heard how the jury trying this case stood on the question of 'Guilty' or 'Not guilty'?

"If you know, or have you heard that the former jury stood ten for guilty and two for not guilty, would that prejudice you in any way against the defendant?

"Do you recognize that evidence might be produced on this trial which was not brought out on the first trial?

"Do you think that **your** knowledge or information as to how the former jury stood, has left your mind as open and impartial as though you had never heard of the case?"

It is now contended by appellant that the court committed prejudicial error in refusing to permit him to interrogate the jurors by asking the above questions. It is not clear from the record upon just what theory the court sustained the objection of the prosecution. We think the questions were proper, as the answers thereto would tend to show the existence or nonexistence of actual bias on the part of the jurors with reference to the case then on trial. If any of the jurors had heard the result of the former trial, and that the jury therein had stood ten for conviction and two for acquittal, we do not think it unreasonable to conclude that such a juror might be influenced by such knowledge, and that he might well conclude that, if ten out of twelve of the former members of the jury believed the appellant guilty, there was a strong probability of his guilt. Persons entertaining such opinions, we think it must be conceded, are not, and cannot be, fair and impartial jurors such as one accused of crime is entitled to have pass upon the accusations against him. The only argument presented by the Attorney General to justify the ruling of the court in sustaining objections to these questions is that the appellant is not prejudiced thereby for the reason that the record shows that, although he had exhausted all of his peremptory challenges during the trial, he did not request or show any desire to use any one or more further peremptory challenges for the purpose of excusing any of the jurors who were finally sworn to try the case. In

support of his position he cites the case of *People v. Schafer*, 161 Cal. 573, 576, 119 P. 920, 921. In that case the defendant challenged a juror for cause, which challenge the court denied. Thereupon the defendant peremptorily challenged him. On appeal the appellant claimed that the trial court erred in disallowing his challenge of the juror for cause. The court held that he was not prejudiced thereby, for the reason that, although he subsequently exhausted all of his peremptory challenges, "it does not appear that he had occasion or desire to use an additional peremptory challenge, or that each and all of the twelve jurors finally accepted and sworn were not entirely satisfactory to him." We cannot accept this case as an authority in the present action. The facts thereof are not in anyway analogous to those now before us. In that case the objectionable juror was excused, and no showing was made that any of those finally accepted to try the case were not satisfactory to the appellant. In the present action the appellant, by the rulings of the court sustaining objections to his questions, was denied the right to show that the jurors were objectionable to him. It would have been an idle act for him, therefore, to have asked for a further peremptory challenge after exhausting all allowed him by law, for the reason that, had the court granted him an additional challenge or any number of them, and had he exercised all that the court allowed, his position would in no way have been improved, for the reason that he would still be in the dark as to the state of mind of those jurors who might have heard of the result of the former trial, and there still might be among the jurors he was forced to accept one or more and possibly all of them who had heard of such result, and who entertained a belief that, by reason thereof, there was great probability of appellant's guilt. Other authorities expressing a similar rule to that found in *People v. Schafer*, supra, are cited in the petition for a hearing herein by the Attorney General, but, in our opinion, they are not more in point than is the *Schafer* Case.

[6, 7] Certain general questions were asked and answered by each of the jurors upon their voir dire examination. Among these questions was whether the juror had formed or expressed any opinion regarding the guilt or innocence of the defendant; whether he knew of any reason why he could not give the defendant a fair and impartial trial; and whether he would be willing to be tried by a jury "who felt towards you as you feel towards the defendant." The jurors all gave a negative answer to the first two questions, and an affirmative answer to the last one. Each juror was also asked whether he had talked with any person who purported to be a witness in the case or was a member of the former jury, and replied that he had not. It is contended

by the respondent on this hearing that the error of the court, if any such error was made, in refusing to permit appellant to examine the jurors regarding the result of the former trial and as to their state of mind upon learning of such result, if any of them had learned of said result, was cured by these general and special questions asked of the jurors. We are not certain that this is the case. The asking of a general question of a juror does not always direct his attention to all the elements which go to make up the subject-matter of such question. For example, a juror in answer to a general question might state with perfect sincerity that he knew of no reason why he could not give the defendant a fair and impartial trial, but upon a further and more minute examination it might be shown that his conception of a fair and impartial trial for one who had been previously tried by a jury, ten of whom believed him guilty, differed in many material respects from that which the law accords to all persons accused of crime. Furthermore, he might presume the defendant innocent until proven guilty, but his state of mind might be such that it would require less evidence to convince him of defendant's guilt in a case where the latter had been previously tried with the result as above indicated than if no previous trial had been had. He might be in perfect accord with the law which declares that a defendant shall not suffer conviction until proven guilty beyond all reasonable doubt, but having heard that the former jury stood ten to two for conviction, he might not feel called upon to scrutinize and weigh the evidence with that extreme care and caution which the law enjoins of every juror in passing upon the life and liberty of one against whom a criminal accusation has been made. We are not satisfied, therefore, that the error of the court in refusing permission to appellant to examine the jurors as to the result of the former trial was cured by the answers of the jurors to these general questions. Nor do we think that their statements that they had not talked with any of the former jurors or persons purporting to be witnesses in the case necessarily indicated that they had not heard of the result of the former trial. There were other means through which they could have gained this information than through the former jurors and witnesses in the case. We all know as a matter of general knowledge that frequently the result of a jury failing to agree upon a verdict becomes the topic of general conversation in the community, and is the subject of much comment and discussion. It is not unreasonable to suppose that this case, where the defendant was on trial for murder, attracted the attention of the public at large, and that the failure of the jury to agree at the first trial became the topic of general conversation, and that the standing of the jury was

known generally by the public. It would have been somewhat unusual, then, if some of the jurors, and possibly all of them, had not heard that the first jury stood ten to two for conviction, and to gain this information it would not have been necessary for any of them to have talked with the members of the former jury, or with any of the witnesses in the case. The answers of the jurors, therefore, that they had not talked with the former jurors or any person purporting to be a witness in the case did not necessarily show that they had not heard how the former jury stood, and did not in our opinion cure the error of the court in denying the appellant the right to interrogate the jurors upon that subject.

The Attorney General contends that the method adopted by the court in permitting the appellant to file with the court reporter a list of questions which he desired to ask of prospective jurors was hardly fair to the prosecuting attorney, and that it would not be assumed that he would object to questions which he had not seen, and which, in fact, had no existence as far as the record goes until long after the trial. We agree that this practice is not usual, and, in our opinion, it has little to commend it for favorable consideration. But any defect which might be attributed to it cannot be chargeable to the appellant. He simply followed the suggestion made to him and which afforded to him the only means whereby he could perfect his rights and present a record of the proceedings had at the trial to the appellate court.

No authority has been called to our attention which can be construed as holding that section 4½ of article 6 of the Constitution can be relied upon to sustain the judgment herein. As we have already said, in our opinion it was prejudicial error for the court to refuse the appellant the right to examine the jurors as to the effect on their minds of the standing of the former jury. The ruling of the court in thus limiting the appellant in his examination of the jurors was, in our opinion, the deprivation of the appellant of a fundamental right—a right to be tried by an impartial jury. It was never intended by this provision of the Constitution to take from the defendant in a criminal action his fundamental right to a jury trial or in any substantial manner to abridge this right. *People v. Wismer*, 58 Cal. App. 679, 688, 209 P. 259.

[8, 9] Oscar Carlson, who was a witness for the prosecution, testified to many of the events which took place on the day of the tragedy, both at the Bukal home and later at the slaughterhouse, between the appellant, the deceased, and other members of the party, and particularly as to the boastful and boisterous conduct of the deceased and his threatening attitude towards the other men. He detailed the conversations that took place on these occasions between the deceased and

the others, quoting largely, as he remembered them, the exact words used by the different members of the company. On cross-examination the appellant asked this witness whether the deceased did not say on the afternoon of the day of the shooting that the night before he had been in a fight and broken two ribs of a man and smashed his nose. This question was objected to by the prosecution, and the objection sustained by the court. The ground upon which the court apparently sustained the objection was that it was not proper cross-examination. In view of the direct testimony of this witness, in which he was permitted to give all that he heard and saw on that afternoon regarding what took place between the men, we think this question was not subject to the objection that it was not cross-examination. While it is not entirely clear from the language of the question that this remark was made in the presence of the appellant, yet, in the direct examination of this witness in which he detailed the transactions of the day, he invariably included the appellant as among those present at the various conversations which the deceased carried on with the others. We think it must have been apparent from what had preceded that, at the time the question was asked, it was the intention to prove that the deceased made the remarks attributed to him in the presence of the appellant. If made in the presence of the appellant, the statement was material, and might have had an important bearing upon his plea of self-defense. We think the question was properly asked upon cross-examination, and that the court erred in sustaining the objection. We cannot agree with respondent that this error was cured by the admission of the testimony of the appellant himself to the effect that this same statement was made by the deceased in the presence of himself and others on the afternoon of the day of the tragedy. The appellant was entitled to prove by disinterested witnesses, if he could, that the deceased made the statement attributed to him. It might be that the jury would hesitate to accept the uncorroborated evidence of a defendant in a case, when, if his testimony were supported by the evidence of a disinterested witness, they might take an entirely different attitude toward it. The cases cited by respondent do not go to the extent claimed for them, nor support the contention that the error complained of was cured by the subsequent testimony of the appellant.

There are other assignments of error involved in the rulings of the court as to the admission and rejection of evidence. They are not, however, of any serious consequence, and we do not consider it necessary to refer to them in detail.

[10] The court refused to give any of the instructions proposed by appellant. The judge of the court did, however, in instructions prepared with great care by himself, instruct the jury fully upon the law applicable to the case. We think these instructions covered all the matters upon which the jury were required to be informed, and that there was no error in refusing the proposed instructions of appellant. The appellant criticizes the instructions prepared and given by the court, and insists that in many respects they failed to correctly state the law applicable to the case. We think on the whole these criticisms are not well founded.

[11] We are, however, in accord with the opinion of Mr. Justice Hart, the writer of the decision rendered by the Court of Appeal of the Third District in this case, in which the court says:

"One of the given instructions, however, is to some extent subject to the criticism urged against it by counsel for the defendant—not that we think that it does not, when rightly read and understood, contain a correct statement of the rule, but for the reason that the word 'absolutely,' as used therein, might render it misleading to the average lay mind. The instruction states, 'to justify a person in killing another in self-defense, it must appear that the danger, either real or apparent, was so urgent and pressing that, in order to save his own life or Bukal's life, or to prevent himself or Bukal receiving great bodily harm, the killing of the other was absolutely necessary.' The word 'absolutely' might have the effect of leading jurors to believe that, to bring it within the right of self-defense, the act of killing must have actually been necessary. Such an impression of the law would, of course, be erroneous, since there may be a justifiable homicide where the actual necessity for killing is not present. If the circumstances be such as to excite the fears of a reasonable person, and it appears that the party killing 'acted under the influence of such fears alone,' then the slaying is justified, although it may thereafter transpire that there existed no real ground for such fears. Of course, if such fears existed, then, apparently, the killing would be as 'absolutely' necessary as it would be if the danger of death or bodily harm at the hands of the assailant were actual. In the latter sense the criticized portion of the instruction was undoubtedly intended to be understood by the court. However, the elimination of the word 'absolutely' in the connection in which it is used in the instruction under review is recommended."

For the reasons stated herein, the judgment and order denying the motion for a new trial are reversed.

We concur: WASTE, C. J.; RICHARDS, J.; LENNON, J.; SHENK, J.; CASHIN, Justice pro tem.

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(246 P.)

CITY OF ALAMEDA v. CITY OF OAKLAND.
(S. F. 11762.)(Supreme Court of California. April 29, 1926.
Modified and Rehearing Denied
May 27, 1926.)

1. Municipal corporations ☞25 — Prayer, in boundary dispute between Alameda and Oakland, held to warrant judgment fixing boundary as down center of San Antonio creek and along deepest channel to westerly boundary of Alameda county (St. 1878, p. 89; St. 1889, p. 513; St. 1907, p. 1051; St. 1921, p. 1607).

In boundary dispute between city of Alameda and Oakland, brought under St. 1921, p. 1607, prayer of former that boundary be established as embodied in its charter, which specified portion of boundary in dispute as "along center line of Tidal canal and the north or Brooklyn channel through Oakland Harbor and the center line of San Antonio estuary to its mouth" held to warrant judgment describing boundary line as "down the center of San Antonio creek and along the deepest water channel to the westerly boundary of Alameda county," in view of evidence and St. 1878, p. 89, St. 1889, p. 513, and St. 1907, p. 1051, that phrase, "and along the deepest water channel thereof," is but an amplification of the phrase, "center of San Antonio creek."

2. Municipal corporations ☞25—Boundary between city of Alameda and Oakland held established by acquiescence in center of San Antonio estuary and along the deepest water channel.

Boundary between city of Alameda and Oakland held established by acquiescence in center of San Antonio estuary and along the deepest water channel, where its location was uncertain and indefinite, and charters of both cities recognized boundary as established in center of estuary, and city of Alameda for years actually exercised jurisdiction over disputed territory in both a governmental and proprietary capacity, without any protest or adverse claim of right on part of Oakland.

3. Trial ☞391—Decision is not against law because findings of fact are silent as to validity or construction of statutes.

Decision of boundary dispute between municipalities is not against law because findings are silent on questions of constitutionality or construction of statutes; such being questions of law as to which findings of fact were unnecessary.

4. Municipal corporations ☞24—State, in fixing boundary between Alameda and Oakland and in approving their charters, is deemed to have acted for benefit of public.

State, in passing statutes fixing boundary between Alameda and Oakland and in approving freeholders' charters of such cities, is deemed to have acted in manner most conducive to public welfare.

5. Navigable waters ☞37(8)—Cities on either shore have natural right of access and privilege to construct wharves, docks, piers, and other aids to commerce.

Cities located on either side of navigable estuary have a natural right to unrestricted ac-

cess to it and the privilege of constructing wharves, docks, piers, and other aids to commerce.

In Bank.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by the City of Alameda against the City of Oakland. Judgment for plaintiff, and defendant appeals. Affirmed.

Leon E. Gray, City Atty., and Markell C. Baer, Asst. City Atty., both of Oakland, for appellant.

Wm. J. Locke, City Atty., of San Francisco, for respondent.

SHENK, J. This is an appeal by the city of Oakland from a judgment defining and establishing that portion of the boundary line between the cities of Oakland and Alameda running westerly from the Park street bridge in the San Antonio estuary to the boundary line of the city and county of San Francisco.

On the 1st day of March, 1922, the city of Alameda filed its petition in the superior court in and for the county of Alameda, pursuant to an act of the Legislature, entitled, "An Act to provide for determining, defining and establishing the location of the boundary lines of cities, towns, counties, or cities and counties, where the same are indefinite or uncertain or have been obliterated." Stats. 1921, p. 1607. In the special proceeding thus authorized and initiated, the city of Alameda set forth in its petition such facts and exhibits as were deemed pertinent, relevant, and essential to a proper determination of the matter, all as required by said act. It was alleged that both of said cities are situated in the county of Alameda on the eastern shore of San Francisco bay, and lie on either side of a narrow arm of salt water extending easterly from the bay for about 4 miles, then continuing in the form of an oval-shaped basin for approximately one mile, from whence it extends about 4 miles further through an artificial canal and connects with another part of the bay of San Francisco known as San Leandro Bay; that the westerly 4 miles of said arm of salt water is known as "San Antonio estuary"; that the oval-shaped basin at the easterly end of said estuary is known as "Tidal basin," also as north or "Brooklyn basin"; that the artificial canal at the easterly end of said basin is known as the "Tidal canal"; that the city of Oakland lies on the northerly side of said estuary, basin, and canal, and that the city of Alameda lies on the southerly side thereof; that, until improved, the said San Antonio estuary was shallow and had very irregular shore lines, with numerous sloughs and branches running therefrom; that the largest of said sloughs or branches ran northerly from a point near the eastern end of the estuary and connected

with a body of salt water in the city of Oakland known as Lake Merritt; that about 4 miles east of its mouth said estuary made an irregular curve northerly, easterly, and southerly on an approximate radius of 2,500 feet, passing round an irregular shaped peninsula of high land in the city of Alameda, which formerly protruded northerly from the central portion of said city.

The petition then set forth by reference the Act of May 4, 1852, originally incorporating the town of Oakland by special enactment (Stats. 1852, p. 180), the Act of March 25, 1854, incorporating the city of Oakland also by special enactment (Stats. 1854, p. 183), the Act of May 15, 1861, amending the Act of March 25, 1854 (Stats. 1861, p. 384), the Act of April 24, 1862, also amending the Act of March 25, 1854 (Stats. 1862, p. 337), the concurrent resolution filed in the office of the secretary of state on February 14, 1889, approving the first freeholders' charter of the city of Oakland (Stats. 1889, p. 513), and a similar resolution filed on February 15, 1911, approving the new and present charter of the city of Oakland (Stats. 1911, p. 1551).

It further appears from the petition that the town of Alameda was originally incorporated by special enactment approved April 19, 1854 (Stats. 1854, p. 209). It was reincorporated by special act approved February 21, 1878 (Stats. 1878, p. 89). The first freeholders' charter of the city of Alameda was approved by the Legislature on February 7, 1907 (Stats. 1907, p. 1051), and the second charter, which is now in effect, was approved January 25, 1917 (Stats. 1917, p. 1752).

In the prayer of the petition it was sought to have said boundary line established as the same was set forth in the charter of the city of Alameda approved January 25, 1917. The pertinent part of that description, so far as the present controversy is concerned, is as follows:

"Commencing at a point where the center line of the Tidal canal intersects the western line of Park street produced northerly; thence westerly along the center line of the Tidal canal and the north or Brooklyn channel, through Oakland Harbor and the center line of San Antonio estuary to its mouth, as said Brooklyn channel and pierhead lines of San Antonio estuary were established by the United States Harbor Line Survey of one thousand nine hundred ten; thence along the center line of San Antonio estuary produced westerly to its intersection with the western boundary of Alameda county."

In its answer, the city of Oakland alleged that the southern boundary of said city "is located and lies in said estuary, basin, and channel and that the major portion of said basin and channel lies north of said southern boundary and within the territorial limits of said city of Oakland." It also denied that said irregularly shaped peninsula of high land mentioned in the petition, was within the

limits of the city of Alameda. Additional allegations were set forth in the answer with reference to the legal effect of certain statutes above referred to.

The court found that the said cities are situated on either side of the center and deepest water channel of the San Antonio estuary. It also found: That the said peninsula was entirely within the city of Alameda. "That pursuant to an Act of Congress of March 3, 1905, 33 Stat. 1117, 1142, amended March 2, 1907, 34 Stat. 1073, 1106, the United States of America, as part of a system of harbor improvements, cut a channel through and across the neck of said peninsula and deposited the spoil dredged therefrom on or about the point of said peninsula, thereby creating the artificial island shown on" certain maps filed as exhibits in the case. "That Oakland and Alameda were each incorporated three different times under the old Constitution by special acts of the Legislature, the last of which was an act incorporating the city of Alameda on February 21, 1878. * * * That said act described the boundaries of Alameda as being 'the same as now form the said township of Alameda.' That the township boundaries thus adopted by reference were those which had been established by the board of supervisors of Alameda county six weeks before, to wit, on January 5, 1878, wherein that portion of the boundary line involved in this proceeding was described as being 'the center of San Antonio creek and along the deepest water channel.' That this Act of February 21, 1878, * * * by which Alameda was incorporated for the last time prior to the adoption of the new Constitution, was never repealed. That that portion of the boundary line involved in this proceeding has never been changed by the annexation or exclusion of territory under the general laws of the state or otherwise, and that a line along 'the center of San Antonio creek and along the deepest water channel,' as described in Alameda's incorporation of 1878, has never been disclaimed as being the same line referred to in all the freeholders' charters adopted by both cities since that time. That said line is shown and delineated on Plaintiff's Exhibit K and is particularly described as follows, to wit: [Then follows the said description by courses and distances.] That ever since its incorporation of February 21, 1878, aforesaid, the city of Alameda has exercised undisputed jurisdiction in a governmental and proprietary capacity over all the territory lying immediately south of said line, while the city of Oakland has never exercised or attempted to exercise jurisdiction of any kind or character whatsoever over said territory." As a conclusion of law, the court decided that the act of 1878, incorporating the city of Alameda and describing its boundaries, was constitutional and valid, and established the boundary line between the said cities, and that said boundary line as so

established is the line described by courses and distances in the findings of fact, and that said line had been lawfully established by reason of the long acquiescence therein and its recognition by citizens, taxpayers, and public officials.

[1] It is first insisted by the city of Oakland that the judgment is at variance with the prayer of the petition. As above stated, Alameda prayed that the boundary be established as embodied in the Alameda city charter of 1917, which specified the portion of the boundary in dispute as "along the center line of the Tidal canal and the north or Brooklyn channel, through Oakland Harbor and the center line of San Antonio estuary to its mouth." In its findings of fact and conclusions of law the court found and decided that the said line was that established by the act of 1878, which described the boundary line as "down the center of San Antonio creek and along the deepest water channel to the westerly boundary of Alameda county." In its answer the city of Oakland prayed that its boundary be established as that set forth in its charter approved February 14, 1889. This charter specified the said boundary as "following the center of the slough and the center of the estuary of San Antonio," without adding the phrase "along the deepest water channel" as contained in the act of 1878. Counsel for the city of Oakland state:

"Were it not for the addition of the phrase 'along the deepest water channel,' no difficulty would have arisen in this case because, as hereafter pointed out, under the charter of 1889 the southern boundary of Oakland was fixed in the center of San Antonio creek. But the addition of the phrase 'along the deepest water channel' makes this boundary line antagonistic to Oakland's boundary line of 1889."

The argument is that:

"The phrase 'center of San Antonio creek' would be the center of the entire body of water known as San Antonio creek inclosed within the banks of said creek, while the phrase 'along the deepest water channel' means along the deepest water channel, which may or may not be the same as along the entire channel inclosed within the banks. The two phrases are therefore, to a certain extent, antagonistic, and the second qualifies the first and limits the boundary to the center of the deepest water channel of San Antonio creek as distinguished from the center of the entire body of water between the banks."

It is the contention of the city of Alameda that the phrase, "and along the deepest water channel thereof," is but an amplification of the phrase "center of San Antonio creek"; in other words, that the two phrases were intended to convey one and the same meaning. The trial court adopted the theory of the city of Alameda, and in so doing was supported by the evidence adduced. Mr. Burnett Hamilton, city engineer of the city of Alameda, testified that he had prepared the description of

the boundary line which was later adopted by the court as the true line. In connection with his testimony, a map was offered and received in evidence on which the witness had platted the center line of the San Antonio estuary approximately as it was located in 1889, and indicated the same by courses and distances by a red line drawn equidistant between the pierhead lines as established by the United States government engineers. He testified that before dredging and reclamation work had been done in the estuary it spread out at high tide over marsh lands and tidelands on either side and that the marsh lands had been filled in so that the estuary now lies within well-defined banks. From his observation and experience as an engineer, and from the record evidence in the case, he testified that:

"The center of the estuary and the deepest water channel is approximately in the same condition to-day as it was in 1878 and 1889. * * * As near as possible the line was located midway between the pierhead lines with the idea of getting as near as may be the center of the deepest water of the channel. Because the pierhead lines usually extend out to the channel of deep water, a line midway between them would be in the deepest water of the channel as nearly as could be determined. If this red line which I have indicated on my map here were established in any other course or at any other place, it would not, to the best of my knowledge, run along the deepest water of the channel. * * * This line which I have established, indicated on this map, designated as Plaintiff's Exhibit K, depicting the fact that it is midway apparently in many cases between the pierhead lines, is established in the center of the estuary and along the deepest water of the channel as near as I can establish it. * * * By the phrase 'center of the channel' I mean the center of the deepest water channel."

The foregoing and other evidence, both oral and documentary, which need not be specifically referred to, was sufficient to warrant the conclusion that when the act of 1878 defined the boundary of the town of Alameda as running down "the center of San Antonio creek and along the deepest water channel," and when the first charter of the city of Oakland, approved February 14, 1889, defined said boundary as "following the center of the slough and the center of the estuary of San Antonio," and when the first freeholders' charter of the city of Alameda, approved February 7, 1907, defined said boundary line as following the "center line of the Tidal canal," in each case one and the same line in the description was referred to and was intended by both cities and by the Legislature to be the boundary line between the said cities. If, then, the statute of 1878 and the charters of 1889 and 1907 described the same boundary line, the trial court was justified in concluding, in fact was compelled to conclude, that the said boundary line was not on-

ly the legal boundary line of the city of Alameda as contended for by it, but was also the legal boundary line described in the Oakland charter of 1889 as contended for by that city. It but remained for the court to ascertain as a matter of fact the actual location of the legal boundary line. *County of Sierra v. County of Nevada*, 155 Cal. 1, 99 P. 371. This it did by the aid of competent evidence before it. The fact that there was also evidence before the court on behalf of the city of Oakland which might be construed as contradicting the evidence upon which the court based its conclusions would not warrant a reversal of the judgment on the ground that the findings were unsupported. There is therefore no substantial variance between the prayer of the petition and the judgment. In fact, an examination of the judgment discloses that the boundary line is fixed by a definite description by courses and distances, without reference to the provisions of any statute or charter referred to in the pleadings. This form of the judgment was appropriate under the statute pursuant to which these proceedings were taken.

The greater portion of the peninsula of high land mentioned in the petition as "protruding northerly along said Tidal basin from the center portion of said city" of Alameda is now an island known as "Government Island." This island was created by dredging operations and cutting an artificial channel along the southerly portion of the peninsula, terminating at both ends in the estuary, and in dredging out the north or Brooklyn channel. The city engineer testified that the original northerly boundary of the city of Alameda, following the Peralta grant line, extended entirely around the peninsula, and in this statement he was corroborated by other evidence. It is obvious that the dredging of this artificial channel would not in and of itself have the effect of excluding the island created thereby from the territorial limits of the city of Alameda, if said island was theretofore in the city of Alameda, or of including the island in the city of Oakland if it was not theretofore included. Prior to the adoption of the first Alameda charter of 1907 there was only one channel in the estuary, and the description in that charter was therefore properly caused to follow "the center line of the Tidal canal," but between 1907 and the adoption of the second charter of Alameda, in 1917, the federal government had cut the new channel across the neck of the peninsula. It was therefore properly deemed necessary to specify in the second charter which of the two channels was the boundary line, and the description was accordingly caused to proceed along "the center line of the Tidal canal and the north or Brooklyn channel."

In its answer, the city of Oakland denied the validity and constitutionality of the Act of February 21, 1878, in so far as said act

purported to include within the boundaries of the town of Alameda any territory already included in the town of Oakland under the Act of May 15, 1861, and the Act of April 24, 1862, which specified the boundary of the city of Oakland as "along the eastern and southern highest tide line of said slough, and of the estuary of San Antonio." It is the position of the city of Oakland that, as it had jurisdiction under the acts of 1861 and 1862 to the southern high tide line of the estuary, it was not competent for the Legislature by the act of 1878 to include within the boundary of Alameda the strip between the center of the estuary and the southerly high tide line, and that the act of 1878 was therefore unconstitutional to that extent, under the authority of *Petition of East Fruitvale Sanitary District*, 158 Cal. 453, 111 P. 368. It may be assumed that, even under the Constitution of 1849, the Legislature could not, by special act or otherwise, include a portion of the territory of one municipality within the limits of another municipality, but it would not necessarily follow that under the facts presented in this case the judgment should be reversed. Subsequent legislation, adjudications, and facts shown in evidence have rendered the alleged conflict between the acts of 1861 and 1862, on the one hand, and the act of 1878, on the other, quite immaterial. It was held in the case of *Oakland v. Oakland Water Front Company*, 118 Cal. 160, 50 P. 277, that by the proper construction of the original act of incorporation of the town of Oakland of May 4, 1852, the southerly line of San Antonio creek or estuary intended by the act was the line of low tide and not the high tide line, and that the act of 1854, inferentially, and the acts of 1861 and 1862, by direct language, purporting to extend the southern boundary of the city of Oakland to the "high" and "highest" tide lines, were nugatory. True, the case just cited primarily involved conflicting claims to real estate and the land granted to the town of Oakland by the original act of incorporation, but incidentally and necessarily it also involved the location of the boundary line. The determination in that case therefore resulted in the alleged overlapping of the territory of the two municipalities only to the extent of a strip of land between the center of the estuary and the southerly low tide line, a strip of land completely and continuously covered by water.

It is noted that the Oakland charter of 1889 fixed the southern boundary along "the center of slough and the center of estuary of San Antonio," thus contracting its southern boundary by eliminating the strip of submerged land and constituting the alleged overlap. It was observed in *People v. Oakland Water Front Company*, 118 Cal. 234, 50 P. 305, that more recent legislation (presumably the Oakland charter of 1889) had "contracted the southern boundary of Oakland so as to exclude from its limits the southern

half of the estuary, and this amounts to a renunciation on the part of the city and resumption by the state of the control of so much of the grant as may have been covered by the excluded portion of the city." It seems to be conceded by all parties that there was not in effect at the time of the approval by the Legislature of the Oakland charter of 1889 any law of the state prohibiting a municipality from contracting its boundary and thus excluding a portion of its territory in the manner pursued by the city of Oakland, viz., by the adoption of a freeholders' charter. But it is insisted by the city of Oakland that the existence of general laws of the state, particularly the act of 1889 (Stats. 1889, p. 358), prescribing the mode and manner of changing the boundaries of municipal corporations, including the annexation of territory thereto, was an effectual bar to the inclusion of said strip of land in the city of Alameda through the medium of the description of the boundaries of that city as included in its freeholders' charter adopted in 1907. The answer of the city of Alameda is that the city of Oakland is not in the position to raise this question by reason of long acquiescence in the location of the boundary as contended for by the city of Alameda. The rejoinder of the city of Oakland is that, while the doctrine of long acquiescence is admittedly applicable in cases where the location of the boundary line is indefinite and uncertain, there is no uncertainty in the description in this case, and consequently no occasion for the application of the doctrine of acquiescence.

[2] The contention of the city of Alameda must be sustained. This proceeding is predicated on uncertainty and indefiniteness in the location of the boundary line. The act under which it was taken provides for a proceeding thereunder only when the location of the boundary lines of the city are "indefinite or uncertain or have been obliterated." No objection has been made that this proceeding was not properly taken under that act. The issues presented in this case from the standpoint of both the law and the facts were properly the subject of legitimate controversy because of the uncertainty of the location of said boundary line, and were therefore the proper subject of the application of the doctrine of acquiescence. McQuillin on Municipal Corporations, vol. 1, § 260; 28 Cyc. 182; *People v. Town of Antioch*, 17 Cal. App. 751, 121 P. 945; *Belknap v. City of Louisville*, 93 Ky. 444, 20 S. W. 309; *Louisiana v. Mississippi*, 202 U. S. 1, 26 S. Ct. 408, 50 L. Ed. 913. The latest exposition of the doctrine of acquiescence, with its application to an interesting state of facts in the consideration of the present controversy, is found in *Michigan v. Wisconsin*, 46 S. Ct. 290, 70 L. Ed. —, decided by the Supreme Court of the United States on March 1, 1926. There can be no

question of the efficacy of the rule in cases properly coming within its purview.

What, then, are the facts in this case, which bring it within the rule? It is to be remembered that from the first incorporation of the town of Alameda, in 1854, the boundary line in dispute was always designated as along the center of the San Antonio estuary. The first statute was an attempt on the part of the Legislature to fix the boundary line at that location, and would constitute some recognition on the part of the state that such was the boundary. The same may be said of the statutes of 1872 and 1878, reincorporating the town. We then find the first freeholders' charter of the city of Oakland fixing the boundary of that city in the center of the estuary. It would be difficult to imagine a more solemn recognition and acquiescence on the part of the city of Oakland of the location of said boundary than by the vote of its people in adopting its freeholders' charter in 1889. The approval of that charter by the Legislature in the same year is persuasive of the acquiescence of the state in that location of the boundary line. A like situation was presented when the new and present charter of the city of Oakland was adopted by the people of that city in 1911 and approved by the Legislature in the same year, fixing in effect, but with slightly different wording, the boundary line in the center of the estuary. From the very beginning of the town of Alameda as a municipal corporation, in 1854, to the adoption of its latest charter, in 1917, its northern city boundary of record was the center of the estuary. During all that time the city of Alameda would seem to have possessed a colorable claim to its boundary in that location, and the contraction by the city of Oakland of its boundary to that line in 1889 was a recognition by Oakland that such was the true line at that time. And since 1889 the state has unquestionably acquiesced in the attitude of both cities as to their common boundary line.

Furthermore, it appears that the city of Alameda for years has actually exercised jurisdiction over the territory in dispute in both a governmental and a proprietary capacity. It has levied and collected taxes without protest on the property located in said territory. It has furnished light and power from its municipal lighting plant in said territory. The police and fire departments of the city of Alameda have served this territory. All of these conditions have existed without any protest or adverse claim of right on the part of Oakland, until long after the creation of Government Island by the construction of said artificial canal. It would seem to follow, and we do readily conclude, that the facts herein presented satisfy the requirements of the long acquiescence rule. It is also apparent that the trial court was justified in concluding that the boundary line of the city of

Alameda, as originally established and as later confirmed and acquiesced in, and as determined by the judgment herein, did not depend upon nor was it referable for its location to any general law of the state concerning the annexation or exclusion of territory.

[3] In the answer of the city of Oakland, it denied the constitutionality of the statute of February 21, 1878, incorporating the town of Alameda for the third time; it alleged that the Legislature by that statute never intended to include in Alameda the territory in dispute; denied the validity of Alameda's charter of 1917 in so far as it purported to include Government Island by more particular description. It is insisted that the findings are silent upon the issues thus tendered, and that such failure to find thereon renders the decision against law. We think the said denials and allegations presented questions of law to be determined on a consideration of the statutes, and upon which no finding of fact was necessary. It was also denied in Oakland's answer that the deepest water channel in the San Antonio estuary was in the location shown by Alameda's maps, nor was it in any other location than as shown by its map, and complaint is made because a specific finding was not made upon that issue as tendered. There is no merit in the contention for the reason that said issue was necessarily found upon in favor of the city of Alameda when the court found the location of the disputed boundary line as the ultimate fact to be determined.

[4, 5] In conclusion, it may be well to say that we are convinced that the findings and judgment of the trial court were in harmony with the requirements and necessities of both municipalities. The state acts for the public good, and, in passing the statutes above referred to and in approving the freeholders' charters of the cities involved herein, the state is deemed to have acted in a manner most conducive to the public welfare. The city of Oakland as incorporated was situated on one side of a navigable estuary, and the city of Alameda as incorporated was situated on the other side. It must be assumed that each was entitled to equal consideration at the hands of the state.

"These communities * * * had a natural right to * * * this body of navigable water, to unrestricted access to its shores, and to the privilege of constructing wharves, docks, piers, and other aids to commerce. * * *" Oakland v. Oakland Water Front Co., 118 Cal. 160, 172, 50 P. 277, 281.

In fixing the boundary line, by competent and sufficient evidence as we have concluded, in the center of the estuary and along the deepest water channel, the judgment of the trial court would seem to have conserved that natural right.

The judgment is affirmed.

We concur: WASTE, C. J.; CASHIN, Justice pro tem.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; LENNON, J.

76 Cal. App. 767

BURNER v. AMERICAN BAR QUARTZ MINING CO. (Civ. 2911.)

(District Court of Appeal, Third District, California. March 8, 1926. Hearing Denied by Supreme Court May 5, 1926.)

1. Sales $\S$ 340—Where buyer refused to accept lumber, seller could retain it for buyer and sue for purchase price, sell it and sue for difference between contract and sale price, or keep it and sue for difference between contract price and market price at time and place of delivery (Civ. Code, $\S$ 3311, 3353).

Where buyer refused to accept certain lumber, seller could retain it for buyer and sue for purchase price, sell it and sue for difference between contract and sale price, or keep it and sue for difference between contract price and market price at time and place of delivery, in view of Civ. Code, $\S$ 3311, 3353.

2. Pleading $\S$ 205(5) — Complaint in action against buyer who refused to accept part of order not subject to general demurrer because it did not show which of available remedies was sought (Const. art. 6, $\S$ 4½).

In action against buyer who refused to accept part of order, complaint was not subject to general demurrer because it did not show which of available remedies was sought, especially in view of Const. art. 6, $\S$ 4½, providing that judgment shall not be set aside for error in pleading which has not resulted in miscarriage of justice.

3. Appeal and error $\S$ 1170(3)—Where buyer refused to receive certain lumber, omission of allegation of tender of delivery in seller's complaint held not reversible (Civ. Code, $\S$ 1439, 1440; Const. art. 6, $\S$ 4½).

Where buyer refused to receive certain lumber, omission of allegation of tender of delivery in seller's complaint, though rendering complaint technically demurrable, held not prejudicial, in view of Civ. Code, $\S$ 1440, under which offer of performance provided for in section 1439 is not required in such case, and not ground for reversal, in view of Const. art. 6, $\S$ 4½, providing that judgment shall not be set aside for error in pleading which has not resulted in miscarriage of justice.

4. Appeal and error $\S$ 1002.

Verdict of jury on conflicting evidence must be accepted as conclusive by appellate court.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by C. W. Burner against the American Bar Quartz Mining Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Hiram W. Johnson, Jr., and Carl E. Day, both of San Francisco, for appellant.

Raglan Tuttle and Fred P. Tuttle, Jr., both of Auburn, and Dixon L. Phillips, of Oakland, for respondent.

PLUMMER, J. Action by plaintiff to recover the sum of \$2,500 as damages for failure of the defendant to receive and pay for 65,000 board feet of lumber. Plaintiff had judgment for the sum of \$1,400. Defendant appeals. The complaint, among other things, alleges as follows:

"That during the year 1923 plaintiff and defendant made and entered into a contract or agreement as follows: Defendant ordered from plaintiff 130,000 board feet of lumber, to be cut into such sizes and lengths as defendant might desire, and defendant agreed to pay for the same at the rate of \$35 per thousand feet, and to be delivered at the mill of plaintiff. Plaintiff accepted said order as aforesaid.

"That plaintiff immediately thereafter proceeded to saw and cut said lumber, and defendant proceeded to take delivery of the same, and hauled away from said mill 65,000 board feet of lumber.

"That defendant has failed, neglected, and refused, and still refuses, to take delivery of the balance of said lumber so ordered by him, to wit, 65,000 board feet, and has failed, neglected, and refused, and still refuses, to pay plaintiff for the balance of said lumber so ordered by it.

"That, by reason of the aforesaid acts of said defendant, plaintiff has been damaged in the sum of \$2,500, and neither said sum or any part thereof has been paid."

To this complaint the defendant interposed a demurrer worded as follows:

"That said complaint does not state facts sufficient to constitute a cause of action, and especially and particularly in this: (1) That the alleged executory contract or agreement is insufficient and indefinite as to the kind, character, or quality of lumber to be cut, or the dimensions thereof; (2) that it does not state whether or not the balance of the lumber, to wit, 65,000 feet was or not cut.

"That said complaint is uncertain, for the reasons and upon the grounds hereinbefore assigned, and in addition thereto as follows: (1) That it cannot be determined therefrom what is meant or intended by the allegation in paragraph 11 'to be into such lengths and sizes as defendant might desire'; (2) that it cannot be ascertained or determined therefrom whether the alleged refusal of defendant to accept the balance of the lumber was before or after the same had been cut; (3) that said complaint is indefinite as to whether plaintiff relies upon the alleged contract, or its alleged breach."

The defendant's demurrer being overruled, an answer was filed in which the defendant, after making denials, for further defense alleged as follows:

"That in the year 1923 said plaintiff and this defendant entered into a mutual agreement whereby the former agreed to manufacture and deliver at his mill, in said county and state, and defendant agreed to accept and pay therefor at the rate of \$35 per thousand board feet, all necessary and suitable building lumber for the erection and construction of certain build-

ings then in contemplation, and about to be constructed and erected by defendant, upon its mining properties nearby the mill and plant of the plaintiff; that there was no agreement or understanding either as to the amount that would be required for such construction, or that the plaintiff would manufacture or defendant receive, accept, and pay for, other than plaintiff would manufacture and deliver at his mill, as aforesaid, necessary and suitable lumber for the construction and erection of such buildings."

By reference to the allegations of the complaint and the paragraph of the defendant's answer herein set forth, it will be seen that the only issue between the parties is as to the number of feet of lumber ordered, the refusal of the defendant to accept and pay for all of the lumber, and the amount of damages.

[1] Under the circumstances pertaining to this case the vendor of the lumber would ordinarily have three remedies: (1) Standing strictly upon the sale, retain the property for the vendee, and sue the vendee for the purchase price; (2) acting as agent of the vendee, the vendor might sell the property and then sue to recover the difference between the contract price and the price obtained on a resale; (3) the vendor might treat and keep the property as his own and recover from the vendee the difference between the contract price and the market price at the time and place of delivery. *Cuthill v. Peabody*, 125 P. 926, 19 Cal. App. 304.

Section 3311 of the Civil Code provides:

"The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested been resold, pursuant to section three thousand and forty-nine, the excess, if any, of the amount due from the buyer, under the contract, over the net proceeds of the resale; or, 2. If the property has not been resold in the manner prescribed by section three thousand and forty-nine, the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller, together with the excess, if any, of the expenses properly incurred in carrying the property to market, over those which would have been incurred for the carriage thereof, if the buyer had accepted it."

And in estimating damages under such circumstances, the rule for ascertaining the same is set forth in section 3353, Civil Code. In the case at bar the property was not sold in accordance with the provisions of section 3049 of the Civil Code, and the action is one simply for damages; the plaintiff treating the contract as rescinded and the title to the property as not having passed.

[2] The complaint is by no means a model but the demurrer, as a pleading, shows no improvement. The objection argued that the complaint does not distinctly show the remedy sought by the plaintiff is very well answered in the case of *Lillie v. Weyl-Zuckerman & Co.*, 188 P. 619, 45 Cal. App. 607. There the three remedies were being considered, and it

was contended that, as the contract was silent as to the method plaintiff adopted, it failed to state a cause of action. The court said:

"Conceding the complaint was uncertain in the respect named, nevertheless it was obnoxious to the general demurrer, for the reason that, under the allegations made and in the absence of any special objection to the complaint, plaintiff might introduce evidence tending to prove that upon defendant's breach he adopted, as he was entitled to do, any one of the three courses open to him. The question as to how or in what manner the damage arose, other than as appears from the general allegations, is the subject of evidence rather than of pleading."

[3] The complaint in that case was similar to the one at bar, save and except it did contain the further allegation that the plaintiff had tendered delivery of the merchandise contracted for by the defendant. The omission of such an allegation in the complaint in the case at bar, while technically rendering the complaint subject to demurrer, is not in any sense prejudicial, as it appears from the evidence that the defendant had explicitly refused to receive the 65,000 feet of lumber involved in this case. Hence, by the terms of section 1440, Civil Code, the plaintiff was not required to make any offer of performance on his part, as provided for in section 1439, Civil Code, before beginning this action. It does appear from the testimony that the plaintiff had already sawed the 65,000 feet of lumber and had the same on hand ready for delivery. It further appears from the testimony that, after the defendant had refused to accept further delivery of the lumber, the plaintiff sold 35,000 feet thereof at the average price of \$25 per thousand, and that his loss on that number of feet of lumber amounted to the sum of \$350, for which he had judgment. As to the remaining 30,000 feet of lumber, it appears from the testimony that efforts were made to sell the same, and that it had no market value. It appears that the lumber was of a quality suitable only for the building of flumes, and therefore not commercially merchantable lumber. Our attention has not been called to any testimony questioning these facts. Under such circumstances, the court allowed the contract price, to wit, \$1,050, the amount of the damages. After 65,000 feet of lumber had been received by the defendant, it appears from the testimony that the superintendent of the defendant notified the plaintiff that they did not want any more lumber, and that they were through with the plaintiff. The testimony of the plaintiff concerning the value of the lumber and its size is as follows:

"Q. Referring to the sizes that you cut there, Mr. Burner— A. The sizes— Q. Were they commercial sizes? A. No.

"Q. Cut especially for this yard? A. Especially for flume lumber.

"Q. Did that lumber have any market value? A. It did not; practically no value for market.

"Q. You tried subsequently to sell it? A. I did—tried and in fact tried in every way to dispose of it.

"Q. You did dispose of some of it? A. Yes sir; 1,000 feet, here and there.

"Q. And approximately how much did you dispose of? A. I disposed of somewhere around 35,000 feet.

"Q. And what was the average price for that? A. \$25 was the best I could get for it."

Also:

"Q. With whom was the contract made for the 130,000 feet, and where? A. It was a verbal agreement. Mr. Wilson wanted at least 100,000 feet to start with, and Mr. Duffey said they would want at least 30,000 feet of building material. * * * The bigger part of the mining company order was red fir, which is not marketable; very hard to dispose of red fir to any one who is not building flumes. The lumber yards refused to buy it."

[4] No question appears to have been raised by the testimony as to the fact that the plaintiff had sawed and had on hand ready for delivery the 65,000 board feet of lumber ready for the defendant, nor is there any question raised as to the market value, or of the fact of there being no market value, of the lumber not accepted and paid for by the defendant. There is some question as to the amount of lumber ordered, whether 100,000 feet or 130,000 board feet, but, as there is sufficient testimony to support the verdict of the jury that 130,000 board feet of lumber were ordered, we must accept the verdict of the jury as conclusive upon this point. The appellant has argued at considerable length that, as the plaintiff was able to sell 35,000 board feet of the lumber in question for an average price of \$25 per thousand feet, such price was thereby fixed as the market value of the unsold lumber. This, however, overlooks the fact that the lumber was cut for a specific purpose, was cut in a country where the market for such lumber is limited, and, if not accepted and paid for by the person creating the limited market, it would practically have no market value. It might have a value for special use, if any one could be found having use for such lumber, but it does not appear from the testimony that any such facts existed. The fact of there being no market value for the lumber, as testified to by the plaintiff, was left entirely uncontroverted by the defendant, or, at least, our attention has not been called to any testimony contravening the fact of the unaccepted lumber having no market value. The evidence showing that the 65,000 feet of lumber was sawed, that the defendant had notified the plaintiff that the same would not be received, and as the cause was tried upon issues which involved the real merits of the case, we think this is an instance where the provisions of section 4½ of article 6 of the state Constitution apply, where it is said that no judgment

shall be set aside or new trial granted for any error as to any matter of pleading, etc., which has not resulted in a miscarriage of justice. The issues tried out in this case and determined by the jury and the real merits involved in the controversy between the plaintiff and defendant would not have been affected or altered in any particular had all the technical allegations insisted upon by the appellant as necessary to constitute a sufficient complaint been inserted therein. The case of *Donlon v. Meyer*, 169 P. 447, 35 Cal. App. 225, sets forth the rule that we have followed herein showing when offer of performance or pleading offer of performance is unnecessary.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; PULLEN, Justice pro tem.

76 Cal. App. 774

BURNER v. AMERICAN BAR QUARTZ MINING CO. (Civ. 3087.)

(District Court of Appeal, Third District, California. March 8, 1926. Hearing Denied by Supreme Court May 5, 1926.)

1. Mines and minerals § 105(2)—Superintendent of mining company, charged with duty to see that contractor built certain flume, held not authorized to bind company by oral promises to pay extra compensation to plaintiff, who had losing contract to furnish lumber to such contractor.

Superintendent of mining company, charged with duty to see that contractor built certain flume, held not authorized to bind company by oral promises to pay extra compensation to plaintiff, who had entered losing contract to furnish lumber to such contractor.

2. Contracts § 28(3)—Evidence held to show that promises of extra compensation made by superintendent of mining company to one furnishing lumber to contractor building flume for company were indefinite and uncertain.

Evidence held to show that promises of extra compensation made by superintendent of mining company to one furnishing lumber to contractor building flume for company were indefinite and uncertain.

3. Contracts § 75(2) — Promise of superintendent of mining company to pay extra compensation to plaintiff, who had entered losing contract with contractor to furnish lumber for flume he was building for company, held without consideration (Civ. Code, § 1605).

Promise of superintendent of mining company to pay extra compensation to plaintiff, who had entered losing contract with contractor to furnish lumber for flume he was building for company, held without consideration, Civ. Code, § 1605, being inapplicable, though plaintiff put on night shift after promise in order to fill contract.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by C. W. Burner against the American Bar Quartz Mining Company. Judgment for plaintiff, and defendant appeals. Reversed.

Hiram W. Johnson, Jr., and Carl E. Day, both of San Francisco, for appellant.

Raglan Tuttle and Fred P. Tuttle, Jr., both of Auburn, and Dixon L. Phillips, of Oakland, for respondent.

PLUMMER, J. In this case, No. 7083 in the trial court, the plaintiff had judgment against the defendant for the sum of \$2,870, from which judgment the defendant appeals. The action was brought by the plaintiff to foreclose a materialman's lien and for personal judgment. Foreclosure of lien was denied and personal judgment entered.

The record shows that some time during the year 1922 the defendant entered into a written contract with one Edward Martin for the erection of a certain flume for the sum of \$31,000. The agreement specified that the contractor was to furnish all labor and materials, etc., and two certain bonds were executed in the sum of \$16,000 each, one for the faithful performance, and the other for labor and materials, etc.

After the execution of this written agreement, Edward Martin entered into an agreement with the plaintiff whereby the plaintiff was to cut and deliver at the site of a certain sawmill operated by him some 400,000 feet of lumber at the contract price of \$23 per thousand. In accordance with this contract, it appears that approximately 410,000 board feet of lumber were sawed by the plaintiff and delivered to Martin. After the plaintiff had begun sawing lumber under his contract with Edward Martin, and after about 140,000 feet of said lumber had been cut and delivered, the plaintiff ascertained that the price of \$23 per thousand was not sufficient to compensate him for the expenses of furnishing, cutting, and delivering the said lumber. In other words, that he had a losing contract. Thereafter, and somewhere about the 10th of October, the plaintiff had a conversation with a certain Mr. Duffey, the superintendent of the defendant mining company, as follows:

"Q. You had a conversation about the 1st of October? A. Somewhere about the 10th of October—somewhere about the 1st of October.

"Q. Up to that time you had delivered some lumber, had you? A. I think up to that time I think about in the neighborhood of 130,000 or 140,000.

"Q. Where did this conversation take place? A. Why, I went to the river to see Mr. Duffey. I wanted money to pay my men, and went down to the river to see Mr. Duffey, and, while there, I told him I could not continue the way I was going. With the small mill I had I could not

continue at the price, and, also, if there was no chance of getting more pay for my lumber I could not keep cutting at \$23 a thousand, and—

"Q. What did he say to that? A. He seemed to be worried—he was worried as to the lumber—he was afraid the winter would come, and storms and the lumber not be cut.

"Q. Did he say that? A. He did, and he informed the job had been started, and, if I discontinued cutting, it would probably not get the lumber, and they never would get the job completed. I spoke to him about the price. He told me by no means to stop cutting, and asked me about the price, money was no object; that they would see me through if I would guarantee to get the lumber for them.

"Q. Did he say anything else? A. I informed him I could not cut the lumber. I suggested to him I would put on a night shift to do so. It would cost me considerable money, and I did equip my mill—I sawed at nights to fulfill my order with them.

"Q. What was the language used by Mr. Duffey, as near as you can recollect it in that conversation? A. Why, as near as I can recollect, he realized—

"Q. What did he say? A. He said he was willing for me to go ahead—he said they had put up the money for this flume—a certain amount of it, and he said if it stopped there would be no chance to get it started again, probably stop entirely.

"Q. Say anything with reference to the payment of the amount of \$23? A. He did not—he said he would see me through, gladly see that I was well paid for my work.

"Q. Did he say anything about paying any thing above the \$23? A. He did.

"Q. What did he say? A. He said to go ahead and cut, and they would take care of me under the circumstances, at any cost."

Following this conversation, the plaintiff in November had a conversation with the bookkeeper of the defendant, and with two directors, Mr. Kunz and Mr. Stevens. This conversation is as follows:

"Q. Now, coming to November, 1922, did you have any conversation with any of the officers or directors of the company at that time in regard to this matter? A. I did.

"Q. Where? A. In their office in San Francisco.

"Q. You went to San Francisco? A. I did; I went to San Francisco in November.

"Q. And you went to the company's office, the defendant in this case? A. I did.

"Q. Who was present at that conversation? A. Why, Mr. Kunz, Mr. Stevens, and Willie Fink.

"Q. Who was Mr. Fink—how connected with the company, what position did he hold? A. I could not say; he was with the company at the American Bar at that time.

"Q. Do you mean as an employee? A. Yes, I think he was.

"Q. Explain what the conversation was in the company's office, what was said? A. I went down with Mr. Fink—I had been talking with Mr. Duffey, but I was commencing to get worried as to how I was coming out, and I went to the city with Mr. Fink for the purpose of seeing some of the company, and informed them in the office as to how I was coming out; that I was

behind several hundred dollars, and I wanted them to give me something definite, whereas I was sure I could receive my extra money on this order of lumber.

"Q. What extra money are you referring to? A. Extra money over the \$23.

"Q. What did they say? A. They informed me they could not give me anything in writing, as Mr. Martin—as the contractor was using the lumber, he had a bonding company behind him, and, if they interfered between me and Mr. Martin, the bonding company, that would let the bonding company out from under—the way they expressed it.

"Q. Did they say anything to you about paying extra compensation? A. They did; they said they would assuredly take care of me, this mine with millions, and not let a man go hungry and walk out with his blankets on his back—that they were not that kind of people.

"Q. Who told you that? A. Both Harry Kunz and Walter Stevens, also Billie Fink interrupted and assured me they were telling me right."

Again, in February, 1923, plaintiff had a further conversation with Mr. Duffey as follows:

"Q. Did you have a further conversation with Mr. Duffey in the following February in regard to this matter again? A. I did.

"Q. Where was that? A. Down on the ditch.

"Q. At the mine? A. It was on the river, on the flume above the mine, on the flume leading to the mine.

"Q. Who was there? A. Mr. Duffey, Orrin Jones, and myself.

"Q. What was that conversation? A. We went to the river. He was not there. They said he was on the ditch. We went up to meet him, and he said to me all the way in the conversation, 'You got stung, my God, I feel sorry for you,' and he went jumping around, and finally he said, well, he said, 'By golly, we have to pay these men, and want to pay these men now; I cannot do anything else at present, the McCandlesses are not here'—but said—'I have that power enough, whereas I can pay the men's wages that you owe.'

"Q. Your pay roll? A. He told me to go ahead and send in my pay roll for the men, and he would send it to the city office and pay them at once. He said as to the other money I was entitled to it.

"Q. What other money? A. He said as to the money I had run behind, whatever was fair for me to have, he would take it up with the McCandlesses, and he said they would be in San Francisco about the 15th of May, and they would get together and straighten everything up."

The plaintiff further testified that during the period covered by these conversations he was furnishing lumber to Edward Martin, under the contract herein referred to. He further testified that neither Mr. Kunz nor Mr. Stevens made any definite promises. It does not appear either that in any of the conversations had with Mr. Duffey any definite promises were made as to compensation. Mr. Martin, a witness called for the plaintiff, testified to being present at one of the conversations between the plaintiff and Mr. Duffey, and gives this version:

"A. Mr. Burner was there. Before receiving payment, at the previous conversation, and before receiving it, he said, 'This is not in full.' It is full according to my original agreement with him, but additional money promised—which I too, had promised him, having all the confidence we could in the good intentions of the mining company.

"Q. What was said about Burner? A. Burner got his payment to continue operating which was the thing Burner was interested in—getting money enough to pay his men. The men already harrassed him from all sides.

"Q. He said he would not accept payment in full? A. Yes, that is right.

"Q. What else. A. Went back cutting lumber to finish the 400,000 feet.

"Q. What took place with Burner? A. He was satisfied to abide the time until the meeting of the board of directors, and they would officially give him the money.

"Q. That is what took place? A. Yes.

"Q. That was when? A. Some time in November—22d of November, 1922.

"Q. In November, 1922, a payment was made, and the result of that agreement was that the understanding there was that Mr. Burner would abide by a presentation of the subject to the board of directors—correct? A. Now, ask that question again, please.

"Q. In conversation that took place in November, 1922, Burner received payment, and it was agreed at that time that Mr. Burner would present and abide by the board of directors' determination of the matter? A. I want to change that a little—I want to say this: At that time Mr. Burner was satisfied to await the time until Mr. Duffey could make a recommendation—to lay all the facts before the board of directors, because there never was any question in my mind but what Mr. Burner could get the money from the mining company.

"Q. The understanding was Mr. Duffey would lay the matter before the board of directors and Mr. Burner would abide by the result?"

[1] It thus appears that the plaintiff is suing upon an oral contract, if any, to pay extra compensation for the performance by the plaintiff of his written contract with Edward Martin for the sawing and delivering of the 410,000 feet of lumber, such compensation to be paid by other than a party to the contract. As grounds for reversal, the appellant alleges that Duffey, as superintendent, was without authority to make any contract such as claimed by the plaintiff, and, secondly, that the alleged contract is without consideration.

In support of the theory that Duffey, as the superintendent of the defendant mining company, has authority to promise additional compensation, the plaintiff introduced testimony simply to the effect that Duffey was the superintendent and general manager. In further support of the authority of Duffey, the respondent cites the following:

"Where an agent is by his principal put in charge of a business in a certain locality as the manager thereof, it is a general rule that he is clothed with apparent authority to do all things

that are essential to the ordinary conduct of the business at such place." 1 Cal. Jur. p. 745.

And also:

"Where one has the actual charge and management of the general business of a corporation, with the knowledge of the members, or the directors, this is sufficient evidence of authority and the company will be bound by his contracts, made on their behalf, within the apparent scope of the business intrusted to him"—citing *Aigeltinger v. Burke*, 169 P. 376, 176 Cal. 626, and *Leavens v. Pinkham & McKevitt*, 128 P. 399, 164 Cal. 248.

It does not appear from the testimony that Duffey, as the superintendent of the mining company, had anything to do with the contracts for building the flume, entered into between the company and Mr. Martin, or with the contract entered into by Martin and the plaintiff for furnishing the former with the necessary lumber with which to build the flume. Under such circumstances, the following from 31 Cyc. 1387, appears to be applicable:

"Presumptively an agent is employed to make contracts, not to rescind or modify them, to acquire interests, not to give them up, and no power to cancel or vary an agreement is to be inferred from a general power to make it, nor has the agent any implied power to waive or give up rights or interests for his principal, nor to increase his obligations and liabilities for the mere benefit of third persons, unless the principal knew or approved of such modifications by the agent. However, a general agent may act under such broad power to contract in his own name, or to make terms or to settle upon his own discretion, as to overcome this presumption, and bind the principal by the modification, rescission, or release of his agent."

The testimony set forth in the transcript distinguishes the case at bar from the case of *Western Lithograph Co. v. Vanomar Producers*, 197 P. 103, 185 Cal. 366, hereinafter referred to in this opinion, in which it was held that the president of the defendant company had authority to make the contract there involved in this; in the *Western Lithograph Co. Case*, the president and secretary of the company had executed the contract for the corporation, and the contract concerning which the extra compensation was promised was the contract of the corporation. In the case at bar the contract was not executed by the superintendent, and was not, in fact, the contract of the corporation at all. It was a contract entered into by the plaintiff and Martin, for the performance of which it is alleged that Duffey, representing the corporation as a third party, promised extra compensation. It does not appear that Duffey in behalf of the corporation, had anything to do with the execution of the contract between Martin and the corporation concerning the erection of the flume by Martin, nor does it appear that the corporation had anything to do with the contract between the plaintiff

and Martin concerning the lumber. It does not show either that Duffey was charged with any other duty by the corporation than that of seeing that the flume was properly constructed by Edward Martin, the contractor with whom the defendant had a written contract.

We do not very well see how the mere fact that Duffey simply as superintendent of the defendant mining company, charged with the general duty of seeing that the company obtained from Mr. Martin a flume constructed according to a contract entered into between Edward Martin and the mining company, would authorize Duffey, as such superintendent without any further authority conferred upon him by the board of directors of the mining company, to compensate the plaintiff, because the plaintiff had ascertained that he had entered into a losing contract with Edward Martin, who had previously agreed in writing with the company to perform certain labor, furnish materials, and erect a certain structure for the sum of \$31,000.

[2] It is also clear from the testimony herein set forth that there is nothing definite or certain as to the promises made to the plaintiff by Duffey, even though the testimony were sufficient to show authority vested in Duffey to bind the corporation by any such promises or agreement.

[3] The objection that the alleged promise, if any, is void for want of consideration we also think is well taken. It may be stated that it does not appear from the transcript that the defendant in this case obtained anything to which it was not entitled under its contract with Edward Martin, nor does it appear that the defendant agreed and promised that, if the plaintiff would do certain things which he was not obligated to do, and thereby furnish something to the defendant which it was not otherwise entitled to receive, additional compensation would be paid. The most that does appear is that the plaintiff stated he would put on a night shift, and in this way be able to fill his contract. The plaintiff in this particular sets forth section 1605 of the Civil Code, which reads as follows:

"Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

However, it does not appear that the alleged promisor in this case was obtaining anything to which it was not legally entitled under its contract with Martin, and which the plaintiff, in turn, under his contract with Martin, was obligated to furnish to Martin, in order that Martin might comply with his contract with the defendant. A very similar

question came before the Supreme Court of this state in *Western Lithograph Co. v. Vanomar Producers*, 197 P. 103, 185 Cal. 366. In that case a contract had been entered into for the furnishing of labels at a certain price. Thereafter it became apparent that the contract was a losing one on the part of the plaintiff. The plaintiff obtained from the president and general manager of the defendant a promise of an increase in the price to be paid for the labels in the sum of 35 cents per thousand extra. The president wrote the following letter:

"Gentlemen: Referring to the conversation held between your Mr. Courtlander and the writer, we wish to say that we shall be very glad to pay you a sum equal to 35 cents per m., beyond our contract price, for all labels which we may receive from you this season's pack. We appreciate the efforts you have made in the past to meet our wishes and requirements, and thoroughly understand some of the obstacles which confront you in the endeavor to take care of your large business this season."

In this case it appears that the president had been by the company permitted to carry on business in such a way as to bring the contract in question within the apparent scope of his authority, but it was held that the agreement was without consideration, and this notwithstanding the fact that the defendant in that case received and paid for a considerable quantity of labels at the increased price. The court, in commenting upon this phase of the case, said:

"Now, the letter of June 15, 1917, was merely an agreement to pay an increase over the prices at which the plaintiff was already lawfully bound to the defendant to deliver labels. It is evident that because of the promise the defendant received no benefit, nor was it agreed that it should receive any, to which it was not already lawfully entitled. It is likewise evident that the plaintiff did nothing, and agreed to do nothing, which it was not already obligated to do. A plainer case of a mere naked promise it would be difficult to imagine. The courts in some instances have held that, where one party to a contract refuses to go on with it, and the other party to induce him to go on promises to pay him additional compensation, such promise is supported by a consideration. The theories upon which this conclusion is reached are various, and it is exceedingly doubtful if any of them are sound. *Alaska Packers' Ass'n v. Domenico*, 117 F. 99 (54 C. C. A. 485). The authorities are collated and their different rules well stated in 13 *Corpus Juris*, 351-355. But, so far as we are aware, the authorities are in practical agreement that where, as here, all that appears is that one party found himself with a losing contract and, without abandoning it, requested the other party to pay him more, which the other party promised to do, the promise is without consideration."

The court further in that case commented upon the decisions of the Minnesota Supreme Court (*Michaud v. MacGregor*, 63 N. W. 479, 61 Minn. 198; *King v. Duluth, etc., Co.*, 63

N. W. 1105, 61 Minn. 482), apparently holding to a different rule, and pointed out the inapplicability of the ruling of the Supreme Court of Minnesota to the case at bar. It is further set forth that extra costs and difficulties, such as increase in the cost of manufacture, inadequacy of the contract price, which is the result of error of judgment and not of some inexcusable mistake of fact, is not sufficient upon which to predicate a consideration for a promise to pay extra compensation. To the same effect is the case of *Marinovich v. Kilburn*, 96 P. 303, 153 Cal. 638. In 6 Cal. Jur. 180, § 123, the rule is also clearly set forth relating to alleged promises of extra compensation showing that under the circumstances at bar the alleged promise is not supported by any consideration. Likewise, in 13 C. J. 351 to 357, the cases holding that the promise of extra compensation alleged as the basis or consideration by the promisee to perform an obligation which he is already under legal obligation to perform is without consideration. As heretofore stated, the only consideration in this case, was the furnishing of Edward Martin with the lumber which the plaintiff was already under legal obligation to furnish, and we think this case comes clearly within the rules laid down in the authorities which we have cited showing that the alleged contract is void for want of consideration. It follows that the judgment of the trial court must be reversed, and it is so ordered.

We concur: FINCH, P. J.; PULLEN, Justice pro tem.

77 Cal. App. 93

HORSCHMAN v. KIZIRIAN et al.
(Civ. 5440.)

(District Court of Appeal, First District, Division 2, California. March 15, 1926.)

Contracts — 322(3).

Evidence held to sustain finding that note given to secure payment of services rendered by plaintiff in drilling certain wells for water was supported by consideration.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by P. B. Horschman against K. Kizirian and another, in which defendants filed a cross-complaint. Judgment for plaintiff, and defendants appeal. Affirmed.

Stanley Moffatt, of Fresno, for appellants.
Briggs & Sorensen, of Fresno, for respondents.

STURTEVANT, J. The plaintiff commenced an action against the defendants to recover on a promissory note. The defendants answered and also filed a cross-com-

plaint. The plaintiff answered the cross-complaint, and a trial was had in the lower court before the court sitting without a jury. The court made findings in favor of the plaintiff, and a judgment was entered in accordance with the findings. The defendants have appealed from the judgment under section 953a, Code of Civil Procedure.

The appellants make but one point, and that is that the finding that there was a consideration for the note is not sustained by the evidence. In this behalf the appellants claim that the note was given to secure the payment of services rendered by the plaintiff in drilling certain wells for water, and the appellants contend that the plaintiff held himself out as specially qualified to perform that particular work, and that there was an implied warranty that the work which he undertook to do should be reasonably fit for its intended use. No other question is presented by the record. We think that the point is without merit for the following reasons:

In the spring of 1923 the defendants employed the plaintiff to drill for water on the property owned by the defendants. Under the contract the plaintiff was to be paid so much per foot. He commenced the work, and the defendants worked with him. From time to time the defendants exercised their judgment in directing or supervising the work; however, they did not claim to be informed on such matters. At times they counseled with the plaintiff, and accepted his suggestions as to how deep they would sink any particular well, and as to when that well would be abandoned and an attempt made to sink in a different place. There are two different methods more or less in use in the neighborhood of the farm owned by the defendants. One is known as the "open-bottom" well, and the other may be called the "perforated-casing" well. The plaintiff followed the first method. That method is executed by using solid casing and sinking to a solid formation, and on that formation resting the casing. The driller then proceeds to drill a hole through the solid formation into a water-bearing stratum. By this method all intervening strata of water are excluded. In following the theory which the plaintiff had adopted he sunk one well without getting water. Then he sunk another well without getting water, and he had moved his outfit to another point and was about to sink a third well when the defendants adopted a different course of procedure.

Being dissatisfied with the results obtained by the plaintiff the defendants interrupted the proceedings by employing Mr. Burris to inspect the work as far as it had proceeded and to advise the defendants in premises. On inspecting the first well Mr. Burris advised hiring a perforator. It was hired, and the casing in the first well was sunk a few

feet lower, and then it was perforated at the level of the water-bearing sand, and, after pumping out some water and sand, the defendants found that they had a satisfactory well. The latter method is the second method above mentioned.

On this appeal the defendants asserted that one who does not follow the latter method is not skilled, and that there is no evidence to the contrary; hence they argue that the finding of the trial court that there was a consideration for the note is not supported by the evidence. The answer is that there is an abundance of evidence in the record contrary to the contention of the appellants. Mr. Bramblett, one of the witnesses called by the appellants, testified that the first method was one of the recognized methods, but he preferred the latter method. There was testimony that both methods are used in the neighborhood of the property owned by the appellants. There was testimony that about one-half of the wells are sunk following one theory, and about one-half are sunk following the other theory.

It was shown to the trial court that each method has its good points, and that each method has its bad points. In using the "perforated-casing" system it sometimes happens that when the perforations are made the sand flows in in such quantities as to give one a sand well instead of a water well. Furthermore, the perforations must be made after the casing is in place, and it is not every driller that has the machinery necessary to do the perforating. On the other hand, when one adopts the "open-bottom" system, he may have such difficulties as were experienced in sinking the wells on the defendants' property.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

77 Cal. App. 95

HIMOVITZ et al. v. JUSTICE'S COURT OF SIXTH TP., KERN COUNTY, et al. ★
(Civ. 5211.)

(District Court of Appeal, Second District, Division 1, California. March 15, 1926. Rehearing Denied with Modifications. April 2, 1926. Hearing Denied by Supreme Court May 13, 1926.)

1. Justices of the peace §184—Appeal from "judgment or order" of justice's court taken on questions of "law and fact" was properly determined by superior court on questions of law alone, where proceedings in justice's court were before superior court in the record.

Appeal from "judgment or order" of justice's court taken on questions "both of law and fact" was properly determined by superior

court on questions of law alone, it being immaterial that no formal statement of case had been made, where proceedings in justice's court were fully before superior court in the record, and facts were undisputed.

2. Statutes §243.

Court is required to construe provisions of Code liberally with view to effect its objects and promote justice.

3. Justices of the peace §146(1)—"Order" of justice's court reinstating original judgment held "final judgment," within statute investing superior court with jurisdiction of appeal (Code Civ. Proc. §§ 974, 980).

"Order" of justice's court reinstating original judgment held "final judgment," within Code Civ. Proc. § 974, investing superior court with jurisdiction of appeal taken from "final judgment" of justice's court, and court being authorized to reverse such "order," under section 980.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

4. Prohibition §9—Prohibition held not proper remedy to prevent trial of action in justice's court on remand from superior court after reversal of order "or judgment" of justice's court reinstating original judgment, where superior court had jurisdiction of matter before it.

Writ of prohibition held not proper remedy to prevent trial of action in justice's court on remand from superior court after reversal of order "or judgment" of justice's court reinstating original judgment, where superior court had jurisdiction to decide matter before it, and it being immaterial whether its decision was correct.

5. Prohibition §11—Writ of prohibition cannot annul acts already done, unless they are flagrantly wrong in a judicial sense.

Writ of prohibition cannot annul acts already done, unless they are so flagrantly wrong in a judicial sense as to entitle them to no consideration.

Application for writ of prohibition by Morris Himovitz and another to be directed against the Justice's Court of the Sixth Township, County of Kern, and Edward V. Jones, as Justice of the Peace of such court. Application denied.

E. A. Klein and R. W. Henderson, both of Bakersfield, for plaintiffs.

Siemon & Garber, of Bakersfield, for respondents.

YORK, J. An original application is made to this court in this case for writ of prohibition for the purpose of prohibiting the respondent, a justice of the peace, from hearing and deciding a case pending before him as such justice. The case was within the jurisdiction of the justice's court, and jurisdiction over the person of defendant had been legally ob-

tained. A default had been duly entered in said case and a judgment thereon for plaintiff had been duly entered on January 17, 1924. The defendant in that action (respondent herein) moved to set aside the default and judgment on January 30, 1924. Said justice granted said motion, "with the provision that defendant paid accrued costs up to the present date." At the hearing of the motion and before the order was made, the defendant offered to pay the costs as required by the order, but plaintiff's counsel declined to inform him what the costs were, and defendant had no means of ascertaining what they were. Defendant thereupon filed an answer to plaintiffs' complaint without paying the costs, which the justice permitted him to do. The case was then at issue. The answer remained on file without any objection by plaintiffs and without plaintiffs informing defendants what the costs were and without moving to set the case for trial, until the 19th day of June, 1925, when the justice, on motion of plaintiffs and without notice to defendants, entered an order setting aside the order of January 30, 1924, and adjudging that the original judgment be "reinstated." The defendant appealed from this "so-called judgment or order," to the superior court. Plaintiffs made a motion to dismiss the appeal upon the ground that the purported appeal was from an order and not from a judgment, and that the superior court was without jurisdiction of the action. The superior court denied the motion and decided the appeal on questions of law alone. It was there held by the court that the so-called order of June 19, 1925, was in effect a judgment, erroneously rendered by the justice's court. Therefore the judgment was reversed, and the case remanded to the justice's court, to be tried. It is to prevent such trial that this proceeding has been brought here.

It is the contention of petitioners herein that the justice has no jurisdiction to try the case, and that the judgment on appeal has not settled the law of the case on that question, since (so they contend) the superior court was without jurisdiction of the subject-matter of the attempted appeal.

[1] While section 974, Code of Civil Procedure, provides that an appeal may be taken from a final judgment of a justice's court and no appeal from an order is provided for, section 980, Code of Civil Procedure, provides that, on an appeal heard on a statement of the case, the superior court may review and may set aside, modify, or confirm proceedings subsequent to judgment, and may order a new trial. Although the appeal was taken on questions "both of law and fact," the superior court properly heard and determined the

appeal, as above stated, on questions of law alone. *Peacock v. Superior Court*, 126 P. 796, 163 Cal. 701. While no formal statement of the case had been made, it would have served no useful purpose, because the proceedings in the justice's court were fully before the superior court in the record made in the justice's court, of which the facts were and are undisputed. *Rauer's Law, etc., Co. v. Superior Court*, 152 P. 957, 26 Cal. App. 289.

[2-5] The appeal from the "so-called judgment or order" simply indicates that defendant was in doubt what to call it. The proceedings on appeal, although unusual, were not prejudicial to the plaintiffs for that reason, and we are required to construe the provisions of the Code liberally with a view to effect its objects and promote justice. The only judgment existing in the action at the time of taking the appeal was that entered on June 19, 1925, which was considered by the superior court as a final judgment. It could be rightfully so construed, because of the adjudication "reinstating" the original judgment. We therefore hold that it was within the jurisdiction of the superior court to consider the appeal and reverse the order "or judgment" of June 19, 1925. We are not called upon to consider whether the decision of the superior court was correct. It is sufficient for the purpose of this matter to decide that it was within the jurisdiction of the superior court to decide it. It is evident that the petitioners are here making a collateral attack on both the acts of the justice of the peace and the superior court. The writ of prohibition cannot annul acts already done unless they are so flagrantly wrong in a judicial sense as to entitle them to no consideration. *Alexander v. Crollott*, 26 S. Ct. 161, 199 U. S. 580, 50 L. Ed. 317; *Ex parte Oklahoma*, 31 S. Ct. 426, 220 U. S. 191, 55 L. Ed. 431; *Estate of Bond*, 225 P. 450, 193 Cal. 482; *County of Sutter v. Superior Court*, 204 P. 849, 188 Cal. 292; *Valentine v. Police Court*, 75 P. 336, 141 Cal. 616; *Carr v. Superior Court*, 81 P. 515, 147 Cal. 227; *McAneny v. Superior Court*, 87 P. 1020, 150 Cal. 6; *Mousnier v. Superior Court*, 115 P. 221, 159 Cal. 663; *Simpson v. Police Court*, 117 P. 553, 160 Cal. 530; *Lindley et al. v. Superior Court*, 74 P. 765, 141 Cal. 220; *More v. Superior Court*, 28 P. 1117, 64 Cal. 345; *Kinard v. Police Court*, 83 P. 175, 2 Cal. App. 179; *Johnston v. Superior Court*, 87 P. 211, 4 Cal. App. 90; *Beaulieu Vineyard v. Superior Court*, 91 P. 1015, 6 Cal. App. 242.

The application for a writ of prohibition is denied.

We concur: CONREY, P. J.; HOUSER, J.

77 Cal. App. 104

PEOPLE v. KIRKPATRICK. (Cr. 1271.)

(District Court of Appeal, Second District, Division 1, California. March 15, 1926. Hearing Denied by Supreme Court May 13, 1926.)

1. **Embezzlement** ⚡44(5)—Evidence held to show that money advanced by wife to defendant for purchase of store was a loan, and, therefore, not the subject of embezzlement by him.

Evidence in prosecution for embezzlement held to show that money advanced by wife to defendant for purchase of store was a loan to defendant, and, therefore, could not have been the subject of embezzlement by him.

2. **Embezzlement** ⚡8—Money received by defendant from his wife for express purpose of purchasing home for her did not cease to be trust fund or her separate property by husband's mere act of mingling it with other moneys in his bank account.

Where wife delivered check to husband for the express purpose of purchasing a home for her, the mere act of the husband in mingling it with other moneys in his bank account did not cause it to cease to be a trust fund or her separate property.

3. **Embezzlement** ⚡44(6)—Evidence held sufficient to establish fact that defendant embezzled money given to him by wife for express purpose of purchasing home for her.

In a prosecution for embezzlement, evidence held sufficient to establish fact that defendant embezzled money delivered by wife to him for express purpose of purchasing home for her.

4. **Criminal law** ⚡829(9)—Refusal of requested instructions relating to community property and to presumption attending acquisition of property by married person held not error, where court gave correct and sufficient instructions relating thereto.

In a prosecution for embezzlement by husband of wife's funds, refusal of requested instructions relating to community property, and to certain presumptions attending acquisition of property by married person, held not error, where court gave correct and sufficient instructions relating thereto.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Joseph Lee Kirkpatrick was convicted of embezzlement on two counts, and he appeals. Judgment reversed as to first count, and affirmed as to second.

Homer C. Mills, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Erwin W. Widney, Deputy Atty. Gen., and Hamish B. Eddie, of Los Angeles, for the People.

CONREY, P. J. The information is in two counts, and the defendant was convicted on both of the charges. The first count charges embezzlement, on or about the 27th day of November, 1924, of the sum of \$3,500 belong-

ing to Elizabeth Gnabe Kirkpatrick. The second count charges embezzlement, on the same date, of the sum of \$1,989.29, also the property of Elizabeth Gnabe Kirkpatrick.

The defendant and Elizabeth Gnabe became acquainted with each other in January, 1924. The defendant very promptly learned that Miss Gnabe, who had been a domestic servant for many years, owned cash and securities amounting to about \$8,000. During the month of February they were engaged to be married. They agreed that Miss Gnabe would furnish money for the purchase of a grocery store, which would be operated by the defendant, who was experienced in that business, and they found a grocery store belonging to one Hanson, which seemed to be suitable for their purpose. Defendant and Miss Gnabe examined the store together on the 28th day of February. Hanson's price for the property was \$3,500. In describing the transaction, Mrs. Kirkpatrick testified as follows:

"Mr. Kirkpatrick and Mr. Hanson talked about the store, and made the arrangements about it, looked at it, and then he came out to me, and said, 'Why, Libby, Mr. Hanson wants \$3,500 for it, and I would like to get it for less,' and I said, 'Well, if Mr. Hanson won't sell for less, you pay him the \$3,500 for the store,' so he did. They arranged about the store, and we talked about it, Mr. Kirkpatrick and Mr. Hanson and I, and I was satisfied for him to get the store, but before that we had planned about getting one. * * * Well, Mr. Kirkpatrick said that he would take the store for that, and that we would go the next day to Santa Ana and be married. We had talked about it before about—about being married before I turned the money over to him."

The sale was completed on that day; Miss Gnabe paying for the property by assigning to Hanson two mortgages, each in the principal sum of \$1,750, which Hanson accepted as payment of the purchase price. A bill of sale was executed by Hanson in the name of the defendant Kirkpatrick. Mrs. Kirkpatrick admitted that this was done with her knowledge and approval.

On the following day, February 29, 1924, the defendant and Miss Gnabe were married. From that time until the following November they lived together in a rented apartment, and the defendant conducted the business of the grocery store. In November, 1924, without the consent of his wife, the defendant sold the grocery store for the cash sum of \$2,700.

Concerning the charge contained in the second count of the information, Mrs. Kirkpatrick testified in substance as follows: In April and May she and the defendant began to talk about buying a home. As a result of those conversations she sent East for some money which she had in a building and loan association. This money came to her in a

check, which she indorsed and delivered to the defendant. He said to her:

"If you send East for your building and loan, it will enable me to buy this home. * * * I am unable to pay for it all."

She spoke to him about the business being in his name and suggested that it was no more than right that the home should be deeded to her. He replied: "The home will be deeded to you." On the next day after Mrs. Kirkpatrick indorsed the check to the defendant he showed her the bank book showing the deposit of said check. It was deposited in the same account in which he was accustomed to depositing the proceeds from the store; this account being in the name of the defendant. The proposed property for a home never was purchased. The defendant has never repaid to the plaintiff any of the money received from her on either one of said transactions.

On the evening before Thanksgiving Day of 1924, which was after the store had been sold, the defendant made an appointment to meet Mrs. Kirkpatrick at a place down town in the city of Los Angeles and go with her to a theater. While she was waiting there for him he went home and removed therefrom his personal belongings. Later he called on her, and together they discussed the situation. There had never been any trouble between them prior to this time. She asked him:

"You mean that you are going to willfully desert me like this?"

He replied that he was going to Tia Juana. He said:

"I have something in view down there, and, if you don't do anything, I might reconsider this act that I am about to do and come back."

He never did return, and she did not see him against until she saw him in the county jail in February, 1925.

Before the marriage, and before the purchase of the store, the complaining witness said to the defendant:

"In case I turn this money over to you to buy the store and anything should happen between us, you never can tell, will you turn this money—will you give me this money back?"

He replied:

"Absolutely; but there is nothing going to happen; we are going to lead a happy life, and we are going to get along."

The use of the money for the purchase of the store was never talked about as a loan. Some time after the store had been purchased, the defendant said to his wife that, since he had taken her interest from her when she turned this money over to him he was going to arrange to pay her the interest on it. She replied that, if he did, she would use the interest for her clothes. Afterwards, he gave her some payments of money as interest on

the sum of \$5,300, which was on the \$3,500 together with another sum of \$1,800 not involved in this action.

In February, 1925, Mrs. Kirkpatrick commenced an action against the defendant to recover from him the sum of \$8,000, which, in her verified complaint, she alleged that the defendant had received from the plaintiff "to be used by said defendant for the use and benefit of said plaintiff." She made in that action an affidavit for attachment in which she alleged that the defendant was indebted to her in the stated sum of \$8,000 on an express contract for the direct payment of money, etc. Default judgment in favor of the plaintiff was thereafter duly entered. The complaint and affidavit and judgment in that action were introduced in evidence in this action at the instance of the defendant, presumably for the purpose of showing that the transactions included in the information herein were solely in the nature of loans of money, which, therefore, could not be the subject of embezzlement.

In the present action no other evidence was introduced on behalf of the defendant, and there is no substantial conflict in the evidence of the facts which are in effect as shown by the foregoing statement.

The principal contention of appellant is that the evidence is insufficient to support the verdict. This contention is made separately for each count.

[1] With regard to the first count, appellant contends, among other things, that the transaction relating to the \$3,500 was a loan, and that the evidence is insufficient to prove that the store and its contents, purchased with that money, or that the proceeds of the sale of the store, were held in possession by him as agent or bailee of Mrs. Kirkpatrick or in trust for her or for her use. We are of the opinion that this contention must be sustained. Upon the undisputed facts it clearly appears that the money (in the form of said mortgages assigned to Hanson) was advanced by Mrs. Kirkpatrick (or Miss Gnabe, as she then was) to the defendant as a loan. Therefore, it could not have been the subject of embezzlement by him.

[2, 3] With regard to the second count, there is nothing in the evidence to indicate either a gift or a loan. Neither do we think that the money included in the second count became community property. The contention of appellant is that, when the \$1,829.29 check was deposited by him in the bank account kept for the business of the store, it was thus mingled with funds that presumably were community funds; that, when Mrs. Kirkpatrick promptly learned that fact, and made no objection, she thereby consented to such mingling of funds, and there is no evidence of their subsequent segregation; that (as the court instructed the jury) if the money alleged to have been embezzled was community proper-

ty, the jury was bound to render a verdict of not guilty; that there is no evidence that any specific sum of money appropriated by the defendant to his own use was other than community property. We are of the opinion, however, that the money received by defendant from his wife did not, by the mere act of mingling it with other moneys in his bank account, cease to be a trust fund, and her separate property. *Noble v. Noble* (Cal. Sup.) 243 P. 439. The evidence is clearly sufficient to establish the fact that defendant embezzled this money.

[4] It is contended by appellant that the court erred in refusing to give to the jury certain requested instructions relating to community property and to certain presumptions attending the acquisition of property by a married person. It seems not necessary to enter into a detailed discussion of these items. The court did give some instructions, conceded to be correct, in relation to that subject. We are satisfied that the instructions so given were sufficient to protect all rights of the defendant concerning this phase of the case.

Although the jury convicted the defendant on each count of the information, the court suspended judgment on the first count. The order denying defendant's motion for a new trial on the first count is reversed. The judgment on the second count is affirmed. The order denying defendant's motion for a new trial on the second count is affirmed.

We concur: HOUSER, J.; YORK, J.

77 Cal. App. 99

LEWIS v. SHAW, Judge. (Civ. 5197.)

(District Court of Appeal, Second District, Division 1, California. March 15, 1926.)

1. Appeal and error — 803.

Dismissal of appeal from consent order appointing receiver does not uphold sufficiency of pleadings or validity of order appointing receiver.

2. Receivers — 36, 55.

A complaint, not alleging fraud, and merely asking the impounding of certain funds and the appointment of a receiver, was insufficient to warrant appointing receiver, and gave court no authority to allow him or his attorney compensation.

3. Receivers — 31.

Jurisdiction to appoint a receiver cannot be conferred on a court by stipulation or consent of the parties.

4. Courts — 24.

Jurisdiction of the subject-matter of an action cannot be conferred by stipulation admitting jurisdiction, without making a statement of facts sufficient within themselves to constitute a cause of action.

5. Pleading — 8(2) — Complaint, asking impounding of funds and appointment of receiver, insufficient in failing to allege fraud, is not aided by amendments merely averring as conclusions that moneys paid on certain contracts were trust funds, without setting forth facts sufficiently to show trust.

A complaint to impound money and to appoint a receiver which was insufficient in failing to allege fraud would not be aided by amendments containing averments as set forth in affidavits which were mere conclusions to effect that moneys paid on certain contracts were in fact trust funds, without setting forth facts sufficiently to show the trust.

Original application by Charles J. Lewis for writ of mandate prayed to be directed against Hartley Shaw, Judge of the Superior Court of the State of California within and for Los Angeles County, to compel him to annul and vacate an order setting aside an order appointing a receiver and to pass on and determine questions arising on a final report, wherein George W. Hughes and others were real parties in interest, and whose interests were directly affected by the proceedings. Writ denied.

Walter Desmond and Harry L. Cohn, both of Long Beach, for applicant.

Denio & Hart, of Long Beach, for respondent.

YORK, J. The petitioners herein are asking a peremptory writ of mandate to compel Hartley Shaw, as judge of the superior court, to annul and vacate an order rendered by him setting aside an order appointing a receiver in certain consolidated actions set forth in the petition, and to compel said judge to pass upon and determine all questions arising on a final report. The petitioners admit that their complaints in these various consolidated actions do not, nor does any one of them, state a cause of action, except that petitioners state that they would have amended the same to state causes of action, except for the consent of the defendants in their various actions to the making of an order appointing a receiver therein. They further contend that this court should consider said complaints as they would have amended the same, and that the order appointing the receiver was affirmed by the Supreme Court by a dismissal of an appeal from such order, although the appeal was dismissed upon a motion made upon the sole ground that the order appealed from was an order made by consent. It appears to this court that the only question involved, therefore, is whether or not the order appointing the receiver was and is absolutely void.

[1] The dismissal of the appeal by the Supreme Court upon the ground stated would merely hold that the parties appealing were estopped from taking an appeal on the ground that they had consented to the order from

which they were attempting to appeal. Such a dismissal does not in any way pass upon the sufficiency of the complaints involved in the various actions, or of the validity of the order appointing the receiver.

[2] It cannot be contended that a complaint merely asking the impounding of certain funds and the appointment of a receiver would state a cause of action, yet petitioners herein admit that this is in effect the form of their complaints, unless the court considers the complaints amended to conform to their affidavits. In matters of this kind a receiver can only be appointed in certain cases where fraud is specifically alleged. That being so, in the matter before the trial judge he was without authority to pass upon or determine any questions arising upon the final report. All that he could do would be to discharge the receiver. He could not, therefore, fix any fees for the services of the attorney for the receiver or any fees for the services of the receiver in such matters so consolidated. *Miller v. Oliver*, 163 P. 355, 174 Cal. 407; *Smith v. Los Angeles & P. R. Co.*, 34 P. 242, 4 Cal. Unrep. 237, 238; *Smith v. Superior Court*, 32 P. 322, 97 Cal. 348; *Elliott v. Superior Court*, 145 P. 101, 168 Cal. 727; *Grant v. Los Angeles & P. Ry. Co.*, 47 P. 872, 116 Cal. 71, all give abundant authority for the foregoing conclusions. In *Sullivan v. Gage*, 79 P. 537, 541, 145 Cal. 759 to 771, inclusive, the Supreme Court says:

"This, it will be observed, does not present the case of a reversal of an order appointing a receiver for mere error or irregularity in its procurement. It presents the case of an order void for want of legal authority, where the receiver, in point of law, was not a receiver but a trespasser. * * * The cases are not infrequent where the court has settled the account of a receiver erroneously appointed and made the amount a charge against the party who has procured the appointment, but no case has been brought to our attention where a court has made such an order when its own judicial act in appointing the receiver was nugatory and void for want of jurisdiction. The receiver is not obliged to accept such appointment, and in such a case as this, as the court was without power to appoint him, it must equally be without power to make any other order depending for its validity upon the order of appointment. The utmost that is left for a receiver appointed under such circumstances is his right of action for compensation against the party procuring his appointment. * * * So here it must result that the order allowing compensation, being based upon a void order appointing the receiver, is itself void."

[3-5] It is held in the case of *Scott v. Hotchkiss*, 47 P. 45, 115 Cal. 89, 94, and *Baker v. Varney*, 62 P. 100, 129 Cal. 564, 565,

79 Am. St. Rep. 140, that jurisdiction to appoint a receiver cannot be conferred upon a court by stipulation or consent of the parties. A stipulation of facts which would state a cause of action, of course, could be made, but jurisdiction of the subject-matter of an action cannot be conferred by stipulation merely in so many words admitting jurisdiction. It would require a statement of facts, sufficient within themselves, stripped of any conclusion of law. If the complaints had been amended so as to contain all of the additional facts as set forth in the affidavits referred to by the petitioners, they would have contained conclusions of the affiants only. For instance some of the strongest averments being:

"The moneys were in fact trust funds and were intended to be held in trust for the making of said improvements. * * * The improvements would be seasonably and timely made."

And, further, in one of their affidavits which the petitioners apparently rely on is a statement which could be nothing more than a conclusion of what other parties might have concluded:

"We have no hesitancy in stating that each of said purchasers was led to believe that the money they were paying upon said property was to be used for the purpose of making the improvements that we have stated, prior to the time that it was diverted for any other purpose."

The mere averment that moneys paid on certain written contracts were in fact trust funds and were intended to be held in trust for making the improvements could not and would not add anything to any complaint, unless the facts were set forth sufficiently to show a trust. But in this case before the court, all of the things set forth in the affidavits were merely oral statements, or conclusions that were reached by affiants by reason of conclusions made at the time the oral statements were made by the parties, and would not and could not modify the written agreements, unless they were executed oral agreements.

We have treated this proceeding as being directed against Hartley Shaw as judge of the superior court, and we are not passing upon the question as to whether the peremptory writ would have to be limited to the exact, identical and full scope of the alternative writ.

The petition for a writ is denied.

We concur: CONREY, P. J.; HOUSER, J.

77 Cal. App. 238

GERMAN PUB. CO. v. SCHEIDT.
(Civ. 5337.)

(District Court of Appeal, First District, Division 2, California. March 22, 1926.)

Corporations §319(3) — **President sued by corporation for recovery of money, paid to corporation for treasury stock and appropriated by him, cannot contend that contract for sale of such stock was illegal.**

President sued by corporation for proceeds of check, given to corporation as purchase price for shares of treasury stock and appropriated by him, cannot question validity of contract for sale of such stock, in that corporation did not at the time have permit of corporation commissioner to sell such stock.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action for money had and received by the German Publishing Company against J. H. Scheidt. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Kauke, of Fresno, for appellant.

Hugh P. Graves, of Fresno, for respondent.

LANGDON, P. J. This appeal is by the defendant from a judgment against him in an action brought by plaintiff corporation to recover \$1,500 alleged to have been received by defendant as the president of said corporation for the use and benefit of the corporation and wrongfully appropriated to his own use. The record contains a mass of conflicting testimony, rendered particularly unsatisfactory and confusing, in many instances, by the fact that many of the witnesses had a most imperfect and limited knowledge of the English language. However, out of the conflict, the trial court has found: That on or about November 3, 1922, defendant, while acting as president and director of plaintiff, received for the use and benefit of plaintiff the sum of \$1,500 in cash; that plaintiff at said time was, and ever since has been, the lawful owner of and entitled to the immediate possession of the said \$1,500; that defendant appropriated and used in his own private business the said \$1,500 in cash received by him for plaintiff's use as aforesaid.

Our discussion will be confined merely to the evidence in the record which supports the findings. The transcript reveals that the plaintiff was the owner and publisher of a newspaper called the "California Post," with offices at Fresno, Cal. Defendant, while acting as president and director of plaintiff, received on November 1, 1922, a certain check for \$1,500 belonging to plaintiff, drawn in favor of the "California Post Building Fund." This check had been given to Mr. Mayer, secretary of the plaintiff company, for the company by F. K. Emich in payment of the purchase price of 300 shares of the treasury

stock of the company which it was agreed should thereafter be issued to Emich when a permit to issue additional stock could be obtained from the commissioner of corporations.

Before this payment by Emich the directors of the plaintiff company had passed a resolution and made plans for a new building for the conduct of its business, and to obtain the necessary funds for this purpose had agreed to levy an assessment upon the outstanding stock and to sell such additional stock as might be necessary to raise the amount required, and had also agreed that the money to be received from these sources should be deposited in the bank to the credit of the plaintiff, but in a special account, to be designated "California Post Building Fund" account. As we have stated, the check in question was drawn in favor of this fund. When it was received by the secretary he took it to the president of the corporation, the defendant here, who accepted it, expressly promising to deposit it in the account of plaintiff. At this time defendant had full knowledge of the facts herein recited, and promised to issue the treasury stock to Emich as soon as the permit should be received from the corporation commissioner. On December 12, 1922, this permit was received.

Instead of depositing the check in the account of plaintiff, defendant cashed it and used the proceeds in his personal business dealings and concealed this fact from the other stockholders and directors of the plaintiff corporation, who did not discover the misdirection of this money for several months.

During all this time, and until October, 1923, defendant retained in his own possession, at his store, the stock certificate book of the company, and refused to deliver it up or return it to the company's office, though repeatedly requested to do so by the secretary. On March 17, 1923, after repeated demands made upon defendant by Emich for issuance to him of the 300 shares of treasury stock which he had subscribed for, defendant, while acting as president and director of plaintiff, issued and delivered to Emich a certificate for 300 shares of company treasury stock.

Defendant refused to repay to plaintiff the \$1,500 paid by Emich, and when action was brought to recover this amount he sought to justify his retention of it by claiming that the certificate for stock issued to Emich was not for company treasury stock, but represented a sale by him of 300 shares of his own stock in the company, and that this transaction was in accordance with an agreement between himself and Emich. There is testimony in the record emphatically contradicting such claim, and the trial court has found that there was no understanding or agreement of any kind at any time between John Mayer, F.

K. Emich and defendant, or either of them, that defendant should, at his election, apply the said \$1,500 received by him for plaintiff's use and benefit in payment to himself for 300 shares or any shares of his own stock which he might thereafter elect to sell and transfer to said Emich, and that the \$1,500 was not delivered to nor received by said defendant for such purpose. This last finding is supported by the record.

The foregoing discussion of the evidence and findings disposes of the appeal. The only question raised, outside of the claim that the evidence does not support the findings, is that the contract between the company and Emich for the sale of stock was illegal because at the time it was made the company did not have the permit of the corporation commissioner to sell this stock. This question cannot be raised by defendant in a collateral proceeding. He was not a party to the contract. He received the money for the corporation, and must account to the corporation for it.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

77 Cal. App. 109

Ex parte McDERMOTT. (Cr. 1331.)

(District Court of Appeal, Second District, Division 1, California. March 15, 1926.)

1. Infants ⇐19—Order adjudicating minor a ward of juvenile court gives court discretion in determining custody of minor.

Order adjudicating minor ward of juvenile court transfers matter of her guardianship from parents to court, making it discretionary with court whether to permit minor to return to parents or to place minor in state institution.

2. Infants ⇐19—Giving custody of minor adjudicated ward of juvenile court to parents does not affect power of court to change custody (Juvenile Court Act, § 9 [St. 1915, p. 1225]).

Exercise of discretion by juvenile court in giving custody of minor adjudicated ward of court to her parents does not affect power of court to thereafter change order as to person or institution to be vested with custody of minor, in view of Juvenile Court Act, § 9.

3. Infants ⇐19—Change in custody of ward of juvenile court from parents to juvenile home for conduct not involving criminal charge does not require trial or hearing, and refusal to permit interview with attorney violates no rights of minor.

Change in custody of minor originally adjudged ward of juvenile court from parents to juvenile home because of irregularity in conduct not involving a criminal charge is within discretion of juvenile court, not requiring trial or hearing, and hence no rights of minor are

violated by refusal to permit interview with attorney.

Application by Rosella McDermott, sometimes known as Rosalie McDermott, for a writ of habeas corpus, prayed to be directed to the Superior Court, Erwin W. Owen, Judge, to secure the release of petitioner from the custody of the juvenile probation officer. Writ discharged.

Dorris & Henderson, of Bakersfield, for petitioner.

H. E. Schmidt, Dist. Atty., and Edward West, Asst. Dist. Atty., both of Bakersfield, for respondent.

HOUSER, J. From the petition herein and the return thereto it appears that on January 22, 1922, after due proceedings had in the juvenile court in and for the county of Kern, an order was made by said court by which three minors, including the petitioner, were adjudged wards of the juvenile court. In connection therewith the said court further ordered "that until the further order of the court they (said wards) be allowed to go home with their parents upon the condition that they be properly cared for."

It further appears that nearly four years later, to wit, on the 14th day of November, 1925, at which time petitioner still being a ward of the juvenile court, under the direction or order of the judge of the said juvenile court, petitioner was removed from the home of her parents and placed in the juvenile home of the county of Kern; that thereupon the father of said petitioner employed a firm of attorneys to represent him "in preparing to resist any order of the said juvenile court in any wise changing the custody" of petitioner, and to represent petitioner "in any proceedings before said juvenile court"; that thereupon one of the members of said firm of attorneys applied to the judge of said juvenile court and to the probation officer of the county of Kern, who at that time had the custody and control of petitioner, for permission to consult with petitioner relative to the change in her custody, but that such permission was, and ever since has been, refused. Whereupon petitioner has besought this court to grant a writ of habeas corpus to the end that the rights of petitioner in the premises may be by this court determined.

In the case entitled *In re Rider*, 195 P. 965, 50 Cal. App. 797, a ward of the juvenile court, who was detained in a juvenile hall on a felony charge, complained that she was unlawfully restrained of her liberty by the superintendent thereof, in that the ward was denied the right of private consultation with her attorney for the purpose of enabling the ward to prepare for her defense on the said criminal charge. It was held that the claimed right of the ward was one of the fundamental guar-

anties of the American criminal law and one which no Legislature or court could ignore or violate. In *re Snyder*, 217 P. 777, 62 Cal. App. 697, is to the same effect.

One of the essential differences between the *Rider Case* and the case at bar is that in the former the ward was being detained on a felony charge against her which was about to be prosecuted, which of necessity involved the preparation of a defense, and, as ordinarily incidental thereto, frequent confidential consultations between the defendant and her attorney; while in the instant case the ward has not been accused of the commission of any criminal offense, but is being detained in the juvenile home primarily under the original order by which she was adjudged a ward of the juvenile court; and, secondarily, because of some alleged irregularities in her conduct necessitating or at least suggesting the desirability of a change in her care and custody. It does not appear that any trial or proceeding of any character is pending or contemplated with reference thereto.

[1, 2] The order of the court by which petitioner was made a ward of the juvenile court of necessity had the effect of transferring the matter of her guardianship from her parents to the court itself, and it thereupon became discretionary with the court whether to permit the minor to return to the home of her parents or to place her within the care and custody of some state institution. In *re Hunter*, 195 P. 76, 50 Cal. App. 285. Although the actual physical care of the minor was in the parents, the ward was rightfully under the final control of the court, rather than under the control of her parents. The discretion of the court as to the custody of the minor having been exercised in favor of the parents of the minor at the time she was declared to be a ward of the court did not of itself in any manner affect the power of the court to thereafter change the order as to the person in whom or the institution in which should be vested the custody of the minor. The authority of the court to make the necessary order changing the custody of the minor from her parents to the officers of the juvenile home is contained in section 9 of the Juvenile Court Act (Stats. 1915, p. 1225), as follows:

"Any order made by the court in case of any person subject to the jurisdiction of the court * * * may at any time be changed, modified or set aside as to the judge may seem meet and proper. * * *"

[3] As heretofore suggested, the case here is not that of a person accused of the commission of a crime who is denied the privilege of consulting with his attorney. It is simply a question of the right of the lawful guardian of a minor to change the physical custody of the ward. The facts involved are somewhat similar to those which might be present if the prison board, having jurisdiction over some per-

son who theretofore had been convicted of a criminal offense and who had been committed to one of the state prisons, were to order that the prisoner be transferred to some other state penal institution, or if the proper authorities in charge of the state insane hospitals were to direct that a patient therein should be transferred from one state hospital for the insane to another such institution. No question of a trial or a hearing of any sort is involved in such a transaction. It involves purely a matter of judgment or discretion on the part of the person, board, or tribunal having authority or jurisdiction in the premises. In the instant case, for reasons apparently sufficient to the judge of the juvenile court, he has directed or ordered that the ward be taken from the care and custody of some person or persons, and that thereafter the ward be in the care and custody of some other person or institution. No trial or hearing or court proceeding is necessary or incident to such a transaction, and consequently no rights of the ward in such a connection can be violated or abridged in the premises. So far as this particular order is concerned, it appearing that no legal rights of the ward are involved therein, neither necessity nor occasion exists for the advice of an attorney in relation thereto.

It is ordered that the writ be and it is discharged.

We concur: CONREY, P. J.; YORK, J.

77 Cal. App. 82

BLACK v. BLACK. (Civ. 3004).

(District Court of Appeal, Third District, California. March 13, 1926. Hearing Denied by Supreme Court May 10, 1926.)

1. Landlord and tenant §94(2)—Lessee having estate for years, who holds property after expiration of fixed term, is trespasser, not entitled to written notice to quit.

Lessee, having estate for years, who holds property after expiration of fixed term, is trespasser, and landlord is entitled to possession without giving lessee written notice to quit premises.

2. Landlord and tenant §116(2)—Where lessee from year to year holds over after termination of tenancy as fixed by lease, landlord must give notice to vacate before he can secure possession (Code Civ. Proc. § 1162; Civ. Code, § 789).

Where lessee, having estate from year to year, holds over termination of tenancy as fixed by lease, landlord must give notice to vacate under Code Civ. Proc. § 1162, Civ. Code, § 789, as prerequisite to securing possession.

3. Frauds, statute of §44(4)—Agreement not in writing for leasing real property for period longer than one year is invalid (Civ. Code, § 1624, subd. 5).

Agreement not in writing for leasing real property for period longer than one year is in-

valid by express provision of Civ. Code, § 1624, subd. 5.

4. Landlord and tenant ⇨291(11)—Presumption that new term of lease is created by payment of rent after expiration of first term held disputable (Civ. Code, § 1945).

Presumption that new term of lease is created by payment of rent after expiration of first term, provided for in Civ. Code, § 1945, is disputable, and may be overcome by other evidence.

5. Landlord and tenant ⇨18(3)—Evidence held to show that tenant under oral lease had estate for years.

Evidence held to show that tenant under oral lease had estate for years, where each year, prior to expiration of term, he agreed with landlord to continue under same terms during succeeding year.

6. Evidence ⇨471(28)—Landlord's testimony that tenancy was from year to year, if intended to express legal concept of expression, held wholly lacking in probative quality.

Landlord's testimony that tenancy was from year to year, if intended to express legal concept of expression, held wholly lacking in probative quality, being legal conclusion.

7. Appeal and error ⇨1011(1).

It is solely duty of trial court, sitting without jury, to resolve and settle conflict in evidence.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by Charles A. Black against W. O. Black. Judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Cowan and A. W. Hollingsworth, both of Santa Rosa, for appellant.

R. M. Barrett, of Santa Rosa, and F. W. McConnell, of Healdsburg, for respondent.

HART, J. This is an action in unlawful detainer. The plaintiff was, prior to and at the time of the commencement of this action, the owner of a certain tract of improved land in Sonoma county, which is described in the complaint by metes and bounds, and which has been and was, down to the time of the filing of the complaint herein, devoted to farming, horticultural, and viticultural uses and purposes. The complaint alleges that, on or about the 1st day of November, 1923, the plaintiff, by an oral lease made on said day, leased to the defendant the said land, together with certain farming tools and implements, for the term of one year beginning November 1, 1923, and ending October 31, 1924, upon an agreement upon the part of defendant that he would, at his own expense, prune, plow, cultivate, "and carefully tend the said farm and the orchards and crops thereon in a good and farmerlike manner for the said term, and harvest said crops and deliver the same at the place of market, and

which said crops were to be sold by and in the name of the plaintiff herein, and the gross proceeds were to be equally divided between plaintiff and defendant." It is further likewise alleged that defendant, by virtue of the provisions of said agreement of lease, entered into and took possession of said farm, and continued to possess and occupy the same during said term; that, ever since the termination of said lease on the 31st day of October, 1924, the defendant, contrary to the terms of said agreement of lease, has wrongfully continued in the possession of the said land or farm in person, after the expiration of the term for which it was let to him, and without the permission of plaintiff; that, on or about the 1st day of July, 1924, "and thereafter repeatedly, and at various times before the expiration of the term of said lease" on the 31st day of October, 1924, plaintiff expressly notified defendant that he (plaintiff) would not renew said lease, and demanded and requested him (defendant) to vacate and surrender the said premises upon the expiration of said term, and that the said defendant refused, and still refuses, to vacate the said farm and premises and property or to deliver the same to plaintiff, and has ever since the termination of said lease withheld, and still withholds, the possession thereof from the plaintiff, to his damage in the sum of \$500.

The prayer is for a restitution of the premises to plaintiff, and for damages for the alleged wrongful withholding of the same in the sum above named.

A demurrer to the complaint on both general and special grounds was interposed by defendant and by the court overruled. Thereupon the defendant answered, admitting plaintiff's ownership of the land or farm described in the complaint, but specifically denying all the other material averments thereof.

The cause was tried by the court without the aid of a jury, and findings and judgment were for the plaintiff for the restitution of the premises, and costs. The defendant appeals from said judgment upon a bill of exceptions.

[1-4] The general contention urged by the defendant on this appeal is that the findings do not derive support from the evidence. This contention, however, involves and submits to us for solution this question: Whether the lease to defendant of the premises was, according to the evidence, or the testimony of plaintiff himself, for a definite and limited term of one year, or only from year to year, which, as the cases sometimes characterize such an estate, is a "periodic tenancy." The importance of the question thus propounded is thus to be explained: That, if by the agreement of lease, an estate for years was created—that is to say, a lease for a determinate term, as for a year—then, in that case, the holding over the term fixed or agreed up-

on by the tenant would amount to a trespass, and the landlord, without first giving the tenant written notice to quit the premises, would be authorized to take possession, or, in case the tenant refused to deliver up possession, proceed in and maintain an action of unlawful detainer or proceed in any other authorized way, for restitution or possession of the premises. On the other hand, if the tenancy was from year to year, and the tenant held over after the termination of the tenancy as fixed by the lease, then, in order to terminate the tenancy notice to vacate as prescribed by law (see section 789, Civ. Code, and section 1162, Code Civ. Proc.) must be given the tenant as a prerequisite to the maintenance by the landlord of an action to secure possession, which notice, it is conceded, was not given to nor served on defendant. Certain other rules relating to the leasing of real property may as well be stated at this point, viz.: (1) That an agreement not in writing for the leasing of real property for a period longer than one year is invalid (Civ. Code, § 1624, subd. 5); (2) that, "if a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly, nor in any case one year" (Civ. Code, § 1945). But this is a disputable presumption, the force of which is subject to be overcome by other evidence.

"The implication of a new term created by the payment of rent after the expiration of the first term is an implication of fact merely. It is evidence from which an agreement for a new or further term may be inferred or presumed. If it be shown that, in point of fact, a new agreement was made, such new agreement would, of course, destroy the implication of a different term, which might otherwise be presumed from the subsequent payment of rent." *Skaggs v. Elkus*, 45 Cal. 154, 160.

See, also, *Rogers v. Duhart*, 32 P. 570, 97 Cal. 500, 506; 16 R. C. L. 1161.

Or, as the rule is stated in 35 C. J. 1104:

"Where the holding over is in conformity with a new and express agreement, a tenancy from year to year inconsistent with such agreement will not arise, as, for example, * * * where the tenant holds under express successive renewals of the lease for definite terms of a year, he is tenant for years and not from year to year."

[5] As to the evidence, it appears that the plaintiff, who is the father of the defendant, first let the latter have possession of the premises described in the complaint in the year 1916, upon an agreement and understanding that they were to divide between them in equal parts or shares the crops raised on the farm during said year; that, after the crops for the year 1916 were gathered,

the defendant departed from the premises, but, in the year 1917, returned and proposed to plaintiff a lease of the property upon the same terms as those upon which he worked the farm in the previous year. The proposition was assented to by plaintiff. The proposition of a written lease was discussed between them, but it was finally decided that defendant would take a verbal lease. The defendant thereupon entered into the possession of the premises under said lease at some time between the 1st and 10th of April, 1917. At the end of the year in 1918, so plaintiff testified, a new oral agreement of lease was entered into between the parties. By said agreement the plaintiff leased the premises to the defendant for the term of one year, beginning with the 1st of November, 1918, upon the same terms as those upon which defendant held possession under the previous lease. The defendant continued in the possession of the property down to the date of the commencement of this action.

The plaintiff testified that the leases during the period from and including the year 1917 to and including the "lease" year ending on the 30th of October, 1924, were made each year "from year to year." Thus he testified:

"Q. When did Oscar first go on the place? A. 1916—some time in February.

"Q. And then, after that, did you and he have any agreement with reference to the year 1917? A. We had.

"Q. When was that agreement made? A. Between the 1st and 10th of April, 1917.

"Q. Now, what was that agreement? A. Oscar was to take the property and lease the property, take good care of it, harvest the crops, deliver them, and pay all the expenses of the ranch, and give me half.

"Q. Was anything said as to how long that was to run? A. That was just from year to year.

"Q. The first time you said this was done was in April, 1917? A. That would be from the 1st of April to November 1st of the same year.

"Q. What was your arrangement, if any, between you from November 1st on thereafter? * * *

A. Same agreement.

"Q. November 1, 1917? A. Yes.

"Q. From year to year you say? A. From year to year.

"Q. For how long? A. From November 1st each year.

"Q. Down to what time; down to the present time? A. Down to the present time.

"Q. That is down to last year, 1924? A. Yes.

"Q. What was your arrangement, if any, with Oscar for the year 1924 beginning November 1, 1923? A. Just the same as the others.

"The Court: Q. Did you have a conversation in 1923 about the renewal of the lease? A. In '23—that would be from '23 to '24?

"Q. That would be a year ago last November. A. Yes, they are all identical, the same all the way through for each year. I had several talks with Oscar between November 1, 1923, and November 1, 1924, about renewing the

lease from 1925. In July of 1924 I told him I would not renew the lease."

On cross-examination plaintiff testified:

"Q. Did you say anything to him about the terms on which he was working in 1916? A. Yes, sir.

"Q. What did you say? A. He had the property leased under the same terms he has always had. He continued in 1916 the same as in 1914 and has continued ever since the same way.

"Q. And did you say anything each particular year; you just let it run along the same way? A. No; each year he would just rent from year to year.

"Q. Well, there was nothing said about it; you just let it go on the same old way? A. Yes, there was always something said. * * * In 1916 he left after the crop was harvested. He went away from the place. I don't know that he went right exactly just at that particular time. He was backwards and forwards. Nothing was said about leaving that I know of. They came back and wanted to lease the place in '17.

"Q. He came back, and wanted to draw up a lease? A. Yes, sir; this was the one we were talking about.

"Q. There was nothing said about leaving in 1916; whether he was coming back or not? A. Not that I remember of.

"Q. In 1917 you say he came back in April? A. No, about the 1st of April.

"Q. What conversation did you have with him then about the place? A. He had it in 1916, and I said I would give it to him on the same terms, and those were the terms agreed upon. I told him we would have it drawn up in writing. He asked for a lease. I went to Mr. Ornbaum and had it drawn up, and took it out to the ranch. He had never moved his things away from there. We read the lease over, and he objected to signing it, and neither of us signed it. Then he started in doing the work, harvesting the crop, and continued there during 1917. My wife and I were living there all the time. The 1917 crop was sold under the name of C. A. Black & Son, and we divided the money from that crop. I collected the money for the crop, and then divided it with Oscar.

"Q. He went on in 1918 in the same manner? A. Same manner.

"Q. And then he went on in 1919 in the same manner? A. '19 same manner.

"Q. You and your wife lived there a portion of that time, did you? A. We left there in the spring of 1919, but I worked there during the summer of '19.

"Q. He continued there in 1920 in the same manner? A. In 1920 in the same manner, all except the payment.

"Q. I mean in reference to the farming and the place, they went on just the same as in 1919? A. Oh, yes.

"Q. And did the same in 1920? A. Yes.

"Q. 1921? A. Yes, sir.

"Q. 1922? A. Yes.

"Q. 1923? A. Yes, sir.

"Q. And 1924? A. Yes, sir.

"Q. Continued on, Oscar as he always had? A. As he always had.

"Q. And you never had any new or any different understanding with him? A. No,

it was just always handled the same way from one year to another.

"Q. You just settled up at the end of every year? A. A true and correct statement of each and every year.

"Q. Now you mean you rendered him a statement every year? A. Yes, sir.

"Q. Do you mean that you rendered a statement to Oscar at the end of each year showing just exactly how much was received and how much was paid out? A. Yes, sir.

"Q. And also a statement showing how much you had taken in? A. Yes, sir. * * *

"Q. Now, in 1918 after the crop was taken off, did you say anything to your son about renting the place? A. '19 and '18?

"Q. Yes. A. We leased it to him for the same terms.

"Q. Well, did you talk about it? A. Well, nothing more than we had an agreement that he would stay on the place and lease it under the same terms.

"Q. Until you sold the place or in case of your death? A. No; no understanding he was to stay there until I sold the place. I just leased it to him from year to year.

"Q. At the end of the '19 year did you say anything to him about continuing on the place? A. Except continuing on the place from year to year.

"Q. What did you say at the end of 1919? What did you say about staying there? A. Just leased it to him the same as we had been.

"The Court: Q. He is asking you after your crops were harvested and sold in the fall of 1919, did you and your son have any talk about the renewal of the lease for the following year? Did you have any talk about it? If so, what was the talk? A. Nothing more than we just agreed upon the terms for the next year the same as we had been running on.

"Mr. Cowan: Q. You told him if he wanted to stay on another year he might stay on the same terms? A. Yes.

"Q. 1920 did you have any conversation? A. About the same each year.

"Q. Now in 1922 where did you have any conversation with him? A. I don't know of any particular place.

"Q. Did you ever have any with him? A. Yes, we have always had an understanding at the end of each year.

"Q. Do you mean to say you talked it over at the end of each year? A. Yes; we always had an understanding whether he wanted to stay on the place, I re-leased it to him.

"Q. If he wanted it, he could have it? If he wanted to move off, he could leave it? A. If he wanted to run it again he could?

"Q. Yes. A. Yes; he could go on with it.

"Q. You didn't have any talk with him in 1923? A. Yes; we had.

"Q. Where? A. I think we were over in the prune dipper somewhere.

"Q. Who was there? A. Oscar and I.

"Q. Anybody else? A. Nobody as I know of.

"Q. What did you say to him then? A. We just talked it over, and said he would go ahead with the ranch; lease it on the same terms again."

[6, 7] Emphasis is put upon the statements frequently made by plaintiff that the agreement "was made from year to year," and "on

the same terms" as those upon which the premises were leased for the preceding year or years, the interpretation of those statements by counsel for defendant being that plaintiff thus intended to say, and, in fact, did say, that the lease was from year to year; that is, not for a definite or limited period of time. But the trial court, as its findings indicate, interpreted those statements by the plaintiff by the light of his unqualified statement, repeatedly made, to the effect that in each year prior to the expiration of the term then existing he took up with defendant the matter of a further lease of the property for another year upon the terms upon which defendant then had possession thereof under the lease or leases previously made. We find no reason for doubting the soundness of that interpretation of those statements. The plaintiff repeatedly stated in a positive way that, at the end of each term in every year of the several during which the defendant held the property as the tenant of plaintiff, he would ask the defendant whether he desired to continue with the leasing of the property upon the terms upon which he had always held it from the time he first took possession thereof as a tenant, and that the latter invariably agreed to the proposition, and proceeded as under the previous leases. What, therefore, plaintiff intended to say, when making the statement that the lease was "from year to year and upon the same terms as the other leases were made and carried out (and this was the view of the trial court, as we must construe its findings), was that in every year succeeding the first year of the lease of the premises to him a new agreement of lease was made upon the same terms, as to rental, as the preceding lease or leases had been made." In other words, "from year to year he made a new agreement upon the terms upon which the previous agreements of lease were made." This is a reasonable and just interpretation of the statements referred to, and, as stated, presumptively, in view of the conclusion upon the facts arrived at by the trial court, as indicated by the findings, the interpretation thereof by that court. If, indeed, the interpretation thus given said statements is not sustainable, or, if, as defendant contends, plaintiff intended thus to say that the tenancy at all times was one "from year to year" in the legal concept of that expression, said statement would then involve purely a legal conclusion and, therefore, wholly lacking in probative quality, and thus there would be left of an evidentiary character before the trial court upon the question at issue the testimony of plaintiff only that he always asked defendant each year whether he desired to continue to hold the property under lease for another year, the irresistible inference from which is, if believed (and, obviously, the trial court believed it), that the lease each year was for a definite and fixed term,

limited to one year, and, of course, the testimony of defendant inconsistent therewith or tending to prove that there never was any determinate or definite term agreed upon, but that he took possession and retained it from year to year upon the general understanding between himself and plaintiff that he (defendant) should continue to maintain such possession as a tenant until plaintiff should at or before the expiration of any one year elect to terminate it. Thus the findings as to the nature of the tenancy created are safely grounded on plaintiff's testimony other than the statements referred to. Of course, the testimony of the defendant at variance with that of plaintiff merely created a conflict in the evidence which it was solely the duty of the trial court to resolve and settle.

In their nature, the facts, as they were testified to by plaintiff concerning the hiring or leasing of the premises for the year ending October 31, 1924, are strikingly similar to those in the case of *Johnson v. Foreman*, 40 Ill. App. 456. In that case, the original leases were written, and each provided for a definite term of one year for each of nine consecutive years. The tenant, after the expiration of the term covering the ninth year, no written lease having been executed for the tenth year, nevertheless remained and continued in possession and occupancy of the demised premises. The plaintiff in said case testified:

"Q. What was done when that (the written lease for the ninth year) ran out? A. He continued on another year.

"Q. Without a written lease? A. Without a written lease.

"Q. Was any new arrangement made at all? A. None at all, except for the year. He said he would stay another year."

The Court of Appeal held that the latter part of the testimony of the plaintiff in that case, "he said he would stay another year," effected a lease of the premises for a definite term, to wit, one year. The court said:

"When one is a tenant of premises for a year, under either a written or a valid verbal lease, and the tenant and landlord come together at the end of the year, and the tenant says to the landlord that he will stay for another year, and the landlord assents to it and rent is paid at the former rate, that is leasing for one year, and does not create a tenancy from year to year. A tenancy from year to year will be created where a tenant holds over, after the expiration of a former lease, for one or more years, and pays rent, nothing being said between the parties, no agreement as to the time he shall hold being made."

The case here, candor will force the admission, is much stronger in the showing of the creation of a tenancy for years than is the case from which the above excerpt is taken, and we agree that the testimony of plaintiff in that case was amply sufficient to

show the creation of a tenancy or an estate for a definite and limited time or term.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

77 Cal. App. 212

PEOPLE v. HATFIELD. (Cr. 1262.)

(District Court of Appeal, Second District, Division 2, California. March 19, 1926.)

1. Gaming ☞98(4).

Evidence held to sustain conviction for occupying room with paraphernalia for recording or registering bets in violation of Pen. Code, § 337a.

2. Criminal law ☞535(2)—Corpus delicti held sufficiently established independently of extrajudicial confession by defendant (Pen. Code, § 337a).

In prosecution under Pen. Code, § 337a, for occupancy of room with paraphernalia for recording bets, corpus delicti held sufficiently established independently of extrajudicial confession by defendant.

3. Criminal law ☞535(1).

Conviction cannot be had on extrajudicial admissions or confessions of defendant, unless corroborated by proof aliunde, the corpus delicti.

4. Criminal law ☞680(2).

Admission of proof of extrajudicial confession before corpus delicti is fully established is not prejudicial error.

5. Criminal law ☞404(4)—Large sheet and tickets taken from defendant's possession held properly admitted in prosecution for occupying room with paraphernalia for registering bets (Pen. Code, § 337a).

Exhibits consisting of large sheet, paper, and tickets taken from defendant's possession held properly admitted, in prosecution under Pen. Code, § 337a, for occupying room with paraphernalia for registering bets, as tending to throw light on transaction, though there was no evidence that defendant was using them for purposes alleged.

6. Indictment and information ☞98.

Information charging in separate paragraphs violations of Pen. Code, § 337a, subs. 2, 3, and 4, is not fatally defective for want of numbering of such counts.

7. Criminal law ☞1032(4).

That counts of information were not numbered cannot be successfully urged on appeal, in absence of demurrer in lower court.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

T. H. Hatfield was convicted of occupying a room with paraphernalia for registering bets, in violation of statute, and he appeals. Affirmed.

Cooper, Collings & Shreve, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Edwin W. Widney, Deputy Atty. Gen., for the people.

CRAIG, J. An information filed by the district attorney of San Diego county charged the appellant with having violated certain subdivisions of section 337a of the Penal Code, one of which prohibits the occupancy of a room or any part thereof "with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, or any purported bet or bets, * * * or of selling pools, or purported pools, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast," etc. The information consisted of three counts, alleging, respectively, the violation of subdivisions 2, 3, and 4 of said section, in that appellant maintained and occupied such a room with the books, papers, and paraphernalia for registering bets and selling pools on horse races; that he received, held, and forwarded money to be staked and bet on the results of horse races; and that he recorded and registered bets and wagers on the results of such contests. He was convicted upon the first count only, and appeals from the judgment upon several grounds.

The argument urged for reversal divides itself into two points: (1) That the corpus delicti was not proven independently of the admissions or confessions of the defendant; and (2) that such admissions or confessions were admitted in evidence before the corpus delicti had been shown or established.

[1, 2] It appears that appellant and a partner conducted a cigar store in the city of San Diego, over which they maintained a clubroom, which contained a dice counter or gambling table, a telephone, and card tables, and chairs. The first evidence offered by the prosecution was that of a police sergeant, who testified that on the afternoon of December 4, 1923, he entered the clubroom conducted by appellant; that appellant and one Tubbs were then standing by the dice counter, where they had some small tickets and papers, which they were marking; that, upon the approach of the officer, appellant folded the tickets and papers, and a large sheet upon which were some markings, and held them down behind the counter. The officer testified that he took possession of these tickets and papers and arrested appellant, with the remark:

"You know that you have been warned time and again about bookmaking, and I will have to take you down to the police station for bookmaking this time."

He also swore that he retained possession of all such tickets and papers until the pre-

liminary examination, whereupon he identified them, and they were delivered into court upon the arraignment. They were identified by the witness at the trial, and were then introduced and marked for identification.

Motion to exclude the statement of the officer, above quoted, was made, and was denied by the court. The district attorney thereupon propounded the following question: "What, if anything, further did he say at that time?" Strenuous objections were made that—

"It is attempting to prove the corpus delicti by statements on the part of the defendant before any crime has been proven at all; attempts to prove the corpus delicti by statements, admissions, or confessions of the defendant which are incompetent, irrelevant, and immaterial at this time."

Counsel for the people promised to connect it up later, and the objection was overruled. The trial court held that the statements might be considered in establishing the corpus delicti; that there must be some evidence at least to make a prima facie case without them, but that it was a question of order of proof, and, if the corpus delicti should subsequently be established, the statements might be considered. The witness was then permitted to testify that the defendant said:

"Can't you let me off this time; I will promise you that I will not do this again. I have been taking bets here, but I won't do it again."

Another police officer who testified that he had had about five years' experience with bookmaking paraphernalia as used in San Diego and at Tia Juana, Mexico, stated that he had observed their operation about every day or so during that time, and understood them. This witness testified that the slips marked for identification bore the name and number of the horse, and the odds on its chances to win races, and that such was the general method of bookmakers in registering and recording bets on horse races; that the large sheet was a bookmaker's chart, bearing the name and position of each horse, the particular race, the weight each horse would carry, and the odds offered. A third witness identified the documents in the same manner, pointing out the names of horses, odds, initials of persons who had placed bets, and the results of various races. The papers and slips were introduced in evidence, and appear in the record before us. There were seventy-eight such slips, and a chart, as described by the witnesses, the latter bearing headings, "First Race, 6 Furlongs," "Second Race, 6 Furlongs," etc., to and including the "Seventh Race, Mile and Seventy Yards."

We think there was ample evidence to warrant the jury in believing that appellant occupied a room with the alleged paraphernalia. It is objected that there was no evidence that he maintained the room for gain, hire, or re-

ward, but the section in question specifically includes "every person * * * who, whether for gain, hire, reward, or gratuitously, or otherwise," shall keep or occupy for any period of time, a room for such purposes, and applies to "every person or persons who may do in a single instance any one of the acts specified." Appellant was not convicted of the offense of receiving wages upon horse races, nor of having recorded and registered them, but a thorough, careful review of the evidence, an exhaustive outline of which we have set forth, is manifestly convincing in its tendency to establish the fact that appellant was, when arrested, occupying a room with papers and paraphernalia for the purposes forbidden by the statute. And we should be equally impelled to deny a reversal upon this ground, in the absence of appellant's alleged admission, since the witnesses positively testified as to the nature and purposes of the documents which were taken from the defendant when arrested, and they were not impeached, nor was their testimony denied.

[3] Many authorities are cited which hold that a conviction cannot be had upon the extrajudicial admissions or confessions of a defendant, unless corroborated by proof aliunde the corpus delicti. Of course, this is a correct statement of the law, but it does not aid appellant in this case.

Cases are also cited to the effect that extrajudicial statements should not be introduced until after the corpus delicti has been proven, and holding that "then and then only may the admissions of the accused be used to show that he is the one committing it." *People v. De Martini*, 194 P. 506, 508, 50 Cal. App. 109, 113. But in each of the cases mentioned the order of proof was not directly attacked. It was held that there was no evidence outside of the confessions, except hearsay, and the Supreme Court, in *People v. Frey*, 131 P. 127, 165 Cal. 140, 145, said that without such other proof a conviction could not be sustained.

[4] It has repeatedly been held, however, that, while it is ordinarily the proper practice to establish the corpus delicti previously to offering evidence of admissions or confessions, "we are, however, not to be understood as holding that a mere variation in the order of proof would be prejudicial to the defendant." *People v. Jones*, 55 P. 698, 123 Cal. 65; *People v. Fallon*, 86 P. 689, 149 Cal. 287." *People v. Besold*, 97 P. 871, 873, 154 Cal. 363, 368. Other authorities announcing the same principle are: *People v. Ward*, 66 P. 372, 134 Cal. 301, 306; *People v. Wilkins*, 111 P. 612, 158 Cal. 530, 535; *People v. Saunders*, 110 P. 825, 13 Cal. App. 743, 747; *People v. Barnovich*, 117 P. 572, 16 Cal. App. 427, 430; *People v. Hinshaw*, 182 P. 59, 40 Cal. App. 672.

[5] It is next insisted that the exhibits were not admissible, because there was no evidence that appellant was using them for the purposes alleged in the information. We

think there was strong circumstantial evidence of appellant's guilty connection with the exhibits in question, and it is not here material whether or not he was registering wagers thereon when apprehended. Appellant concedes that exhibits may be received in evidence, if they tend to throw light upon the transaction and to prove the offense itself, and we therefore take his proper enunciation of the rule to be that, if the exhibits inhibited by the statute were such as they were alleged to be, they were admissible. The jury must have believed the testimony of the officers, one of whom testified that the defendant was, at the time of his arrest, occupying the room, and then possessed, and apparently was attempting to conceal, the slips and papers used by gamblers for recording and registering purported bets upon the results of races or contests of speed of horses. These documents cast a convincing light upon the transaction, and constituted the major element of the offense charged. There is no merit in this contention.

Another reason advanced to support the claim that the exhibits were inadmissible is the assertion that it was not shown that they were ever used in an unlawful manner or for unlawful purposes, and that until such showing was made it was erroneous to receive expert testimony as to what they were. Appellant concedes that *People v. Hinkle*, 221 P. 693, 64 Cal. App. 375, has held that it is permissible for an officer to testify that certain exhibits were registers of bets. He attempts to differentiate this case from the one before us by calling attention to the fact that the defendant here was acquitted of having received and held money for bets and of recording bets. We fail to see how this fact alters the rule of evidence which permitted the admission of the testimony of an expert. We think the case of *People v. Hinkle* is controlling, and that further discussion of the point is unnecessary. However, it may be added that the record does not disclose that any objection was interposed to the testimony of the officers; hence, their testimony having been admitted, a sufficient foundation was laid for admission of the exhibits themselves.

[6, 7] The third point raised by appellant is that the information did not separately state the three offenses which he was charged with having committed. They were alleged in separate paragraphs, and it is said in the briefs that each was founded, respectively, upon subdivisions 2, 3, and 4, of section 337a of the Penal Code. We cannot say that the omission of the numbering of the charges or counts rendered the information so defective that the rights of the defendant were prejudiced thereby. At all events, no demurrer was interposed to the information, and it cannot be questioned here. *People v. Gonzales* (Cal. App.) 237 P. 812.

The only remaining contention of appellant

is that the evidence was not sufficient to justify the verdict. This point we have heretofore discussed, and, having decided that it is untenable, it requires no further consideration.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

77 Cal. App. 44

PEOPLE v. WARDWELL. (Cr. 870.)

(District Court of Appeal, Third District, California. March 10, 1926. Rehearing Denied April 9, 1926. Hearing Denied by Supreme Court May 3, 1926.)

1. Banks and banking ⚡62—Embezzlement ⚡44(6)—Evidence held to show actual shortage of assets, not mere book shortage.

In prosecution for embezzlement and falsification of bank records, evidence held to show an actual shortage of assets, caused by defendant's manipulations, and not a mere book shortage.

2. Embezzlement ⚡44(1).

Evidence held to warrant conviction of embezzlement of bank funds.

3. Banks and banking ⚡62—Embezzlement ⚡42.

In prosecution of bank manager for embezzlement of bank funds and falsifying certificate of deposit, record evidence of general shortage of assets held admissible.

4. Banks and banking ⚡62—Charge of felonious omission to make entry of certificate of deposit issued by defendant, sufficiently states public offense, though not alleging that omission pertained to business of bank.

Charge that defendant, as manager of bank, with intention to deceive, willfully and feloniously omitted to make record of time certificate of deposit issued by him, sufficiently states a public offense, though it is not alleged that omissions and false entry pertain to business or affairs of bank, since this reasonably appears from facts alleged.

5. Embezzlement ⚡48(1)—Instruction that crime of embezzlement is proved if money was used to cover another shortage or in transaction with which bank had no connection, held proper.

Instruction that crime of embezzlement is proved, if defendant used money of bank to cover up some other shortage in assets of bank or in some transaction with which bank had no connection, held proper.

6. Criminal law ⚡720(7)—On proof that assets of bank had disappeared and records falsified, district attorney may draw any reasonable inferences therefrom as to means by which assets were appropriated.

In prosecution for embezzlement and falsification of bank records, on proof that assets of bank intrusted to defendant had disappeared, and that defendant had falsified records, district attorney had right to draw any reasonable in-

ferences therefrom as to means employed in appropriating assets.

7. Criminal law ⚡1129(1)—Statements of district attorney not assigned as misconduct, which defendant requested court to instruct jury to disregard, cannot be complained of on appeal.

Where defendant requested court to admonish jury to disregard statements of district attorney, but did not assign such statements as misconduct, they cannot be complained of on appeal.

8. Criminal law ⚡720(7).

Argument of prosecuting counsel in embezzlement case held not beyond bounds of permissible deduction.

9. Embezzlement ⚡44(6)—Particular method by which embezzlement was affected need not be shown, where bank assets were fraudulently appropriated by some means for some unlawful purpose (Pen. Code, § 504).

Prosecution need not prove particular method by which embezzlement was affected, where it appears that defendant fraudulently appropriated assets of bank by some means to some unlawful use, as required by Pen. Code, § 504; it being a fair inference that defendant appropriated assets to own use.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

G. E. Wardwell was convicted of embezzlement and falsification of bank records, and he appeals. Affirmed.

A. K. Wylie, of Alturas, and N. J. Barry and Hardin Barry, both of Susanville, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The information herein contains 18 counts. The first 14 counts charge embezzlements of moneys, and the remaining counts charge falsifications of bank records. Counts 1 and 10 were dismissed, and the defendant was convicted of the crimes charged in the others. This appeal is from the judgment and the order denying a new trial.

The Lassen Industrial Bank is located at Susanville. It maintains a branch bank at Bieber, which will be referred to as the Bieber Bank. During the times herein mentioned, the Bieber Bank had funds on deposit in the Anglo & London Paris National Bank of San Francisco. The latter bank will be referred to as the Anglo Bank. The defendant entered the employ of the Bieber Bank as a clerk December 3, 1916. In the early part of 1922 he became assistant manager, and about May 10, 1923, he was promoted to the position of manager, and thereafter served in that capacity until May 10, 1924. During the first years of his employment he "made the remittances, sorted checks, kept the individual ledger." He kept all the records for two or

three years before he became manager and made the daily reports to the Lassen Bank. During the time he was manager, he was alone in the bank, except that he had a boy to assist him for about two months and another boy for two or three months. Immediately prior to the time he became manager, he was engaged "in the garage business * * * a little over a year or a year and a half." He was agent for and sold "some" automobiles, sold automobile accessories, and carried on a general garage business. He also "had a sporting goods store and selling guns and taxidermy work." In June, 1923, he sold his store and his garage business.

The second count charges the embezzlement of \$5,400 on or about July 20, 1923. The evidence shows that on July 11, 1923, John Pallido presented his personal check, drawn on the Alturas Branch Bank of Ft. Bidwell, and payable to the Bieber Bank, for the sum of \$5,400, and that a time certificate of deposit was thereupon issued to him by defendant for the amount of the check. The certificate was left with defendant, but was not paid until after he left the bank. The defendant properly entered the certificate in the time certificate register. In the "date paid" column he wrote in red ink "6/24/23." He entered the \$5,400 as a credit in the time certificate of deposit account in the general ledger on the 12th day of July, 1923, and the same sum on the debit side 4 days later. He then made out and kept a deposit slip showing a credit to Pallido's checking account in the sum of \$5,400, and entered the same on the cash sheet, but not in the general ledger. Neither did he credit Pallido's check account in the ledger with any sum. The defendant testified:

"Pallido come into the bank with a check for \$5,400 and put it on time certificate. I sent the \$5,400 into the Anglo in the regular way, and issued him time certificate, and he gave the check (certificate) to me, and left it there in my charge, and it was my impression he said he would leave it there, and, if he wanted any money to buy sheep, all he would have to do was to notify us, and we would transfer it to the checking account, and on the 20th day of July I transferred it to his checking account, but didn't give him a ledger sheet for some cause or other."

Pallido had not directed the transfer, and he then had to his credit in his checking account about \$1,800. The net result of the defendant's acts was to reduce the bank's liabilities on the records in the sum of \$5,400. The other charges of embezzlement all relate to amounts for which certificates of deposit were issued by defendant. In two instances he made no record whatever, and in the others he entered them in the time certificate register and marked them "paid" without any payment having been made. The course pursued was not the same in every instance as

that in connection with the Pallido certificate, but the effect was to so falsify the records as to show that all of such certificates had been paid and had ceased to be liabilities of the bank, when in fact they were all outstanding obligations. There is no contention to the contrary. It would serve no useful purpose, therefore, to lengthen this opinion by a detailed statement of the various false entries made by defendant in connection with the other certificates. The amounts charged by the other counts to have been embezzled are as follows: July 10, 1923, \$1,000; December 2, 1923, \$1,000; December 14, 1923, \$560; December 8, 1923, \$500; January 4, 1924, \$550; February 15, 1924, \$1,000; February 10, 1924, \$500; February 13, 1924, \$1,200; February 13, 1924, \$3,800; April 28, 1924, \$1,600; August 7, 1923, \$6,073.35. The foregoing amounts and dates correspond with the amounts of the certificates and the false dates of payment thereof as entered by defendant in the register. By the fifteenth and sixteenth counts the defendant is charged with failure to make any record of the two certificates which he did not enter in the books of the bank. By the seventeenth and eighteenth counts he is charged with making false entries in the records of the bank.

After defendant had left the bank, and while its officers were endeavoring to disentangle its affairs, upon inquiries made by them, they were informed by defendant that he had removed some of the sheets from the ledger and placed them in a safe deposit box, of which he had the key. The defendant surrendered the key, and 139 individual ledger sheets were found in the box, also some checks and deposit slips. These ledger sheets showed balances due depositors in the aggregate sum of \$61,455.91. The outstanding certificates of deposit were over \$30,000 more than the books showed. The sum of \$6,000 more than the books showed was due depositors in the savings department. The savings account of one depositor had a balance of \$4,270.83 on the 11th of February, 1924. The defendant transferred the whole thereof to the general commercial account of the bank, closed the savings account of the depositor, without giving him any credit in his checking account or otherwise, and drew a draft on the Anglo Bank for the exact amount of such savings account. The defendant testified that he did this because the Bieber Bank's commercial account with the Anglo Bank was running low. Numerous other manipulations of the books were shown which had the effect of lowering the record liabilities of the Bieber Bank, but it is deemed unnecessary to enumerate them all. The uncontradicted evidence shows that the assets of the bank had been depleted in the aggregate of more than \$100,000.

The defendant, after he left the bank, with the approval of the board of direc-

tors, employed E. M. Wilson, a competent expert accountant, to audit its books and affairs. Wilson was given every opportunity to make a thorough investigation, and the defendant was permitted to work with him. The bank later employed Wilson to make a further examination. He testified that there did not appear to have been any shortage on the 31st of August, 1920; that on August 31, 1921, there was a shortage of \$13,609.05; on May 14, 1923, \$47,191.98 in the commercial accounts and \$525 in the certificate of deposits account; and on May 22, 1924, \$59,441.95 in the commercial accounts, \$20,986.83 in recorded certificates of deposit, \$13,215.84 in unregistered certificates, \$4,000 in notes receivable, \$6,063.27 in savings account, and \$1,943.63 in the account with the Anglo Bank, making a total shortage at that time of \$105,651.52.

The account books of the bank are of the loose-leaf type, the sheets thereof being unnumbered and interchangeable. The defendant testified:

"There was a shortage when I took charge of the bank, and I took those leaves out of the ledger and filed them away to get by the bank examiner and keep the bank on its feet until such time as I could find the errors and go and show what happened. * * * I thought I could show the bankers where it was and make a big name for myself and get some place."

He further testified that he then thought the shortage was about \$30,000; that he first discovered there was a shortage in August, 1921; that it was then about \$28,000 and kept increasing; that "the ledger was off balance that much"; that he never reported the shortage to any person; that he did nothing to cover it up and removed none of the ledger sheets until after he became manager; that he did not include the hidden accounts in his daily reports to the Lassen Bank because "they wouldn't have balanced"; that he "took out the accounts that wasn't apt to change"; "I would take out a bunch, and as the accounts would go down or get active I would move them back into the active ledger and take out some that wasn't so active, they were changing all the time." He did not explain the method by which he made the books balance prior to the time he became manager. One of the officers of the bank testified:

"I questioned him (defendant) as to how this shortage had grown and what was the cause of it. He indicated by statements to me that it was on account of allowing overdrafts; that he had allowed individuals and corporations to draw or that they had been allowed to draw against the accounts that didn't exist in fact, * * * indicating that had continued for a considerable time, and the bulk of it occurred previous to the time he became manager of the bank. * * * He stated that was the cause of practically all the shortage. * * * He told me these checks that had been drawn would be paid, and, without making any record of them whatever, they would be returned to the

drawer, leaving no evidence in the bank who obtained the money. I said, 'You want me to understand you have been fool enough to let money go out that way without keeping a record of it,' and he said, 'Yes,' he had. * * * He referred to the account of the Juniper Mining Company. This had taken place during the management of Sanders (the man who preceded defendant as manager). * * * A check would come in when the mining company didn't have a balance to its credit. * * * Regardless of whether the Juniper people came in and actually put in the money for them, they were returned to the Juniper people and not kept as a record of the bank. * * * No record of them kept at the bank. * * * He said the shortage that existed was largely made up in that way. He didn't say it was all made up through the drawings of the Juniper Mining Company. The Juniper Mining Company was the only one he referred to. * * * As to the other overdrafts, there wasn't any fixing of time."

The defendant testified that he once called Sanders' attention to the fact that the Juniper Mining Company had overdrawn its account by a check for \$1,360, and "I passed him the check, and that was the last I seen of it, and I knew there was something wrong about it," that the Juniper Mining Company's account was not charged with the \$1,360, and that he did not know whether the check was paid by the bank or whether the company thereafter deposited sufficient money to cover the overdraft. He did not testify that the company had overdrawn its account at any other time. He did not deny the various false entries made by him or explain why he made them, except as herein stated. Other witnesses testified that the defendant stated that the ledger sheets "had been coming out for a long time," a few at a time; that "he said he did all the manipulating and made most of the figures"; that "he didn't receive any benefit from them (the certificates of deposit) himself whatever; it was used for other purposes, but never told me what purposes, * * * straightening up other things that had been done creating shortages"; that "he said no one else was implicated with him."

[1] Admitting that the books and records of the bank were improperly kept, appellant contends that the evidence does not show any actual diminution of the assets of the bank, but merely a "book shortage." The uncontradicted testimony of several witnesses, however, shows that the assets of the bank had been depleted to the extent of more than \$100,000. Mr. Wilson testified that the shortages of August 31, 1921, and May, 1923, were book shortages. The statement is obviously correct. He had no means in May, 1924, of ascertaining what the assets of the bank actually were in 1921 or 1923, but could only determine what the records of the bank disclosed in that regard. At the time of his audit he was able to count the cash then on hand, compute the amount of the notes, and

determine the other assets actually in the possession of the bank. He testified:

"You couldn't say absolutely it was a cash shortage. It is simply a deficiency of the resources over liabilities. * * * Your resources are deficient that much to balance your liabilities. * * * I wouldn't say absolutely it was a cash shortage in a way. I would say the resources are simply deficient."

Other witnesses gave testimony to the same effect. There is also testimony to the effect that the assets were not depleted in any amount between the time that defendant left the bank and the time of the Wilson audit. It is clear that an actual shortage of assets, not a mere book shortage, was shown.

[2] There is abundant additional evidence showing that the assets of the bank were depleted during the time the defendant was in full charge of its business. The Bieber Bank and the Lassen Bank transferred funds back and forth as necessity required. In case of a heavy reduction in the total amount of deposits in the Bieber Bank, without a corresponding reduction in the amount of bills receivable, that bank was under the necessity of replenishing its funds by drawing on the Lassen Bank. No other reason appears for so drawing during the time defendant was manager. During that time the deposits in the Bieber Bank decreased in the total amount of \$8,524.13 and the loans in the sum of \$7,766. It thus appears that during the time the defendant was manager there was no necessity of drawing on the Lassen Bank for any large amount. During that period, however, as such manager, he drew on the Lassen Bank in the total amount of \$81,500 and transferred to it \$39,000, making a net transfer to the Bieber Bank of \$42,500. Practically all of this large sum is wholly unaccounted for. What defendant did with it must be left to inference from the other facts in evidence. Those facts point unerringly to defendant's guilt. Every time he failed to record a certificate of deposit or falsely entered a record of payment thereof, he created the opportunity to embezzle a corresponding amount of the bank's assets. Corresponding amounts of such assets must have been withdrawn, otherwise his daily statements of assets and liabilities would have been out of balance, and the evidence shows that they balanced, except for minor errors. Such statements, of course, did not include the liabilities shown by the hidden records, but the fact that such records were secreted merely tends to show that other and additional assets had been embezzled, either during the time of defendant's management or prior thereto. The evidence, therefore, is sufficient to show, without any reasonable doubt, that the defendant embezzled the amounts charged and at about the times charged. There is no rational basis upon which the jury could have returned a verdict of not guilty.

[3] Appellant contends that evidence of a general shortage of assets was not admissible to prove the embezzlements charged in the information, citing *People v. Walker*, 75 P. 658, 142 Cal. 90, 93. The facts of this case are unlike those of the *Walker* Case, and are similar to those involved in the case of *People v. Rowland*, 106 P. 428, 433, 12 Cal. App. 6, 19, where it is said:

"Counsel for appellant refers to the case of *People v. Walker* [75 P. 658] 142 Cal. 94, where it is held by a divided court that evidence of a general indebtedness is not admissible as proof of the specific crime of embezzlement charged in the information. But that case does not sustain the position of counsel here for the reason that the facts there are decidedly different from those here. The court says: 'In the case at bar the said testimony objected to was not of any other embezzlement; it was simply of a general indebtedness, and it appears affirmatively that the \$80.35 charged to have been embezzled was not included in the general balance which the books showed.' * * * Here there is a direct relation existing between the crime charged and the general shortage, because the former is shown to be one of the several transactions from which the general shortage arose, and the latter has, therefore, a tendency to establish the offense charged."

[4] It is contended that counts 15, 16, and 17 do not state facts sufficient to constitute public offenses. Count 15 charges that:

Defendant "was manager and an officer and employee of the Bieber Branch of the Lassen Industrial Bank * * * and * * * as such manager * * * there came and was under his control and possession a certain record known as a 'Time Certificate Register,' which said record was then and there the property of and kept by said corporation and by said G. E. Wardwell as manager, officer, and employee thereof, and said G. E. Wardwell, * * * the 7th day of August, 1923, with intent in him the said G. E. Wardwell, to deceive the officers and directors of said Lassen Industrial Bank, * * * did then and there willfully, unlawfully, and feloniously omit, at said time or at all, to make any record of the issuance of a time certificate of deposit to Clara Bieber for the amount of \$6,073.35 though in truth and in fact a time certificate of deposit was actually issued by him on said date to Clara Bieber for said amount."

The sixteenth count is in like form. In similar language, the seventeenth count alleges that the defendant made a false entry in the general ledger relative to a deposit of \$5,400 made by John Pallido. The objection urged is that it is not alleged that such omissions and false entry pertained to the "business or affairs of the bank." It reasonably appears from the facts alleged that such omissions and false entry did pertain to the business and affairs of the bank. Besides the failure to so allege could not by any possibility have prejudiced the substantial rights of the defendant.

It is urged that the court erred in refusing

to give 6 instructions proposed by defendant. Appellant has failed to point out wherein the proposed instructions were material to the case. A careful examination of them shows that they contain no statement of law not fully covered by instructions which were given.

[5] The court instructed the jury to the effect that, if the defendant used the money of the bank "to cover up some other shortage in the assets of said bank, or if it was actually taken from the possession of said bank by the defendant and used in some transaction with which the bank had no connection, the crime with which he is charged is, in either event, proved." The instruction is in accordance with the law as stated in *People v. Rowland*, 106 P. 428, 12 Cal. App. 6, 16. Even if it be conceded that the instruction should not have been given, the evidence of defendant's guilt is so overwhelming that it cannot be said that the giving of the instruction has resulted in a miscarriage of justice.

[6-8] Appellant strenuously contends that the district attorney was guilty of prejudicial misconduct in his argument to the jury. The district attorney therein said:

"Ladies and gentlemen of the jury, we have seen how Mr. Wardwell marked the certificates of deposit 'Paid,' reducing the amount of the time certificates of deposit on the time certificate register and in the general ledger, drawing on the home office in Susanville for the amount of money, which would increase the amount which the Bieber Bank owed the home office, transferring that money into Anglo London and Paris National Bank of San Francisco and diverting it out of there—that was one method. It was then subject to his check, and could be diverted by him."

On objection by counsel for defendant, to the effect that the district attorney's statement was outside the evidence and prejudicial error, the court said:

"I think counsel is merely giving his deductions from the evidence that has been introduced, and I think he is entitled to give his deductions. * * * The objection is overruled."

The prosecution was unable to prove, and was not required to prove, the particular method by which the embezzlements were effected. Having proved that the assets of the bank entrusted to defendant had disappeared, and the manner in which the business of the bank was conducted, including falsifications of the records by defendant, the district attorney had the right to draw any reasonable inferences therefrom as to the means employed in appropriating such assets. Drafts were admitted in evidence showing that defendant, as manager, had drawn on the Lassen Bank, through the Anglo Bank, about \$80,000. The funds so transferred to the Anglo Bank were subject to "his check," as manager, and "could be diverted by him." Appellant argues that there is no evidence that "the defendant did or could have drawn his

personal check" on the Anglo Bank "for any money whatever." But the district attorney did not so state. At another point in his argument the district attorney said:

"That cash was taken right from the home office here and Anglo—\$100,000 transferred in to the Anglo Bank and checked out by Mr. Wardwell. Now that is the situation."

Counsel for defendant said:

"We object to the statement that any money was checked out of the Anglo account. There is no such evidence in the record. It would have been an impossibility for Wardwell to have checked any money out of Anglo. He had no checking account with Anglo. When he makes that statement to the jury he is stating something that isn't in the record, and I ask the jury be instructed and admonished to ignore any such statement."

The court said to the jury:

"The jury will understand that they are to be governed only by the evidence introduced in the case, and, if counsel don't get the statements of the evidence correct, if you desire to have the evidence read to you, we will do so. He is merely drawing his conclusions from the evidence, and he is entitled to draw such conclusions as he desires. Objection overruled."

Counsel for defendant requested the court to admonish the jury to disregard the statements of the district attorney, but did not assign such statements as misconduct.

"Such assignments and requests were necessary as a foundation for a complaint to this court of misconduct." *People v. Routh*, 189 P. 436, 438, 182 Cal. 561, 567.

[9] Neither does it appear that the district attorney transcended the bounds of legitimate argument in drawing the conclusions stated by him. It clearly appears that such statements were mere deductions, and reasonable deductions, from the evidence. The assistant cashier and auditor of the Anglo Bank testified that the checks paid by that bank and charged to the Bieber Bank were returned twice a month to the latter bank; that in one instance the defendant "drew a draft on the Susanville bank for \$6,000 and charged it to the Anglo-London Paris National Bank's account on his books, but it was never sent to San Francisco at all for credit, nor had Susanville ever received that item." Under such circumstances, the defendant had the opportunity to embezzle the \$6,000 without any shortage appearing in his book accounts. Similar deductions may be made from his many other falsifications of the bank's records. It was naturally beyond the power of the prosecution to show the particular method or means by which the defendant appropriated the funds of the bank. Whether he directly took the money, or paid checks which were fictitious or drawn by persons having no moneys on deposit, and which

were returned to such persons without any record being made thereof, as he said was done in cases of overdrafts, or whether some other method was pursued, does not appear. But it was not incumbent upon the prosecution to prove such particulars. That he fraudulently appropriated the assets of the bank, by some means, to some "use or purpose not in the due and lawful execution of his trust" (Pen. Code, § 504) appears with great clearness and certainty. Since crimes are not usually committed for the philanthropic purpose of benefiting others, it is a fair inference that the defendant appropriated such assets to his own use.

The other errors complained of are of slight importance, and need not be specially considered. None of them could have affected the verdict.

The judgment and the order are affirmed.

We concur: HART, J.; PLUMMER, J.

76 Cal. App. 741

STEVENS v. FETTERMAN et ux.
(Civ. 3024.)

(District Court of Appeal, Third District, California. March 4, 1926.)

1. Mortgages $\S$ 36—Although deed absolute on its face may be shown by parol to have been intended as security for payment of debt, presumption is that deed granting real property is absolute conveyance.

Although deed absolute on its face may be shown by parol to have been intended to stand as security for payment of debt, presumption of law independent of proof is that deed granting real property is absolute conveyance, and such presumption must prevail, unless evidence to contrary is sufficient to overcome or entirely destroy it.

2. Mortgages $\S$ 36.

Burden of proving that deed was intended by parties to operate as mortgage is on party taking affirmative of that issue.

3. Mortgages $\S$ 38(2)—Oral testimony, to justify court in determining that deed was intended as mortgage or trust, must be clear and convincing.

Testimony must be clear and convincing to justify the court in determining from oral testimony that deed purporting to convey real property in fee simple was intended to be something different, as a mortgage or trust.

4. Appeal and error $\S$ 1010(1)—It is function of trial court to determine from evidence whether deed was what it purported to be, or whether it was intended to operate as mortgage.

It is solely function of trial court to determine sufficiency of evidence to overcome presumption that deed was not intended to operate as mortgage.

5. Appeal and error — 1010(1).

Trial court's finding, supported by evidence, that deed was not intended as mortgage, will not be disturbed.

6. Quieting title — 44(4)—Evidence in action to quiet title held to support finding that defendant, alleging that conveyance was made from owner to plaintiff as security for debt owing by him to plaintiff, had acted only as real estate broker, and had transferred nothing of value in consideration, and was not indebted to defendant (Code Civ. Proc. § 738).

In action to quiet title under Code Civ. Proc. § 738, evidence held to support finding that defendant claiming interest in property on ground that conveyance was made to plaintiff by owner as security for debt owed by defendant, had acted only as broker in bringing grantor and plaintiff together for exchange of properties, and that defendant did not transfer anything of value as consideration, and was not indebted to plaintiff at time of exchange, and had no interest whatsoever in property.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by Auber B. Stevens against George C. Fetterman and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

James P. Clark, of Los Angeles, for appellants.

Henry L. Knoop, of Los Angeles, for respondent.

HART, J. This action is by the plaintiff to remove a cloud from the title to the real property described in the complaint and so to quiet his title thereto. Judgment passed for the plaintiff, and the defendants appeal therefrom upon a bill of exceptions.

The controversy is the outgrowth of several transactions, involving, in so far at least as it is required to present a clear understanding of the situation as it is portrayed by the record, three different and distinct pieces of real estate. The real property described in the complaint, and as to which relief is herein sought by the plaintiff, was at one time owned by one James Keeney, and is situated near the city of Azusa, in Los Angeles county. The other two properties are, respectively, a certain bungalow court, in which there are or were several bungalows, said property being situated in the city of Los Angeles and was formerly owned by the plaintiff, and the third consisting of five lots located in the city of Pasadena and owned by Rosa Fetterman, codefendant and wife of George C. Fetterman. For convenience and clarity, and, following the briefs of the parties in that respect, we will refer to these properties herein as the "Keeney property," the "Stevens dwellings" or "Diamond Hill tract" and the "Fetterman or Pasadena lots or property."

On August 22, 1923, the plaintiff and de-

fendant George C. Fetterman entered into a contract whereby they agreed to an exchange of the Stevens dwellings and the furniture in the bungalow occupied by plaintiff for the Pasadena lots and the sum of \$15,000. As stated, the Pasadena lots were the property of Rosa Fetterman, but George C. Fetterman, in the transaction just mentioned, was her duly appointed attorney in fact. Each of the conveyances, in case the agreement of exchange was consummated, was to be subject to certain incumbrances on the respective properties. The terms of the agreement were to be carried out through an escrow to be handled and administered by the Los Angeles Title Insurance Company. Accordingly, the parties deposited with said company the said agreement and deeds to the respective properties, together with escrow instructions.

The agreement provided, among other things, that one William H. Dennis should act as the agent of plaintiff in negotiating the exchange of said properties upon the terms specified in the agreement, and that, "when he has secured an acceptance of the proposition to exchange the above-described property on the above terms, I will then pay the sum of \$250 as commission for such services." The escrow instructions on the part of said Fetterman contained the following:

"I will hand you \$15,000 which you are authorized to use in connection with your above escrow number (No. 237985) on condition that you issue your one continuation guaranty of title in your usual form on the following described property situated in the County of Los Angeles"—following which is a description of the Stevens Dwellings or the Diamond Hill tract.

The escrow instructions on the part of the plaintiff contained, among other things, the following:

"I will hand you a mortgage and note for \$15,000 and a Tr. deed and note for \$20,000 to be shown as first and second incumbrances on said lots. I will hand you a bill of sale of furniture in buildings on said lots. I will hand you an agreement to buy said lot which you are authorized to use in connection with your above escrow number on condition that you issue your one continuation guaranty of title in your usual form on the following described real property situated in the county of Los Angeles"—following which is a description of the lots in the city of Pasadena and owned by the defendant Rosa Fetterman.

Said instructions also contain the following:

"Pay \$250 commission to William H. Dennis. Received from me \$15,000 as a bonus in exchange."

The life of the escrow was to be for 30 days—that is, the agreement for the exchange was to be consummated within 30 days. Fet-

terman failed to perform the agreement on his part within the time limited by the instrument, and, on October 8, 1923, the plaintiff addressed to him a letter demanding compliance by him with the terms of said agreement. The letter concluded thus:

"Unless you fully perform said terms, promises, and conditions on or before the 13th day of October, 1923, the undersigned will take such proceedings as in the premises he may be justified. He notifies you, however, that he will hold you at all times bound by the terms of said agreement, and he will at all times hold and consider said agreement binding and in full force and effect."

Notwithstanding the above notice to or demand upon him to perform the terms of the agreement, Fetterman failed to do so, and on October 23, 1923, the plaintiff instituted an action against him for damages for a breach of said agreement. The summons and a copy of the complaint in said action were duly served on Fetterman, but the litigation was not proceeded with because of an agreement entered into by and between the parties on the 30th day of October, 1923. The salient provisions of said agreement read:

"Now, therefore, in consideration of the premises above recited and of the following promises and terms, the parties hereto agree one with the other as follows:

"1. G. S. Fetterman will cause to be delivered at once to Auber B. Stevens a certain deed now held by California Title Insurance Company in connection with the escrow instructions hereinabove referred to, being said company's said escrow No. 237985, and said deed conveying to said Auber B. Stevens the following described property, to wit (the five Pasadena lots). * * *

"2. Auber B. Stevens will upon the delivery to him of said deed give to said G. C. Fetterman a dismissal in writing in form required by law of the said action hereinabove referred to, being case No. 130802.

"3. Auber B. Stevens hereby grants G. C. Fetterman an option to purchase from him (the Stevens dwelling) * * * including furniture now in said tenements, for the total purchase price of \$15,000, said sum to be paid as follows: \$12,000 in cash on or before forty-five (45) days from the date hereof, and \$3,000 on or before six (6) months from the date hereof, the said \$3,000 to be evidenced by a promissory note executed by said G. C. Fetterman and Rosa Fetterman, his wife, and delivered to said Auber B. Stevens simultaneously with the said \$12,000. * * * Unless the said G. C. Fetterman exercises the said option within the period of 45 days from the date hereof, said option shall be null and void and the said G. C. Fetterman shall have no interest, right, title or estate whatsoever in or to the said last described real property or any part thereof.

"4. * * *

"5. * * *

"6. The parties hereto will prepare proper escrow instructions and deliver same to California Title Insurance Company for the pur-

pose of further carrying out the terms of this agreement."

Said agreement was deposited in escrow with the Title Insurance Company, above referred to, accompanied by certain instructions, in substance as follows:

"You may deliver the deed of (Pasadena lots) * * * to the grantee therein named at this time, and hold escrow open for completion later, provided said Auber B. Stevens extends time of closing escrow to 45 days from this date (October 30, 1923). You will not be held responsible for any loss on my part for so doing, as I assume all responsibility, and in case I do not deposit in escrow \$12,000 of the \$15,000 to be deposited by me on or before December 15, 1923, and a trust deed and note for \$3,000 secured thereby for balance of said \$15,000 to be shown as a next lien on said (Stevens dwellings), * * * I will not call for return of deed. * * *

"In case you use my deed as above provided for, you will receive a dismissal of suit No. 130-802 Sup. Ct. and file same in said suit."

Fetterman did not exercise the option to purchase the Stevens dwellings given him by the agreement of October 30, 1923, within the 45 days to which the life of said option was limited. Fetterman never at any time deposited with the Title Insurance Company, nor did he ever pay to plaintiff, the sum of \$12,000 which he was to have deposited with said company in pursuance of the agreement, nor was the trust deed for the \$3,000 ever delivered to the Title Insurance Company or to plaintiff. After and upon the expiration of the period of 45 days within which the said Fetterman was at liberty under said agreement to purchase the Stevens dwellings, the action by the plaintiff against George C. Fetterman for damages for the failure of the latter to perform the terms of the agreement between plaintiff and said defendant, executed on and dated the 22d day of August, 1923, was dismissed and the deed by said Fetterman conveying to plaintiff, the Pasadena lots was delivered to the latter, all in pursuance of the terms of the agreement of October 30, 1923.

After the transactions above spoken of were closed, George C. Fetterman, who was, during all the times mentioned herein, a real estate broker, continued to make efforts to negotiate the sale of the Stevens dwellings, although, according to the testimony of plaintiff, he (Fetterman) had never been by plaintiff clothed with authority to do so. While thus engaging his attention, said Fetterman met James A. Keeney, who, with his wife, owned the Keeney property, which is the real property described in the complaint and involved in this action.

"Toward the latter part of December" (1923), proceeds the respondent's brief, which accurately states the facts in this immediate connection, "a tentative deal was arranged by Mr. Keeney and Mr. Fetterman. By the terms of this deal it was provided that Mr. Keeney

should secure a first mortgage loan of \$10,000 upon the Keeney property; that Mr. Keeney should convey the Keeney property subject to said incumbrance to the plaintiff, and should pay the plaintiff the \$10,000 so borrowed, and the plaintiff, in consideration thereof, should convey the Stevens dwellings subject to existing incumbrances to Mr. Keeney. The plaintiff's first knowledge of this deal, as well as of all prior negotiations between Mr. Keeney and Mr. Fetterman, came to him during the latter part of December from Mr. Wm. H. Dennis, the broker mentioned in the original exchange agreement. Mr. Dennis no longer represented any of the parties to this action, nor did he represent Mr. Keeney. He was, however, very anxious that the plaintiff should consummate some sort of a deal involving the Stevens dwellings with Mr. Fetterman, inasmuch as he had agreed with the plaintiff not to demand the payment of the commission which he had earned by securing the acceptance of the original exchange agreement by Mr. Fetterman unless and until the plaintiff should consummate a deal of some kind with Mr. Fetterman. * * *

During the last week in December the plaintiff first discussed this deal with Mr. Fetterman, and, after some bickering, he finally agreed to convey the Stevens dwellings to the Keeney and give Mr. Fetterman a 90-day option to purchase the Keeney property for five thousand and some odd dollars in consideration of the conveyance to him of the Keeney property, subject to the \$10,000 mortgage, and the payment of \$10,000 in cash. The Keeney received nothing in this deal from Mr. Fetterman. No agreement in writing was executed by any of the parties, but suitable escrow instructions were executed by the plaintiff and Mr. Keeney on the 3d day of January, 1924. Mr. Fetterman did not become a party to this escrow until January 29th, when he executed the following instructions:

"You may close escrow in accordance with instructions of James A. Keeney, who is to acquire title to said lots 3, 4, and 5 (the Stevens dwellings), and is conveying as part payment thereof certain property of which he is the owner; the intention being that I pay all charges of which I agree to pay, and you will not be called on to deliver any papers or property to me by reason of this escrow, as I have arranged an option and agreement as to the property in section 4 (the Keeney property), outside of escrow."

"On January 9, 1924, an option agreement was executed by the plaintiff and Mr. Fetterman. By the terms of that agreement the plaintiff gave and granted to George C. Fetterman an option to purchase the Keeney property at any time within 90 days from the date thereof for \$5,033.33, and certain interest and other sums. At the request of Mr. Fetterman, that agreement was amended by interlineation by substituting Rosa Fetterman in the place of George C. Fetterman. Some time thereafter, but under the same date, the option agreement involved in this action was executed by plaintiff to the defendant Rosa Fetterman, the latter acting through George C. Fetterman, her attorney in fact. The latter agreement was intended to, and did, supersede the former. Both agreements were identical in form except that in the latter all the sums required to be paid by the defendant Rosa Fetterman in order

to exercise the option were set out in dollars and cents. That agreement reads as follows:

"1. Auber Browne Stevens agrees to sell and convey to Rosa Fetterman that certain real property situated in the county of Los Angeles, state of California, and bounded and described as follows (the Keeney property). * * *

"2. Rosa Fetterman agrees to pay to and said Stevens agrees to take and accept for said property the sum of \$5,033.33, together with interest upon \$5,000 of said sum at the rate of 7 per cent. per annum from the date of this agreement to the date of payment of the principal sum of \$5,033.33. Said Rosa Fetterman further agrees to repay to said Stevens (1) the sum of \$98.61 paid by Stevens to James A. Keeney and Louella Keeney on account of the premium upon unexpired fire insurance on the house situated on the above-described property; (2) such sum or sums as said Stevens may be required to pay on account of taxes and assessments levied upon and against the above-described property; and (3) such sum as said Stevens shall be required to pay as interest upon that certain \$10,000 mortgage executed by James A. Keeney and Louella Keeney to Azusa Valley Savings Bank of Azusa, Cal.

"3. The term of this option is 90 days from and after the date hereof.

"4. If the said Rosa Fetterman pays the said sum of \$5,033.33 and the interest accrued thereon, and repays the amount paid on account of premiums on fire insurance and taxes and assessments, if any, to said Stevens during the term of this option, said Stevens promises and agrees to execute and deliver to said Rosa Fetterman forthwith a grant deed conveying said property to said Rosa Fetterman, subject, however, to the liens and incumbrances herein specified.

"5. If said Rosa Fetterman fails to pay the said sum of \$5,033.33 and accrued interest, and fails to repay such sum or sums as said Stevens shall have paid on account of premiums on fire insurance and taxes and assessments during the term of this option, then this option and all the rights of the parties thereunder shall forthwith cease and determine."

The defendants, on the 8th day of April, 1924—the last day of the period of time within which they were authorized by the above option agreement to exercise their right or option to purchase the Keeney property—filed the said option agreement with the county recorder of Los Angeles county for recordation, and the same was duly recorded by said recorder. The evidence without conflict shows that the defendants, or either of them, never exercised the option within the time specified and limited by the option agreement, and that there never was any attempt by either to exercise said option until the 22d day of May, 1924, or approximately a month and a half after the option had expired by force of its own terms, and 21 days subsequent to the commencement of this action, when the defendant George C. Fetterman addressed and mailed a letter to the plaintiff to the effect that he was "now prepared to pay" plaintiff the sum of \$5,033.33, together with interest upon the \$5,000 and the amount

of money paid by plaintiff for insurance and taxes on the Keeney property, and offering to deposit the money in any responsible bank or title company, in the discretion or at the pleasure of plaintiff, the latter to deposit a deed to the Keeney property "as per our agreement" (the option agreement of January 9, 1924).

As before stated herein, the purpose of this action was to remove from the real property described in the complaint the cloud created and existing by reason of the recordation by the defendants in the office of the county recorder of Los Angeles county of said agreement of option.

The complaint is in the usual form of actions instituted under section 738 of the Code of Civil Procedure for the purpose of determining a claim by a party to an interest or estate in real or personal property, and sets forth facts substantially as they are above stated respecting the option agreement last hereinabove referred to and the outcome thereof.

The answer denies that plaintiff is or at any time ever was the owner of the real property described in the complaint, alleges that defendants acquired title to said property by purchase from said Keeney, on the 9th day of January, 1924; that at that time defendants were indebted to the plaintiff in the sum of \$5,000 and two other smaller sums totaling \$131.94, and, to secure said indebtedness, defendants caused said Keeney to convey said property to plaintiff, said sums so secured to be paid within 90 days after January 9, 1924; that defendants have not paid said sums to plaintiff, averring, however, that, on the 22d day of May, 1924, they offered to pay plaintiff the full amount of their indebtedness to him, as indicated above, but that plaintiff refused to accept the same. The relief prayed for by defendant is: That the deed by Keeney conveying said property to plaintiff be determined and declared to be a mortgage to secure the payment of the indebtedness of defendants to plaintiff; that defendants be given the right to pay said indebtedness and discharge said mortgage, and that, upon the payment of said total indebtedness or any sum or sums found to be due to plaintiff from them, said defendants are entitled to a deed from plaintiff reconveying said real property to them. The plaintiff, upon the assumption that the answer of defendants was as well a cross-complaint, filed an answer to the affirmative averments of defendants' pleading.

The findings are specific, and embrace a decision favorable to plaintiff upon every vital fact in the case. Among other things, the court found that at some time prior to the 3d day of January, 1924, the defendant George C. Fetterman learned that the Keeneys were desirous of selling or otherwise disposing of the property involved herein; that he succeeded in bringing the Keeneys and plaintiff

together in negotiations for the exchange of their respective properties, and that on the date just named the Keeneys and the plaintiff entered into the exchange agreement above mentioned and finally consummated the same as above indicated; that defendant George C. Fetterman "did not pay, give, transfer, convey, or assign to the plaintiff or to the said Keeneys anything of value whatsoever as a consideration or inducement for the transfer of said properties other than his services as a real estate broker"; that, at the time said exchange was effected, said defendants were not, and neither of them was, indebted to plaintiff in any sum or amount whatsoever, and "neither of them is now" so indebted.

The defendants contend, as is indicated by their answer, that they acquired the real property in dispute by purchasing the same from the Keeneys, that, being indebted to the plaintiff in the total sum of \$5,131.94, they authorized the Keeneys to convey the property to plaintiff, to be by him held as security for the payment to him of said indebtedness, and that the agreement of January 9, 1924, while upon its face an option agreement only, was in fact intended and understood by the parties to be a defeasance agreement, and that it and the deed from the Keeneys to plaintiff should together be considered as a mortgage or trust deed to secure the payment of the several sums therein mentioned, and totaling, as stated, the sum of \$5,131.94. They undertook, in the court below and undertake here, to connect the transaction culminating, through the efforts of George C. Fetterman, in the conveyance of the Keeney property to plaintiff with the previous transactions involving an attempt upon the part of George C. Fetterman to purchase from the plaintiff the Stevens dwellings, and which, as above shown, failed of consummation, contending, however, that the conveyance by said Fetterman to plaintiff of the Pasadena lots was not part of the consideration moving from him for the dismissal of the damage action above explained, but as in part payment for the Stevens dwellings, there remaining still to be paid on that transaction under the agreement relating thereto the sum of \$15,000; that the payment by the Keeneys to the plaintiff of the sum of \$10,000 on the deed resulting in the conveyance of the Keeney property to plaintiff constituted a payment on the said \$15,000 then still due on the Stevens dwellings transaction, and that there then remained due plaintiff from defendants on the latter transaction the sum of \$5,000, together with some smaller sums incidentally accruing in the Keeney transaction, aggregating \$131.94, making, as seen, a total of \$5,131.94, to secure which the deed from the Keeneys to plaintiff was given and the defeasance (option) agreement between plaintiff and defendants was executed to become effective as in destruction of the

force of the Keeney deed upon the payment of said sum by defendants to plaintiff.

[1-4] As will be seen, the important ultimate question submitted for decision by the trial court was whether the transfer of the Keeney property to plaintiff was intended by the defendants and the plaintiff to operate as a mortgage and as security for a debt due the latter from the former. Obviously, if defendants were in no way indebted to plaintiff by reason of the Stevens dwellings transaction under the agreement of August 23, 1923, then the very foundation upon which they have planted their position in this case, as indicated by their special defense or cross-complaint, is demolished. If there was no debt or other legal obligation to be paid or performed by defendants to or for the plaintiff, then, of course, the conveyance could not be a mortgage. *Ahern v. McCarthy*, 40 P. 482, 107 Cal. 382; *Henley v. Hotaling*, 41 Cal. 22, 27; *Montgomery v. Spect*, 55 Cal. 352, 353; *Todd v. Todd*, 128 P. 413, 164 Cal. 255, 258; *Chapman v. Hicks*, 182 P. 336, 41 Cal. App. 158, 162. It is also true, as a legal proposition, that, while a deed absolute upon its face may be shown by parol to have been intended by the parties thereto to stand as security for the payment of a debt and therefore to operate as a mortgage only, and not as an absolute conveyance of the fee, or whatever mortgageable estate or interest the grantor may have therein (*Ahern v. McCarthy*, 40 P. 482, 107 Cal. 382, 383; *Pomeroy's Equity Juris.* [2d Ed.] § 1196), it is also true that the presumption of law, independent of proof, is that a deed granting real property is what it purports to be, viz. an absolute conveyance, and that this presumption must prevail unless the evidence to the contrary is sufficient in probative force to overcome or entirely destroy it. *Wadleigh v. Phelps*, 87 P. 93, 149 Cal. 627, 637. Equally settled are these propositions: (1) That the burden of proving that a deed was intended by the parties to operate solely as a mortgage is upon the party taking the affirmative of that issue (*Woods v. Jensen*, 62 P. 473, 130 Cal. 200, 203); (2) that, to justify a court in determining from oral testimony that a deed purporting to convey real property absolutely in fee simple was intended to be something different, as a mortgage or trust, "such testimony must be clear, convincing, and conclusive—something more than that modicum of evidence which appellate courts sometimes hold sufficient to warrant a finding where the matter is not so serious as the overthrow of a clearly expressed deed, solemnly executed and delivered" (*Sheehan v. Sullivan*, 58 P. 543, 544, 126 Cal. 189, 193; *Mahoney v. Bostwick*, 30 P. 1020, 96 Cal. 53, 58, 31 Am. St. Rep. 175; *Sherman v. Sandell*, 39 P. 797, 106 Cal. 373, 375; *Ganceart v. Henry*, 33 P. 92, 98 Cal. 281, 284; *Emery v. Lowe*, 73 P. 981, 140 Cal. 379, 384-385; *Kohn v. Parent*, 163 P. 1008, 174 Cal. 570); (3) that whether the evidence

is of such character and strength as to produce the conviction that a deed was in fact intended as a mortgage is a question for the trial court to determine (*Mahoney v. Bostwick*, supra; *Brisson v. Brisson*, 27 P. 186, 90 Cal. 323). In other words, it is solely the function of the trial court to determine whether the evidence introduced to overcome the presumption that a deed is what it purports to be or that it was not the intention of the parties that it should operate as a mortgage is or is not clear, satisfactory, and convincing. See, also, *Barry v. Beamer*, 96 P. 373, 8 Cal. App. 200, 213.

As is to be inferred from the above general statement of the facts, the Fettermans do not claim that they were or became indebted to the plaintiff in the aggregate sum named in their answer or cross-complaint or in any sum by reason of any transaction other than that eventuating in the execution by George C. Fetterman and plaintiff of the agreement last hereinabove considered. It will be noted that the last agreement between plaintiff and George C. Fetterman relative to the purchase by the latter of the Stevens dwellings (hereinabove quoted in part), after specifically setting forth the consideration therefor, to wit, on the part of plaintiff, the dismissal of his damage suit against George C. Fetterman and giving to the latter an option of 45 days from the date of the agreement to purchase the Stevens dwellings on the terms therein specified, and on the part of said Fetterman to convey to plaintiff the Pasadena lots, expressly states:

"Unless the said G. C. Fetterman exercises the said option within the period of 45 days from the date hereof, said option shall be null and void, and the said G. C. Fetterman shall have no interest, right, title, or estate whatsoever in or to the last-described real property or any part thereof."

It will further be noted that in his escrow instructions (also in part quoted above) accompanying said agreement, and addressed to the Title Insurance Company, holder of the escrow, it is stated that George C. Fetterman, in case he did not, within the time specified, comply with the terms of said agreement as to prepayments to be made and other cognate conditions to be performed, he would not call for a return of his deed conveying the Pasadena lots to plaintiff. Thus it is plainly apparent, from the face of the last agreement and the escrow instructions themselves, that the intention of the parties was that either the consummation of said agreement by a compliance with its terms by Fetterman or the latter's failure to comply therewith within the period of time named therein, would close or terminate the deal respecting the Stevens dwellings, and that the dismissal of the damage suit referred to would be all that would be left to be done by plaintiff in the performance of the consid-

eration for the deed of said Fetterman transferring to the former the latter's Pasadena lots. The terms of said agreement and the escrow instructions relative to the same are in clear, unambiguous, and unqualified language. Construction is not necessary to get their meaning and intent. They were self-operating; the holder of the escrow having no discretion as to the matter of the delivery of the Fetterman deed to plaintiff after the lapse of the time within which such delivery should be made in case the grantor therein failed within said time to meet the conditions without the performance of which he would not be entitled to a conveyance of the Stevens dwellings. But defendants stress as of singular significance, in support of their contention, that the Keeney transaction was related to and the final act in the consummation of the agreement of August 22, 1923, the following which is the concluding language of the written notice served by plaintiff upon defendants, and dated October 8, 1923, demanding of them, on penalty of an action for damages for the breach thereof in case they failed to heed such notice, that they perform the terms of said agreement on or before October 13, 1923, to wit:

"He (plaintiff) notifies you, however, that he will hold you at all times bound by the terms of said agreement and he will at all times hold and consider the said agreement binding and in full force and effect."

The above language cannot reasonably be viewed as meaning anything more than that the plaintiff would insist upon the enforcement of the agreement to which it related. Manifestly, the moment said contract was carried out or terminated in any way, it became *functus officio*. Its existence thereafter could not be to any purpose, and it would therefore be absurd to say the effect of the above language of the notice demanding of defendants compliance with the terms of said contract would be to keep it alive after that time. This view of the meaning, the effect, and the scope of said language coincides with the court's findings which necessarily involve a construction thereof at variance with the effect which defendants would impart to it. And this brings us to the point where it should be considered whether the findings are afforded sufficient support by the proofs.

[5] The findings are, of course, to be interpreted to mean that, according to the judgment of the trial court, to which properly the determination of the questions of fact was submitted, the defendants failed to sustain the burden cast upon them of countervailing or overcoming the presumption that the Keeney deed is what upon its face it purports to be, to wit, an absolute conveyance of the land therein described to plaintiff. The duty of this court is limited to the determination of whether there is sufficient

evidentiary support to the findings, although, in asking us to hold that the findings are not so supported, the defendants necessarily assume that this court can say, as a matter of law, that the evidence introduced by them to support their attack upon the presumption above referred to was of so satisfactory and convincing a character as to have justly persuaded the court below to the conclusion that thus the force of said presumption was entirely destroyed, and that, per consequence, the evidence preponderated in favor of their position that the Keeney deed to plaintiff was intended by the parties to operate as a mortgage to secure a debt owing from defendants to plaintiff. The record here affords no ground for such a course.

The several transactions involved herein were, on behalf of defendants, conducted entirely by George C. Fetterman. The defendant, Rosa Fetterman, was not called as a witness, doubtless because she took no direct or active part in said transactions. Principally upon George C. Fetterman's version of the transactions as given at the trial and the several written agreements and escrow instructions the defendants relied in the court below to sustain their special defense or the allegations of their cross-complaint, and upon which they rely here in support of their contention that the findings are not well grounded, evidentially. It is not necessary to enter herein upon a minute examination or to present a detailed statement of the facts to which said defendant testified. It will be enough for the purposes of the present consideration to state that he testified that there never was at any time, from the date of the agreement between plaintiff and defendant G. C. Fetterman of date October 30, 1923, and the time when Keeney deeded his property to plaintiff, a termination by any means of the agreement between plaintiff and defendants for the acquisition of the Stevens dwellings by defendants; that, prior to the execution and delivery of the Keeney deed to plaintiff, the latter was informed by George C. Fetterman that he (said Fetterman) had arranged to purchase the Keeney property, and that upon such purchase said property would be conveyed to plaintiff as part of the consideration for the conveyance by plaintiff to defendants of the Stevens dwellings; that subsequently the Fettermans did purchase the Keeney property, but caused the same to be directly conveyed to plaintiff in pursuance of the agreement of option of January 9, 1924. Said Fetterman further testified that the Pasadena lots of Rosa Fetterman were conveyed to plaintiff as part of the consideration for the conveyance to them of the Stevens dwellings and not as a consideration for a compromise of the damage suit by plaintiff against George C. Fetterman. In addition to said Fetterman's testimony, all the agreements and escrow instructions, of which there were many, and of which a number were

modifications of like instructions previously deposited with the holder of the escrow by both plaintiff and defendants, such modifications being made to conform to modifications of the several written agreements, were introduced in evidence by the defendants upon the theory, of course, that they would sustain the case of the latter. A number of witnesses testified for defendants to certain matters pertaining to some of the transactions.

[6] The plaintiff's testimony upon all the important facts involved a flat contradiction of George C. Fetterman's testimony (except certain admissions made by said Fetterman) as well as much of that given by the other witnesses of defendants, and his testimony as to certain facts was corroborated by the testimony of his attorney, who, it appears, was conversant with all the several transactions, he having acted therein as the legal adviser of the plaintiff. His testimony derived further corroboration from the several written agreements as they were impliedly construed, and reasonably so, apparently, by the court in its findings, and also certain circumstances of potent significance. We have already seen that there is nothing on the face of the agreement of January 9, 1924, or the escrow instructions deposited by defendant therewith, from which, when considered alone, or by themselves, the inference follows that, after the expiration of the time within which said agreement might be performed, any further negotiations for the acquisition by defendants, or either of them, of the Stevens dwellings, were still to exist or to continue. We have also seen that plaintiff testified that the negotiations for the exchange of the Stevens dwellings for the Keeney property on the terms and conditions above specified were inaugurated by George C. Fetterman without his (plaintiff's) authority and entirely independent of any consideration of any of the agreements or transactions previously made and had by and between plaintiff and the defendants relative to the plaintiff's property. Stevens positively testified that the defendants never owed him any money on account of the Keeney deal, or on account of any of the transactions mentioned herein, except what he claimed for the damage suffered by him from the breach by George C. Fetterman of the agreement of August 22, 1923. Besides that testimony is that of both Keeney and George C. Fetterman that the latter did not pay to the former as much as a single cent as a consideration for the transfer of the Keeney property to himself or to plaintiff. Moreover, Keeney testified (and in this he was corroborated by George C. Fetterman) that it was understood and agreed by and between himself, said Fetterman, and plaintiff that, for a few months after the making of the conveyance of his property either to the Fettermans or plaintiff, he (Keeney) was to and in fact did

continue to occupy the premises and pay the rent to plaintiff, the defendants Fetterman or either of them never at any time exacting or asking for the payment of said rent to them. This is how George C. Fetterman testified on that subject:

"Mr. Keeney did not at any time pay me any rent for the use and occupation of that property (Keeney property), nor did any one else. I did not claim or demand the right of possession of the property from Mr. Stevens, never made no demand on him."

He further testified that he never at any time paid any taxes on the Keeney property, either before or after Keeney conveyed it to plaintiff, nor, he continued, did he offer to pay the taxes assessed thereon; that he never paid any interest on the \$10,000 mortgage on said property subject to which plaintiff took the conveyance from Keeney, although, he stated, he knew that said mortgage was a subsisting lien upon the Keeney property when he caused the same to be conveyed to plaintiff. Keeney testified that the bank holding the \$10,000 mortgage notified him, after he had conveyed to plaintiff, that there was interest due on the note which said mortgage was given to secure; that he did not call the attention of George C. Fetterman to said notice and demand for the payment of interest, but did notify plaintiff thereof; that he (Keeney) had paid the taxes on the property, and that he looked to plaintiff for reimbursement for the expenditures so made, and made no demand upon the Fettermans or either of them for such reimbursement. He stated that he "had no transactions with Mrs. Fetterman," and received no consideration from her or from her husband for the property transferred by him to plaintiff. A further review of the testimony is not required. Enough thereof has been herein considered to confirm the conclusion that the findings are strongly fortified. There is no intrinsic weakness in the testimony of the plaintiff. It seems to be positive, consistent, and probable. Indeed, the circumstances surrounding the Keeney deal to which we have above adverted vouchsafe the verity of plaintiff's testimony. On the other hand, the testimony of George C. Fetterman does not appeal to us as being reasonable or probable, and it is to be presumed the trial court so viewed it. If the transactions leading to and embracing the act of the conveyance of the Keeney property to plaintiff were intended to have the effect claimed for them by defendants, it would seem to be highly probable that some of the several writings between the parties would have so indicated in language as to the meaning or real purport of which there could be no serious doubt or misapprehension. This would, it seems natural to suppose, be the course the most likely to be pursued in cases in which there were at stake property interests of the magnitude of those involved herein and of a correspond-

ing degree of importance to both parties, particularly where, as here, the party claiming from the transaction a benefit not expressly or even impliedly given in the writing covering the terms of such transaction is a real estate broker of the usual business acumen of the average person engaged in the prosecution of that profession. But further comment on the evidentiary phases of the case need not be pursued. It is enough to say generally, as before we have declared, that all the findings vital to the judgment are afforded sufficient support by the evidence.

The claim that there is no evidence which lends support to the finding that the Keeney deal was conducted by George C. Fetterman in the capacity of a real estate broker, and that he had no further or different connection with that transaction, is not well founded, although it is not of material importance here. Said Fetterman testified that his business, at the times of the initiation and the consummation of the Keeney transaction, was that of a real estate broker. The evidence shows it was through him that the plaintiff and the Keeneys were brought together on the Keeney transaction. These facts, together with the evidence from which the court deduced its finding that said transaction involved a transfer of the Keeney property, not to George C. Fetterman, but directly to plaintiff, upon a consideration moving wholly from the latter, are sufficient to support the finding as to the capacity in which Fetterman acted in that transaction. But, with the well-supported finding that the Keeney property was conveyed directly to plaintiff, and the finding that the Fettermans were not at the time of that transaction indebted to plaintiff in any sum whatsoever, and that the Keeney deed was exactly what it purported to be, it would not make the slightest difference, so far as the decision here is concerned, whether Fetterman acted as a real estate broker in the Keeney transaction or performed the service incident to bringing the principal parties together in that deal merely as an act of friendship and without compensation or expectation of receiving any.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

77 Cal. App. 113

PEOPLE v. RUSSELL. (Cr. 1283.)

(District Court of Appeal, Second District, Division 1, California. March 16, 1926.)

1. Criminal law —1159(4)—Appellate court is limited to solving questions of law; jury and trial judge alone determining credibility of witnesses.

Function of appellate court is limited to solving questions of law; jury and trial judge

being charged with exclusive responsibility of determining credibility of witnesses.

2. Criminal law —1159(3)

Conclusion of jury that defendant was present when robbery was committed cannot be disturbed on appeal, though flatly contradicted.

3. Criminal law —517(1)—Confession, to be evidence, must be free and voluntary and not made under promise of immunity or hope of reward.

Before confession may be offered in evidence, foundation must be laid for its introduction by showing it to be free and voluntary and not under promise of immunity or hope of reward.

4. Criminal law —273.

Plea of guilty to grand larceny is confession of guilt of offense included in charge of robbery.

5. Criminal law —273.

Whether plea of guilty of grand larceny was freely and voluntarily made depends on circumstances surrounding defendant at or near time when plea was made.

6. Criminal law —406(4)—Where trial judge fully considered the only evidence surrounding defendant's change of plea from not guilty of robbery to guilty of grand larceny, admission of plea as confession rested in sound discretion of court.

Where trial judge fully considered transcript of reporter's notes which were only evidence of proceedings surrounding defendant's change of plea from not guilty of robbery to guilty of grand larceny in ruling on defendant's objection that no sufficient foundation had been laid for admission of confession, determination whether plea should be admitted in prosecution for robbery rested in sound discretion of court.

7. Criminal law —1144(12)—Judicial discretion in admitting confession of grand larceny in trial of robbery is presumed not to be abused, where record of circumstances of confession is not before court.

Where record of what transpired at time defendant changed plea from not guilty of robbery to guilty of grand larceny is not before court, presumption is that judicial discretion, in admitting confession in prosecution for robbery, was not abused.

8. Criminal law —531(3)—Evidence held to justify finding that change of plea from not guilty of robbery to guilty of grand larceny was freely and voluntarily made.

Evidence held to justify finding that defendant was not induced to change his plea of not guilty of robbery to guilty of grand larceny by reason of any promise of immunity or hope of reward, but that change of plea and confession of guilt were made freely and voluntarily.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Bennie James Russell was convicted of robbery, and he appeals. Affirmed.

Arthur C. Webb, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

HOUSER, J. Defendant appeals from a judgment of conviction of the crime of robbery, and from an order denying his motion for a new trial.

The first point urged by appellant as a reason for the reversal of the judgment is that the evidence was insufficient to justify the verdict—it being his contention that the identification of defendant as the man who committed the offense was weak and unsatisfactory as against the positive denials by defendant of his guilt and a strong “alibi” which was presented by several disinterested witnesses. It is evident, therefore, that the real complaint of appellant is that, because the preponderance of the evidence was in favor of the innocence of defendant, the verdict was unjustified, and not as a matter of law that the evidence was insufficient to support the verdict.

[1, 2] The rule is thoroughly settled that an appellate court cannot be a trier of fact—its function being limited to the solving of questions of law only—and that the jury and the trial judge are charged with the exclusive responsibility of determining the credibility of the various witnesses. In the instant case it is unquestioned that the evidence introduced by the prosecution was sufficient in itself to establish the guilt of defendant. Assuming that evidence in behalf of defendant flatly contradicted that which was offered by the prosecution, and, in addition thereto, that substantial evidence was produced of the fact that defendant was not present when the crime was committed, nevertheless the duty of weighing all the evidence in the case and determining where lay the truth rested solely with the jury. Its conclusion is final in the premises, and cannot be disturbed by this court.

It appears that, some time after defendant had entered his plea of not guilty to the charge of robbery, which had been preferred against him, through an arrangement with the office of the district attorney, which arrangement was concurred in by the judge of the trial court, defendant was permitted to withdraw the plea which he had formerly made and in lieu thereof to plead guilty to a charge of grand larceny. In that connection it is contended by the appellant that the trial court erred to the prejudice of defendant in permitting the deputy district attorney to read to the jury a transcript of the record of the proceedings had in the lower court, a copy of which being as follows:

“Mr. Vobayda (reading): ‘The Court: I would like to take his statement. You tell me, Russell, what the facts were about this of-

fense. Tell me right now all about it, briefly. Having pled guilty to it, there is nothing to conceal any more. A. I was taking the money. Q. How? A. I was taking the money. Q. Come up closer, so that I can hear you. Did you know this man? A. No, sir. Q. No? A. No, sir. Q. Speak up now, so that I don't have to keep cautioning you. How did you come to go in his place of business? What did you go in there for, to rob him? A. No, sir. Q. What did you go in there for? A. I just went in there to buy some things. Q. To buy some things? A. Yes. Q. Did you buy anything? A. No, sir. Q. What did you do after you got in? (No answer.)’”

The record discloses the fact that at the time such evidence was first offered defendant objected thereto on the ground that no proper foundation had been laid for its introduction, in that the admission or confession by defendant was not shown to have been made freely and voluntarily, or without any promise of immunity or hope of reward having been made or held out to defendant to induce him to make such confession. Although the record here is incomplete with reference to the proceedings which supposedly occurred in connection with the change of plea by the defendant, sufficient appears that it may be inferred that considerably more conversation took place between the judge of the trial court and defendant at that time than was offered in evidence. A transcript of the entire proceedings, together with a memorandum indicating the parts of the transcript which were and those parts which were not offered in evidence, were handed to the judge for his examination; whereupon an adjournment of court was had for the express purpose of enabling the court in chambers, with the assistance of respective counsel, to determine how much, if any, of defendant's statements or admissions had been made freely and voluntarily, without promise of immunity or hope of reward. Subsequently and during the trial of the action, the question of the admissibility of the record showing what had occurred at the time when defendant so changed his plea was again before the court, at which time the following occurred:

“Mr. Broker (Attorney for Defendant): I don't mean to object on a technical ground, your honor. The reason I wanted the objection in here was this: That the objection is based upon the fact that the statement or confession, as it purports to be, was not made freely and voluntarily. That is the reason.

“The Court: Well, the court has gone into it up to that point. It is the court's ruling that it was free and voluntary up to a certain point, which I have indicated. After that point, the court has not permitted anything to be said, but up to that time it was, in my opinion, a voluntary statement. Something was said at that time which changed the conditions, and whatever followed after that might be considered not free and voluntary. Up to that point, and that is the point I am allowing, in my opinion that was free and voluntary.

"Mr. Broker: But, if your honor please, the witness on the stand here testified that he was allowed, before that, I believe—and I believe the record will bear me out and I don't believe Mr. Vobayda (deputy district attorney) will dispute it—

"The Court: Well, he pled guilty on the advice of his counsel, as I say, and if there is any objection and you want the minutes, you can have it.

"Mr. Broker: No; I don't want the minutes, your honor.

"The Court: Very well.

"Mr. Broker: But the witness stated the defendant was allowed to plead guilty to grand larceny, and that was some intimation—

"The Court: Well, when we get to that point we will clear it up. Up to that point the objection is overruled."

After the admission or confession of defendant had been introduced in evidence, and the case for the prosecution had been closed, defendant testified, not for the purpose of enabling the trial court to determine the admissibility of his purported confession of guilt, but for the apparent general purpose of establishing his innocence of the crime of robbery, as follows:

"A. Well, I—I was brought into court and my attorney, Mr. Grasty, at that time told me that he had talked to the district attorney and the judge, and that I probably wouldn't get a trial that day, I would probably be in jail for two or three more months before I got a trial, and that he had it arranged so that if I pleaded guilty to grand larceny I would get probation. He told me that I probably wouldn't get probation right then, but he would have me sent to the road camp for a month, or probably two months, so that I might earn some money. At that time my wife was sick in the hospital, and I had an account with the Eastern Outfitting Company, and I didn't have any money, and they was writing me letters up to the jail here that they would have to take the furniture away—

"The Court: Speak up. A. So he told me to plead guilty to grand larceny.

"Q. By Mr. Broker: And, relying on that, you did plead guilty to grand larceny at that time? A. Yes, sir."

In rebuttal thereof, the attorney who represented defendant at the time he made such change in his plea testified, in substance, that, in connection with the arrangements among all the parties, including defendant, his said attorney, two deputies from the district attorney's office, and the trial judge, although defendant had suggested to his attorney the possibility of probation being granted, after consultation with the deputy district attorney in charge of the prosecution, defendant had been informed by his attorney that probation was impossible and that nothing would satisfy the district attorney's office "except this man going to San Quentin," and that defendant "had better go to trial"—defendant said, "I will change my plea;" and that thereupon

defendant withdrew his former plea of not guilty to the charge of robbery and in place thereof substituted his plea of guilty to the lesser charge of grand larceny.

[3-8] It is a well-recognized rule of law that, before a confession may be offered in evidence, a foundation must be laid for its introduction by a showing that the confession was freely and voluntarily made and not under a promise of immunity or hope of reward. In the instant case the defendant's plea of guilty to the crime of grand larceny could be understood in no sense other than that it was a confession of guilt of at least an offense included in the charge of robbery which had been preferred against him. The question of whether such confession had been so made as under the legal safeguards for defendant's protection it could be admitted in evidence against him depended entirely upon the circumstances surrounding defendant at or near the time such confession was made. As has been heretofore indicated herein, the record in this case is practically silent with reference thereto. Enough appears that it may be concluded that a transcript of the reporter's notes of the proceedings in question was placed in the hands of the trial judge at the time when the confession of defendant was sought to be introduced on the trial of the action. The fact that defendant changed his plea from not guilty of the crime of robbery to that of guilty of the offense of grand larceny; that the proceedings had on such occasion were transcribed from the reporter's notes thereof; that the judge of the trial court ordered an adjournment of court for the express purpose of looking "this thing over," and upon reconvening of court stated that he had "gone into it," etc., show conclusively that whatever had been said or done in the course of the proceedings before the court at the time the change of plea by defendant was had were in the mind of the trial judge and fully considered by him with reference to defendant's objection that no sufficient foundation had been laid for the introduction of the evidence of defendant's confession. It should be borne in mind that no evidence touching the question of the sufficiency of the required foundation other than what was contained in such transcript was before the court prior to the time when the confession was admitted in evidence, but that, after the case for the prosecution had been closed, defendant gave some testimony which, if it had been seasonably given might have had a bearing on the question of the admissibility of the confession. Also that the former attorney of defendant gave testimony with reference thereto. In such circumstances the determination of whether the confession of defendant should be admitted in evidence rested in the sound discretion of the court. The record of what transpired at the time defendant changed his plea not be-

ing before the court, the presumption in such circumstances must obtain that judicial discretion was not abused. As the entire record was before the trial court, the judge thereof was undoubtedly fully conversant with what had been said at and immediately prior to the time when defendant changed his plea. At any rate, in view of the conflict between the testimony which was later given by the defendant and by his former attorney, it is clear that the trial judge was justified in his conclusion that defendant was not induced to change his plea by reason of any promise of immunity made to him or by any hope of reward, but, to the contrary, that such change of plea and confession of guilt were made by him freely and voluntarily.

In the case of *People v. Jim Ti*, 32 Cal. 60, where the court was considering the admissibility of a certain confession, among other things, it is said:

"And this is one of the class of questions upon which the judge is to exercise a judicial discretion, to be guided by all the circumstances of the case."

And in the later case of *People v. Siemsen*, 95 P. 863, 866, 153 Cal. 387, 394, the court made the statement that:

"Whether a confession is free and voluntary is a preliminary question addressed to the trial court and to be determined by it (*People v. Miller*, 67 P. 12, 135 Cal. 69), and a considerable measure of discretion must be allowed that court in determining it. The 'admissibility of such evidence so largely depends upon the special circumstances connected with the confession, that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed, in the first instance, to the judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forbore to mark with absolute precision the limits of admission and exclusion.' *Hopt v. Utah*, 4 S. Ct. 202, 110 U. S. 574, 583 [28 L. Ed. 262]."

In the case of *People v. Boyd*, 227 P. 783, 67 Cal. App. 292, 302 (comment by Supreme Court in denying rehearing), the question of the admissibility of an offer on the part of the defendant to plead guilty to one of the offenses charged against him in the information, was considered by the court. It was ruled that such an admission, if voluntarily made, was competent evidence against the defendant, and the fact that such admission was made in court could not detract from either its relevancy or its competency.

No other reasons for reversal being suggested by appellant, it is ordered that the judgment and order be, and the same are, affirmed.

We concur: CONREY, P. J.; YORK, J.

LONG v. ULMER MACHINERY CO.

(Civ. 3083.)

(District Court of Appeal, Third District, California. March 12, 1926.)

1. Sales ⚡156—Seller's setting up of pump with column so short that it would not operate, though of length required by contract, held not an "installation" thereof.

Seller's setting up of pump having column so short that it would not hoist water to surface, though of length provided for in contract, held not an "installation," though within meaning of contract, in view of provision for payment for extras found necessary; "installation" of machinery meaning to place in position where it will reasonably accomplish purposes for which it is set up.

2. Appeal and error ⚡1170(10)—Error, if any, in finding as to date when pumping plant was to be installed held harmless, in view of want of any effective installation (Civ. Code, § 1657; Const. art. 6, § 4½).

Error, if any, in court's finding that seller was to install pumping plant by particular date held not prejudicial, where absence of any effective installation was established, in view of Civ. Code, § 1657, Const. art. 6, § 4½.

3. Sales ⚡62—Sale of pump and engine held single contract as affecting buyer's right to rescind for want of proper installation.

Sale of pump and engine held a single contract, though evidenced by separate written agreements, as affecting buyer's right to rescind for want of proper installation.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by J. M. Long against the Ulmer Machinery Company for rescission of contract, wherein defendant filed cross-action. Judgment for plaintiff in both main action and cross-action, and defendant and cross-complainant appeals. Affirmed.

Waldo E. Burford, of Porterville, for appellant.

C. V. Anderson, and Wiley & Harvey, all of Bakersfield, for respondent.

PLUMMER, J. On the 5th day of December, 1922, the plaintiff and defendant entered into an agreement for the purchase and sale of a Johnson pump, which agreement is in the words and figures following, to wit:

"Agreement for the sale, purchase, and installation of Machinery & Electrical Equipment. Ulmer Machinery Co. (Inc.) of Porterville, Tulare county, Cal., party of the first part, and J. M. Long, of Bakersfield, in the county of Kern and state of California, party of the second part, do hereby agree upon the 5th day of December, 1922, as follows:

"The party of the first part agrees to furnish and install the following described machinery on land belonging to the party of the second part, and situated W. of Bakersfield in Kern Co.,

to wit: 1 Johnson pump complete as follows: 232"6" col shaft and tubing; 5#10 HC vane stages; 1 Type F head; 20' suction; installed ready for belt.

"The party of the second part agrees to pay the party of the first part, or order, at their office in Porterville, Cal., for the above-described machinery, and labor, the sum of two thousand fifty-three dollars (\$2,053) on the following terms: \$500.00 cash with order; \$500.00 90 days after installation; bal. in 3 notes of \$351.00 each due 6, 9, and 12 mon. from installation respectively; notes to bear 8% int. per annum; additions of engine to contract to be added to notes later.

"The party of the first part guarantees the above-described pump to have a capacity to deliver approximately 360 gallons of water per minute from 230 feet below the surface to no feet above the surface, provided the well is straight and plumb, supply of water is ample, and sand not excessive. Also agrees to replace any defective parts for a term of two years when brought to their shop at Porterville.

"It is hereby agreed and understood by the said parties that, in case actual conditions are different from those stated above, and that additional expense is necessary in order to meet such conditions, said extra expense shall be paid by the party of the second part. It is also further agreed that, in case of any changes or alterations in this agreement in the way of machinery or labor specified, and not furnished, or furnished and not specified, the regular price of same shall be added or deducted from the contract price, as the case may be.

"It is also agreed that the above machinery is, and shall remain, the personal property of the party of the first part, until all payments as above described shall have been made in full, whether evidenced by note, book, account or otherwise, and, in case payments are not made in the amounts and at the same time as agreed, party of the first part shall have the right to remove the said machinery from whatever it may be located without process of law and retain all payments that have been made to apply as rental and damage to machinery; however, the return of said machinery does not relieve the party of the second part from fulfilling the terms of this agreement.

"This agreement is contingent on delays caused by conditions beyond the control of the party of the first part, and does not become a contract until countersigned by an officer of the party of the first part."

On the same day and at the same time the plaintiff and defendant entered into a sales agreement, which agreement, so far as is necessary to be considered herein, is in the words and figures following, to wit:

Sales Agreement.

Town, Bakersfield, State, Calif. Date 12/5, 1922.

The following described property is hereby delivered by Ulmer Machinery Co., seller, to J. M. Long, buyer, on the following terms and conditions:

Kind of property: One Johnson turbine centrif. pump. Pump head, type F. No. of stages, 5. Size of stages, 19 H C. Motive power, —. Length of column, 232. Size of column, 6 in. Switch board, —. Belt (describe), —. Accessories: —. For the purchase price of two thousand fifty-three dollars, payable as follows:

With order	\$ 500 00
Cash ninety days after installation (con)....	500 00
Note payable, date June 5, year 1923, 8% per annum	351 00
Note payable, date Sept. 5, year 1923, 8% per annum	351 00
Note payable, date Dec. 5, year 1923, 8% per annum	351 00
Taken in part payment (name article).....	

Total \$2,053 00

This agreement further provides that title shall remain in the seller until fully paid for, property to be kept in good condition by the buyer, in default of any payment, property to be returned to seller upon request, and that the agreement for after payments is further evidenced by notes of even date therewith.

On or about the 12th day of February, 1923, the plaintiff and defendant executed an additional writing or agreement relating to the gas engine involved in this case. This agreement, so far as necessary to be considered, is as follows:

Sales Agreement.

Town, Porterville; State, Calif. Date, Febr. 12, 1923.

The following described property is hereby delivered by Ulmer Machinery Co., seller, to J. M. Long, buyer, on the following terms and conditions:

Kind of property: 1 40 H P (sec. Hd) Fairbanks Morse gasoline engine. Pump head, —. No. of stages, —. Size of stages, —. Motive power, —. Length of column, —. Size of column, —. Switch board, —. Belt (describe), —. Accessories: —.

For the purchase price of four hundred seventy-two and 50/100 dollars, payable as follows:

Cash note payable on or before March 15, 1923	\$112 50
Note payable, date May 12th, year 1923, 8% per annum	120 00
Note payable, date Aug. 12th, year 1923, 8% per annum	120 00
Note payable, date November 12th, year 1923, 8% per annum.....	120 00
Taken in part payment (name article).....	

Total \$432 50

This agreement further provides that the title shall remain in the seller until all of the notes are fully paid; that the buyer agrees to keep the property in good condition; that, upon default, the seller may take the property, and all payments might be retained by the seller as compensation for rentals, etc. It appears from the transcript that the plaintiff had, prior to December 5, 1922, installed or dug a well on certain lands and premises controlled by him, the water in which well stood at an elevation of about 232 feet from the surface; that the plaintiff and the defendant, after the plaintiff had finished digging the well in question, entered into negotiations concerning the purchase and installation of a Johnson pump and a gas engine thereafter to be determined upon for the purpose of hoisting the water from said well and installing the same for irrigation purposes. The contracts entered into by the parties made no mention of the time when the installation of the pump and engine

should be completed, but the circumstance that the water was wanted for irrigation purposes, and that the necessity for the use of the water would arise at the beginning of the irrigation season of the following year, to wit, some time along in March, was apparently well known to all the parties. The court admitted testimony to the effect that it was orally agreed that the installation should be completed by the 1st of March of the year 1923. It appears from the evidence that the pump was installed by the 24th day of February, 1923, and the engine referred to was placed in position ready for use on or about the 19th day of March, 1923. After the pump and engine were placed in position, as herein stated, the defendant tested the same for something like 30 minutes, and was not able to raise any water from the well. The pump and engine not having been so installed as to enable plaintiff to hoist any water from the well, plaintiff notified the defendant on or about the 10th day of April, 1923, of the rescission of the contract, offered to deliver the pump and engine to the defendant, placed the same at the defendant's disposal, and demanded return of the payments made thereon, the surrender of the notes, and also the return of certain personal property taken by the defendant as part payment for the Johnson pump. Thereafter, and on or about the 20th day of May, 1923, the defendant pulled out the pump from where it had been installed, but, nothing further being done, on or about the 20th day of June, 1923, the plaintiff began this action. Judgment was awarded the plaintiff as prayed for, and the defendant appeals.

[1] While there is some contradictory testimony in the record, we think it sufficiently appears that C. A. Moore, the defendant's district manager, who negotiated the agreements with the plaintiff, and who testified as to the kind of pump, length of shafting, and tubing necessary for successful operation, knew that the water in the well where the pump was to be installed stood at a point from 230 to 232 feet from the surface of the ground. The record shows that, after the shafting and tubing were withdrawn from the well, the rust marks on the suction pipe at the end of the column showed that the water level was 18 inches below the lowest bowl, and, therefore, the pump would draw no water. As installed, there were 232 feet of column, 6 feet for bowls, and 22 feet of suction pipe. There were six bowls, one foot apart. The well itself was 315 feet in depth. According to the testimony, the bowls referred to must be submerged in order that the revolutions will force the water to the surface. The defendant, through its agent, had complete charge of the installation of the pump, but it does not appear anywhere in the transcript that any effort was made at any time to ascertain the water level. This appears from the testimony of Mr.

Moore in answer to a question of what he knew concerning the length of column required, when negotiating for the sale of the pump. His answer to such question is as follows:

"Only guessing at what it would be by reason of the fact that no man could tell in an undeveloped country what would be necessary. It is impossible. No man could tell it; it is just a guess; I estimated and I thought that was about what it would take."

This witness then testified that he was told by one Harry Lewis, not a party to the contract, that the water level was about 218 feet from the surface. This statement, however, is contradicted, and, as we have said, there is abundant testimony showing the defendant's agent had knowledge of the water level as hereinbefore stated. After the installation of the pump and engine and the trial thereof without the successful hoisting of any water, it does not appear that defendant did anything to remedy the condition, although the plaintiff demanded that some such action be taken. At the conclusion of the trial the court made and filed its findings, and the appellant assigns eleven grounds as to why the judgment should be reversed, among others, that some of the findings are not supported by the evidence, especially the finding that March 1st was fixed as the time when the installation of the pump and engine should be fully completed; also, that the court erred in permitting oral testimony as to conversations between the plaintiff and the defendant's agent of the date as to when the pump and engine should be installed, and as to the fact that the defendant was to furnish the plans and specifications, in order to determine the capacity of the pump necessary to hoist water from the well in question sufficient for irrigation purposes. Objection is also urged to the fact that the court considered the agreement for the purchase of the pump and engine as really one transaction, although the papers were signed at different dates. From the view which we take of the agreements entered into between the parties we think it unnecessary to pass upon the question as to whether the court erred in admitting testimony that March 1st was understood as the date by which time the pump and engine should be fully installed and ready for operation.

The appellant, in considering the agreement for the purchase of the pump, relies upon the fact that it actually furnished 232 feet of column, 5 # 10 H. C. 8 vane stages, 1 type "F" head, and 20 feet of suction pipe, and that the pump in question had a capacity of delivering 360 gallons of water per minute from a distance of 230 feet below the surface, and that, if it installed machinery capable of performing that service, it had completed its contract irrespective of whether the pump so installed

would or would not hoist any water from the well in question. This reasoning is based upon the paragraph of the agreement hereinbefore first set out, wherein it is guaranteed that the pump furnished has such a capacity. In making this argument the appellant entirely overlooks the next following paragraph in the agreement wherein it is set forth that, in case the actual conditions are different from those thus stated above, and that additional expense is necessary to meet such conditions, said extra expense shall be paid by the party of the second part. "It is also further agreed that, in case of any change or alterations in this agreement in the way of machinery or labor specified, and not furnished, or furnished and not specified, the regular price of same shall be added or deducted from the contract price, as the case may be." In the light of this paragraph in the contract it is evident that it was the duty of the party furnishing the pump which it had agreed to install to ascertain the exact length of the column necessary in order to place the bowls in such a position in relation to the water level that they would be properly installed so as to reasonably perform the services for which the installation was being had. It appears from the testimony that the plaintiff had no knowledge of the manner in which the pumping machinery would be installed; that it was necessary to have the bowls submerged in water to make their operation effective, but that the defendant and appellant did have such knowledge. It is further argued that no one can forecast the quantity of water that would be produced by the well, and no one can guarantee that any pump would hoist a certain quantity of water from the well, but that is a different question entirely from the one which goes to the fact that it was the duty of the appellant in installing the pump to so install its machinery as to render it capable of actually hoisting water from the well. Reading the two paragraphs together which we are considering, we think they mean that the appellant undertook to install a pump, and so install it that it would hoist water from the well belonging to the plaintiff, and that the capacity of the pump was such that, from a distance of 230 feet below the surface, the pump would deliver 360 gallons per minute, and that the delivery of water would be decreased in proportion to the distance of the water level from the surface. It appears from the evidence that the pump in question had a lifting capacity of 252 feet. The appellant knew that the pump had to be installed in such manner that the revolving bowls should be submerged, and, when it so performed its part of the contract that these bowls were left in the air above the water, we do not very well see how it can be argued that installation, as that term is interpreted when applied to placing machinery in position, can effectively be

claimed. Installation means, as we understand the word, to place machinery in that position where it will reasonably accomplish the purposes for which it is set up. As defined in 32 C. J. 939 we find that "installation" includes all that we have just stated. The definition there given is as follows: "Installation, as applied to machinery, a word with a technical meaning, referring to the whole of a system of machines, apparatus and accessories set up and arranged for working, as in electric lighting, transmission of power, etc.," and to install means, "to set up or fix in position for use or service." To the same effect is the definition given in Metzler v. Thye, 124 P. 721, 163 Cal. 96, where a covenant in a lease to install an elevator was held to mean that the elevator should be so installed as to be suitable for use.

[2] As the appellant pulled out its pumping plant prior to its ever having been installed, as we think that term must be construed and understood as found in the agreement where the seller covenanted to install a pumping plant and failed to make any effort to properly install the same, when it ascertained that no water could be raised by the pump as it had been set up and installed, the finding of the court as to March 1st being the time when the contract was to be completed is wholly immaterial. The record shows that the plaintiff did not take any steps towards rescinding the agreement or agreements until nearly a month and a half after that date, and a considerable period of time after the appellant had made its alleged installation, and apparently ceased to complete its work. It would appear from the testimony that, when the pump was installed, and the engine started up, the pumping machinery operated without any difficulty, showing that the well was sufficiently perpendicular for successful operation. The testimony of the appellant's witness who made the tests is as follows:

"The pump was working, it was turning.
* * * Probably tried the pump out for half an hour, and maybe a little more. * * * It didn't pump water during that period."

The witness further testified as follows:

"Q. Now, from any subsequent investigation made after that time, other than from the pulling of the pump, you are able to inform the court why the pump did not pump water? A. Yes.

"Q. Why not? A. Because the pump wasn't in the water.

"Q. Because the pump wasn't in the water? A. No, sir.

"Q. When you refer to the pump what do you mean? A. I mean the pump bowls.

"Q. It would have been necessary for the pump bowls to be submerged in the water in order to pump water? A. Yes."

[3] It is next urged that the court erred in finding that the agreement in relation to

the purchase of the gas engine was in fact, though not in time, a part and parcel of the original agreement, and that the parties intended a purchase and sale of the pump and engine as a single unit. The agreement dated December 5, 1922, contains the following:

"Addition of engine to contract to be added to notes later."

The testimony as to what was understood by this part of the contract dated December 5th and that of the later agreement covering the engine is as follows: Mr. Moore, the district manager of the appellant, testified on that subject as follows:

"Q. That engine referred to in this contract is the same engine that was referred to in this original contract, this original contract, which reads: 'Addition of engine to contract to be added to notes later,' that is the same one? A. Yes, sir.

"Q. That is intended to cover the obligation of the Ulmer Machinery Company in that contract in producing an engine? A. Yes. * * *

"Q. The engine described here then is not necessarily the engine described in Defendant's Exhibit 1? A. I don't know how it would be construed, this engine we purchased for Mr. Long as we agreed to do in the original contract, because there was no specification of the engine at first, just 'an engine.'

"Q. You had not agreed on what he should pay, what kind of an engine it should be? A. No.

"Q. That was to be determined later on? A. Yes, sir."

J. A. Ulmer, president of the appellant company, testified as follows:

"Q. Mr. Ulmer, how did you construe at the time this provision, 'addition of engine to contract to be added to notes later'? A. I construed that we were going to get an engine, I didn't know what size it would be, how much it would cost, or anything about it, I couldn't put it in the contract.

"Q. You expected to add that engine to this contract when you signed it? A. I expected to add it to the notes.

"Q. What did you intend by this language: 'Addition of engine to contract?' A. I considered they wanted me to find an engine for them somewhere, I didn't know how big the engine was going to be, or how much it would cost. I couldn't put it in that contract, because I didn't have the information at that time.

"Q. You didn't know what type of engine? A. Didn't know what type it was or what size, or what it cost.

"Q. For that reason it was not specifically described? A. It wasn't described, and the price wasn't on there.

"Q. If you had had an engine at that time for the purpose of describing it, it would have been described? A. If I was selling an engine at a certain specified price, knew what kind of an engine they were going to have, I would have put that in.

"Q. In this first contract in lieu of that it provided that the engine should in the future be

added to the contract? A. The price would be added to the contract, which was done in that third contract.

"Q. This contract was drawn by your agent, wasn't it? A. Mr. Moore.

"Q. Mr. Moore? A. Yes, sir.

"Q. That is his handwriting in there? A. Yes, sir.

"Q. Why did it not state then that it was simply to be added to the price, or the amount of said bill, instead of that it was to be added to the contract? A. Added to the price.

"Q. Yes. A. The price and contract are the same thing.

"Q. Not necessarily. A. I would think so.

"Q. Why was it necessary in the contract to state further it was to be added to the notes later if the contract and the price are the same? A. Why?

"Q. Yes. A. Because I didn't know the price at that time; I didn't know what engine I was going to get; I couldn't add the price at that time because I didn't know anything about what the price was, or the make of the engine, or where it was to come from, or anything else."

There was some other testimony along the same line, but it is no different in effect from that herein set forth.

Without passing, as we have said, one way or the other upon the alleged error of the court in admitting testimony as to the time when the pumping plant should be installed, we think that section 1657, Civil Code, which provides if no time is specified for the performance of an act required to be performed, a reasonable time is allowed, would bring this case within the provisions of section 4½ of article 6 of the Constitution of the state, when the circumstances surrounding the contracting parties are taken into consideration. All the parties knew that the water was wanted for irrigation beginning with the opening of the irrigation season of 1923, which the testimony shows to be about coincident with the beginning of the month of March, and, in view of the fact that an additional one and one-third months were allowed to elapse after that date before notice of rescission was given, the alleged error of the court, if admitted to be error, has not operated in a miscarriage of justice. The testimony which we have set forth, we think, justified the court in coming to the conclusion that the parties contemplated the purchase and sale of a pump and engine as a single unit. If this is not true, then the words concerning the engine and the addition of the purchase price contained in the agreement dated December 5, 1922, become meaningless. What we have said also disposes of the appellant's cross-complaint for the notes alleged to be due at the time of the beginning of this action. We think the judgment should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

77 Cal. App. 41

HUTCHINSON LUMBER CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 5429.)

(District Court of Appeal, First District, Division 1, California. March 18, 1926.)

1. Master and servant $\Rightarrow$ 419—Injury first believed to be temporary held to constitute "new and further disability" when it became permanent disability (Workmen's Compensation Act, § 11, subd. c. [St. 1917, p. 841]).

Injury to knee of employee of lumber company, which was first believed to be temporary held to constitute "new and further disability" within Workmen's Compensation Act, § 11, subd. (c), when permanent disability developed.

2. Master and servant $\Rightarrow$ 419—Injured workman held not required to file application for compensation, based on new and further disability, within six months (Workmen's Compensation Act, § 11, subd. [c] [St. 1917, p. 841]).

Injured workman held not required, by Workmen's Compensation Act, § 11, subd. (c), to file application for compensation, based on new and further disability, within six months after he became aware of it.

3. Master and servant $\Rightarrow$ 419—Injured workman held not guilty of laches in applying for compensation for new and further disability.

Employee who knew in July that knee injury received in preceding October was no better, but, relying on statement of insurance company's doctor that he would be all right, did not ascertain that such injury was permanent until December, held not guilty of laches in waiting till following May to apply for compensation for new and further disability.

Application for certiorari by the Hutchinson Lumber Company and another against the State Industrial Accident Commission and another to review the named defendant's order awarding compensation for injuries to John Bohan. Award affirmed.

H. C. Kelsey, of San Francisco, for petitioners.

Warren H. Pillsbury, of San Francisco, for respondents.

KNIGHT, J. Petitioners hereby apply for a writ of review whereby they seek to have annulled an award made by the Industrial Accident Commission.

[1] On October 28, 1923, respondent John Bohan, 63 years of age, sustained a severe injury to his knee while working for the Hutchinson Lumber Company near Oroville. The petitioners recognized the compensability of the injury by furnishing him with medical treatment and compensating him up to April, 1924. In December, 1924, Bohan ascertained for the first time that the injury, which the insurance company's doctor had previously indicated to him was only of a temporary nature, had developed into one of a permanent

character, and on May 12, 1925, after said insurance company had refused to recognize the permanent nature of the disability, or to compensate him therefor, filed an application with the respondent commission for an adjustment of his claim. Petitioners filed no answer to the application, but at the hearing urged the objection that Bohan's claim was barred by lapse of time. This objection was not sustained, and the commission held, properly we think, that Bohan's injury, having changed from a temporary to a permanent disability, constituted a "new and further disability" within the meaning of subdivision (c) of section 11 of the Workmen's Compensation Act (St. 1917, p. 841), and therefore entitled him to further compensation. In support of its decision on this latter point the respondent commission calls attention to the fact that recently the Supreme Court has denied two petitions for writs of review, having for their purpose the annulment of awards made in proceedings involving facts similar to those presented here; that is, where temporary disabilities had afterwards become permanent. *Imperial Ice and Development Co. et al. v. Industrial Acc. Com.*, L. A. No. 8334; *Otis Elevator Co. v. Industrial Acc. Com.* and *M. J. O'Connor, S. F. No. 11819*. See, also, *Anaheim Co-operative Orange Ass'n v. Industrial Acc. Com.* (Cal. App.) 233 P. 1115; *Assurance Corp. v. Industrial Acc. Com.*, 207 P. 60, 57 Cal. App. 257.

[2] The main contention made by petitioners is, however, that under section 11 of the Workmen's Compensation Act a claim based upon a new and further disability must be filed within a period of six months after the date on which the new and further disability is ascertainable, and that, since it appears in the instant case that Bohan knew in July, 1924, that he "was no better," and could have ascertained then through medical advice the true character of the injury, his failure to file an application within six months thereafter bars his right to have his claim considered. To this contention the respondent commission replies that subdivision (c) of section 11 of said act, which confers upon the commission continuing jurisdiction for a period of 245 weeks to grant additional compensation for a new and further disability, contains no requirement that an application for compensation based upon that ground shall be filed within a period of 6 months after the nature of the disability is ascertainable. The respondent commission concedes that in a series of causes it has denied relief where the claim has not been filed within a period of 6 months after the claimant had become aware of the fact that a new and further disability had developed, but it is pointed out that the enforcement of such rule of limitation was not based upon express statutory enactment, but was grounded upon the doctrine of lach-

es, and that in the present case there is no evidence to establish any of the elements of such doctrine.

[3] We are of the opinion that the position taken by the commission must be sustained. The statute specifies no such limitation of time for the filing of an application based upon a new and further disability; and, as to the matter of laches, the facts revealed by the record, including those set forth in Bohan's application, are as follows: For a week or two following the happening of the accident Bohan was cared for by petitioners in a hospital in Oroville, and was then sent to San Francisco to the insurance company's doctor for further treatment, arriving there in November, 1923. He called first at the office of the respondent commission, but was referred to the representative of the petitioner insurance company, who, after paying Bohan a certain amount of compensation and expenses, told him that he "should not go further to the commission"; that the insurance company "would take complete care of him and pay him everything that was coming to him." He was thereupon sent by said company to a hospital. On March 12, 1924, an operation was performed on his knee, the report of the surgeon showing that the quadriceps extensor to the right leg were sutured about one inch above its insertion at the patella, at which point it had been almost completely ruptured, and that there was only a small portion of the vastus externus which had not been ruptured, and it was through this small portion that the little motion the leg had was carried on. Bohan continued to remain in the hospital until March 26, 1924, on which date he received his last medical and surgical treatment. At that time the doctor supplied him with an elastic bandage, telling him to wear it for 2 months, and that he "would be all right." He was then discharged, the doctor telling him further to write "how he was getting along." Bohan thereupon went to Sacramento to stay with friends until he was able to go to work. About 2 weeks later, and on April 8, 1924, his compensation was discontinued, although at that time it was apparent that he would not be able to work for approximately 2 months. Bohan continued to wear the elastic bandage as instructed for 2 months, but at the end of that period his knee "did not feel any better." The wound caused by the operation had not healed, and as Bohan expressed, when he "would walk up" his knee would "nearly fall out," and going down stairs he could "hardly walk." In July his knee "felt a little better," and, although it had not healed, he accepted employment with another company, but, after working a few hours, was forced to quit. Thereupon Bohan wrote

to the insurance company's physician as instructed, stating that he "was not getting well," and asking for additional compensation. He waited until December of that year for a reply, and, receiving none, returned to San Francisco. He called first upon the insurance company's doctor, and afterwards visited the commission, whereupon an examination of his knee was made under the direction of the assistant medical director of the commission. It was then determined that the injury to his knee was permanent, and Bohan was so informed. In fact, there had been no improvement in his condition since July but the advice thus imparted to him by the medical department of the commission in December was the first information he had received that his disability was permanent. In February, 1925, he was given a new rating by the medical department of the commission, which the insurance company refused to recognize, and also refused to pay Bohan further compensation. On May 12, 1925, formal application for further compensation was filed with the commission.

There is no contention made by petitioners that prior to December, 1924, Bohan knew that his injury was permanent; and obviously, in view of the statements made to him in March by the insurance company's doctor, the only reasonable impression Bohan could have formed in regard to his condition in July was that his injury was still of a temporary nature, requiring only further medical treatment. This he endeavored to obtain by writing as directed to said doctor, but his letter, so far as the evidence discloses, was ignored and after vainly waiting a reasonable length of time, in the apparent hope that the doctor's statement to him that he "would be all right" would prove true, went to San Francisco in December, where he was told for the first time the true extent of his disability. The delay thereafter in filing the application was attributed by Bohan to the fact that he still depended upon the insurance company to carry out its promises made to him in November, 1923, that they would take complete care of him and pay him everything that was coming to him. Their refusal to do so did not take place until February, 1925, and, in any event, Bohan's application for further compensation was filed within 6 months after he learned of his condition.

In view of the foregoing facts, it is our opinion that the commission's conclusion that the situation presented was not a proper one for the application of the doctrine of laches must be sustained.

The award is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

77 Cal. App. 280

In re NISBET. (Civ. 5265.)

(District Court of Appeal, Second District, Division 1, California. March 24, 1926.)

1. **Attorney and client** ⚖️61—It is not policy of law that attorney who has been disbarred for misconduct shall never be readmitted to practice.

It is not the policy of the law, and is not considered to be in interest of justice, that attorney who has been disbarred for misconduct shall never under any circumstances be readmitted to practice.

2. **Attorney and client** ⚖️61—Court must exercise reasonable discretion in determining whether disbarred attorney should be readmitted to practice.

In determining whether disbarred attorney should be readmitted to practice, court must endeavor to exercise reasonable discretion, uninfluenced by sympathy on the one side or by harsh severity on the other.

3. **Attorney and client** ⚖️61—Letters from attorneys and business men, supported by affidavits, expressing faith in integrity of disbarred attorney, held sufficient to warrant reinstatement.

Letters from attorneys and business men, supported by affidavits as to truth of their contents stating that writers had faith in integrity of disbarred attorney who had successfully occupied positions of trust and confidence since being disbarred, and expressing confidence in him, and willingness to employ him professionally if readmitted to practice, held sufficient to warrant reinstatement.

In the matter of the application of Henry W. Nisbet for an order of reinstatement as counselor and attorney at law. Application granted.

Byron Waters, of San Bernardino, and Henry M. Willis, of Los Angeles, for petitioner.

Kenyon F. Lee, of Los Angeles, for Los Angeles Bar Association.

CONREY, P. J. In May, 1918, a judgment of disbarment was entered against petitioner herein, who for many years had been a member of the bar of California. The specific charges of which he was found guilty were, in substance, that Mr. Nisbet had obtained property or money upon the faith of two certain small checks drawn by him upon banks in which, as he well knew, he had no money on deposit, and wherein he had no account. Prior to that time, in the year 1911, he had been suspended from practice for the period of one year for a breach of his duties as an attorney and counselor at law.

The disbarment of petitioner has been in force nearly eight years. In his petition herein he shows that during this period he has lived continuously in the city of Los Angeles; that during a considerable part of that time

he has occupied positions of trust and confidence, and has at all times conducted himself with integrity and propriety. The petition is accompanied by letters of indorsement from a large number of men of high standing in the legal profession, who inform the court that they know Mr. Nisbet personally; that they have faith in his integrity, and, in substance, that they believe that if he is restored his future conduct will be above reproach.

There are also letters from business men by whom the petitioner has been employed, who express their confidence in him, and in some instances their willingness and intention to employ him professionally in the event of the restoration of his license to practice. As mere letters in support of such an application would not be satisfactory, it should be added that some of these are supported by affidavits that the statements therein are true. There is no evidence of misconduct of petitioner since the date of his disbarment.

[1] It is not the policy of the law, and is not considered to be in the interest of justice, that an attorney who has been disbarred for misconduct shall never under any circumstances be readmitted to practice. In the Matter of Stevens, 241 P. 88, the Supreme Court, in connection with its ruling that applicants for restoration to practice need not in all cases be required to submit to a re-examination as to their mental qualifications, said:

"No adequate reason occurs to us for making the rule invariable. The law is interested in the regeneration of erring attorneys, and in the enforcement of a sound discipline its disposition ought not to be to place unnecessary burdens upon them."

In his separate opinion in that case Mr. Justice Richards stated that in such an inquiry the sole question concerning the petitioner is "whether by his good conduct since his disbarment he has shown cause for restoration to his former position at the bar; whether the doctrine of locus penitentiae shall be applied to his case." In the case of *In re Mash*, 179 P. 897, 39 Cal. App. 548, the Supreme Court, in its opinion on denial of rehearing of an order made by the District Court of Appeal, defined the purpose of such an order as follows:

"It should always be kept in mind that in determining such a question the District Court of Appeal is not considering an application to relieve the applicant from punishment or to give him an opportunity to reform, but that its sole object is to determine whether or not the character of the applicant is such that he should be admitted to an office of trust and recommended to the public as a trustworthy person fit to be consulted by others in matters of confidence. A certificate of admission to practice law is a standing affirmation that he is of that character, and it invites others to enter into intimate confidential relations with him. The interest and safety of those who may be thus led to consult

him should be regarded as the end to be accomplished."

[2, 3] In applying the principles thus declared, the court must endeavor to exercise a reasonable discretion, uninfluenced by sympathy on the one side or by harsh severity on the other. The petition for restoration should be granted when, and only when, the court upon the case as presented to it is convinced by positive evidence that the applicant has established, and now possesses, that good moral character which will make of him a trustworthy and honorable member of the bar. In this case we are satisfied that the application should be granted.

It is ordered that petitioner, Henry W. Nisbet, be, and he hereby is, restored to the rights and privileges of an attorney and counselor at law, and is authorized to practice in all courts of this state.

We concur: HOUSER, J.; YORK, J.

76 Cal. App. 785

**CALIFORNIA CREDIT & COLLECTION
CORPORATION v. GOODIN.**
(Civ. 2935.)

(District Court of Appeal, Third District, California. March 8, 1926. Hearing Denied by Supreme Court May 8, 1926.)

1. Contracts ⚡266(2)—Party rescinding contract for fraud must restore, or offer to restore, what he has received.

One who rescinds a contract on ground of fraud in its procurement must restore, or offer to restore, to other party what he has received of value under contract.

2. Fraud ⚡25.

In action for damages for deceit, based on fraud in procurement of contract, damage must be pleaded and proved.

3. Corporations ⚡170—Where defendant did not pay note for subscription of stock, and stock was not issued to him, title to stock remained in corporation, and defendant did not become a stockholder therein.

Where contract for sale of stock provided that no stock was to be issued until amount of subscription and note given therefor were paid in full in cash, and defendant never paid note and stock was never issued to him, *held* that defendant received nothing of value under contract, and hence title to stock remained in corporation, and defendant did not become a stockholder therein.

4. Corporations ⚡80(12)—Defense that note given in payment of corporate stock was invalid for fraud held available without rescinding in suit on note, where title to stock remained in corporation.

In suit to recover on note given in payment of unissued stock, title to which remained in corporation, defense that note was not binding

on defendant because it was procured by fraud or false representations *held* available without exercise of right to rescind.

5. Corporations ⚡80(12)—Defense of fraud in procuring note given in payment of stock, title to which remained in corporation, held available without plea and proof of damage.

In suit on note given in payment for stock, title to which remained in corporation, defense of fraud in procuring note *held* available without plea and proof of damage by defendant.

6. Contracts ⚡98—Defendant may excuse himself from performance of contract obtained by fraud by proof thereof, where innocent third parties have not acquired equities in contract (Civ. Code, § 3412).

Where note or other contract has been obtained by fraud, and innocent third parties have not acquired equities therein, defendant, instead of proceeding under Civ. Code, § 3412, for cancellation of contract, may, when enforcement is sought against him, excuse himself from performance by proof of fraud.

7. Corporations ⚡80(11)—Evidence held to sustain findings that corporation, to induce purchase of stock, falsely represented that it had definitely decided to locate a packing house, and that certain prominent persons had purchased its stock.

Evidence *held* to sustain findings that corporation, to induce purchase of stock, falsely represented that it had definitely decided to locate a packing house at a certain point, and that a number of prominent citizens with whom defendant was acquainted had bought large blocks of stock.

8. Contracts ⚡94(6)—Promises, accompanied by statements of existing facts showing promisor's ability to perform his promise, are representations, and, if falsely made, will avoid contract, though thing promised to be done lies wholly in future.

While a mere promise to perform an act in the future is not legally a representation, where promise is accompanied with statements of existing facts, which show ability of promisor to perform his promise, and without which promise would not be accepted nor acted upon, such statements are representations, and, if falsely made, are grounds of avoiding contract.

9. Corporations ⚡80(1) — Statements of agents of corporation that it had definitely decided to locate its plant in county, *held*, when false, to avoid defendant's contract for purchase of stock.

Statements of agents of corporation that it had decided to locate a packing plant in certain county, and had voted large sums for its operation which were accompanied with statements of existing facts showing ability of corporation to perform its promise, *held* when false, to avoid contract for purchase of corporate stock by defendant.

10. Corporations ⚡80(1)—False representation of corporation that certain persons had purchased stock held sufficient to vitiate contract and note for stock.

Corporation's false representation to defendant, on which he in part relied in execut-

ing subscription contract and note for stock, that certain prominent citizens with whom defendant was acquainted had bought large blocks of stock in such corporation, held to vitiate contract and note.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by the California Credit & Collection Corporation against Albertis Goodin. Judgment for defendant, and plaintiff appeals. Affirmed.

J. R. Cunyningham and Daley B. Robnett, both of San Francisco, for appellant.

A. G. Bailey, of Woodland, for respondent.

HART, J. The object of this action is to recover on a promissory note executed and delivered by the defendant to the Virden Packing Company for the sum of \$750. The note was dated November 7, 1920. Prior to the commencement of the action, and after it had matured or become payable, the note was assigned by the payee therein named to the plaintiff. These facts, and the fact that no part of said note has been paid, and the further fact of the refusal of defendant to pay the note upon its maturity, are alleged in the complaint, and the prayer is for judgment in accord with the claim of plaintiff as to the several amounts (principal, interest and attorney's fee) alleged to be due, owing, and unpaid on the obligation.

The amended answer admits the execution and delivery of the note by defendant to the Virden Packing Company, and that the same has not been paid, and alleges that the same was made without "any consideration whatsoever." Said answer also sets up fraud on the part of the plaintiff's assignor in inducing defendant to execute the note and a certain agreement, of which said note was the outgrowth. The facts upon which said defense is predicated are set out with much particularity of detail, and are, as so alleged, substantially embraced within the findings of the court, and so declared to be true. It should here be explained that the transcript here contains the record in several different actions brought by the plaintiff against as many different defendants, including the respondent herein, upon promissory notes given by said defendants to the plaintiff's assignor, and that these actions, for the purposes of the trial thereof, were consolidated and tried together, and it was stipulated by counsel on both sides that the testimony taken in the several cases should be considered as applying to all the cases, where applicable.

The facts, however, as found by the court, are, in substance, as follows: That the Virden Packing Company, a corporation, organized as such for the purpose of establishing and carrying on a meat packing plant, and to that end to buy and sell and slaughter cattle, sheep, and hogs, and to refrigerate and preserve the same, and to build the necessary

buildings for the same, and also in connection therewith to establish and maintain stockyards, procured the defendant to enter into an agreement to subscribe for ten shares of its stock at \$100 per share; that, upon the execution of said agreement by the parties, and as a part of the same transaction, the defendant paid to said corporation in cash, in part payment for said stock, the sum of \$250 and his promissory note (the one in suit) for the balance of \$750; that, in order to induce defendant to make said subscription agreement and also said note, said corporation "falsely and fraudulently represented to this defendant that said * * * packing company had located its packing house, packing plant, and stockyards at West Sacramento, in Yolo county, state of California"; that it had purchased land in West Sacramento upon which to erect and maintain its packing house, etc.; that, when soliciting said subscription for said shares of stock from defendant, said company exhibited to defendant pictures of the buildings and plans for a packing plant, etc., and at the same time stated to defendant that said pictures and plans represented the buildings, etc., of said packing plant which were to be erected by said corporation upon said lands so purchased in West Sacramento for that purpose, and where said corporation had theretofore located its packing house, packing plant, and stockyards; that said corporation had voted to spend \$1,500,000 in the construction of said buildings, packing plant, stockyards, etc., upon the lands purchased by it for that purpose in West Sacramento; that said corporation further falsely and fraudulently stated and represented at said time to the defendant that it had put in a spur track to their premises so purchased by it in West Sacramento, and that it had theretofore placed and, at said time, was placing, materials on said premises at West Sacramento for the erection of said buildings, packing house, and packing plant; that said corporation further falsely and fraudulently stated and represented to defendant that many persons with whom he (defendant) was acquainted, and upon whose judgment he relied, and whose names defendant cannot "at this time recall," and particularly stated to defendant, that "J. W. Browning, of Grimes, had subscribed for \$25,000 worth of stock of said Virden Packing Company; that Fred McCullough, of Dunnigan, Cal., had subscribed for \$25,000 worth of the capital stock; and that Frank Edson, of Knights Landing, Cal., and one of the supervisors of the county of Yolo, Cal., had made a very liberal subscription; that each and all of said men so mentioned, as aforesaid, were men of large financial interests, business experience, and capacity, and were successful business men, and that said defendant was well acquainted with each and all of said persons; and that he relied upon said representations and upon the business experience and capacity of the said

Browning, McCullough, and Edson"; that said Virden Packing Company "furthermore stated and represented that it had finally and definitely located its buildings, packing plant, and packing house and stockyards in West Sacramento, county of Yolo, state of California." It is then found that said company had not located its buildings, packing house, etc., or either or any of them, in West Sacramento, Yolo county, or at any other place in the said county; that it had not purchased land in West Sacramento upon which to erect buildings, etc., for a packing plant, and had not established stockyards at West Sacramento or elsewhere in the county of Yolo; that it never intended to do so; that it never voted to spend \$1,500,000 or any other sum in the erection of buildings, packing plant, etc., and stockyards at West Sacramento, or elsewhere, in said county of Yolo; that said company never "put in a spur track in to their premises in West Sacramento," nor placed materials thereon for the erection of buildings, etc., at West Sacramento; and that said company "had done nothing toward the building and erection of said buildings, or any of them; that neither said J. W. Browning nor said Fred McCullough purchased any stock in said packing company, of any kind or in any amount whatsoever, and that neither is a stockholder in said company, and did not subscribe for stock in said company in any amount whatsoever; that said Frank Edson did subscribe for one share, and only one share, of the stock of said company, and that he had never at any time subscribed for more than one share therein; that said Browning and said McCullough, at the time the representations were made by said company that they had purchased or subscribed for shares of the stock of said company, were not subscribers to the capital stock thereof, and that said Edson had subscribed for but one share thereof; that all of said representations were by said Virden Packing Company at said time known to be false, and were false, and that said Virden Packing Company never intended at said time and had no intentions of building and erecting said buildings, packing house, packing plant, and or stockyards, or either or any of them, at West Sacramento, or elsewhere in the county of Yolo, state of California, but that said representations, and each and all of them, so made, as aforesaid, were made by the said Virden Packing Company, with the express intent and purpose of cheating and defrauding this defendant, and of inducing him to subscribe for said shares of stock of said Virden Packing Company, and to induce this defendant to make, execute, and deliver to the said Virden Packing Company said promissory note as hereinabove set forth; that this defendant is a farmer and resident of the county of Yolo, state of California, and engaged in raising live stock in the county of Yolo, state of California, and was desirous of supporting a corporation that

would build and erect and maintain a packing house, packing plant, and or stockyards in the county of Yolo, state of California, which would thereby give to this defendant a ready local market for the stock that he might raise, and would build up and increase the stock business and the transactions arising therefrom in which this defendant was and is engaged; that this fact was well known to the said Virden Packing Company, a corporation, at said time; and that this defendant would not have purchased stock in said corporation, or any other corporation, to build, erect, and maintain a packing house, packing plant, and or stockyards, or any, or either of them, at any other place than in the county of Yolo, state of California."

The defendant claimed and asked for no affirmative relief, and the judgment was that "plaintiff take nothing by reason of its complaint," and that defendant "do have and recover from said plaintiff his costs of suit herein incurred."

The appeal is by the plaintiff from said judgment, and is supported by a record of the proceedings of the trial prepared under the authorization of section 953a of the Code of Civil Procedure.

[1-6] The point first made by the appellant is that the defendant, if in any event he was entitled to avoid the obligations of the note in suit, should have invoked either of the only two remedies available to one claiming that he was induced to enter into a contract through the false representations or fraud of the other party, to wit: (1) Upon the discovery of the fraud to rescind the contract and ask for the recovery of whatever he may have paid or parted with by reason of the contract, in which case he must of course, give notice of the rescission, and return, or offer to return, everything of value which he had received under the contract; or (2) affirm and stand upon the contract, and sue to recover whatever damages he may have suffered by reason of the fraud. To support that position appellant cites these cases: *Hickman v. Johnson*, 178 P. 145, 36 Cal. App. 342; *McColgan v. Muirland*, 82 P. 1113, 2 Cal. App. 6; *Field v. Austin*, 63 P. 692, 131 Cal. 379; *Brandenstein v. Johnson*, 73 P. 744, 140 Cal. 29; *Munson v. Fishburn*, 190 P. 808, 183 Cal. 206, 216; *Hines v. Frode*, 143 P. 729, 168 Cal. 507. Those cases, while, of course, laying down sound principles governing actions at law or suits in equity founded upon fraudulently procured contracts, do not sustain the contention of appellant. Some of them are actions based upon rescission in which the plaintiff failed to maintain his action because he had not restored, or offered to restore, what of value he had received under the contract from the other contracting party. There is to be found in one or two of the cases a statement which, when considered without reference to the facts of the particular case in which it is made, might be under-

stood as an announcement by the court that a party defrauded into entering into a contract for the sale of property has but two remedial courses open to him, and that they are those suggested by appellant and mentioned hereinabove. Obviously, as the cases named declare, one who rescinds a contract on the ground of fraud in its procurement must restore, or offer to restore, to the other party what he has received of value under the contract, or, as the rule is often stated, he must restore the other party to statu quo before he is entitled to a rescission. A party cannot rescind a contract whereby he has purchased, or agreed to purchase, property, and at the same time keep the property. It is likewise true, as some of the cases named declare, that, in an action for damages for deceit, based upon fraud in the procurement of a contract, damage must be pleaded and proved. The defendant never received anything of value from plaintiff under or by reason of the contract. As shown, the contract expressly provided, and so it was agreed by the parties, that no stock "is to be issued until the amount of this subscription and the note or notes given therefor are paid in full in cash" and it is admitted by the pleadings, and was at the trial, that defendant never paid the amount of the note given for the balance to be paid on his subscription and that the stock was never issued to defendant. There was, therefore, as before stated, nothing of value received by defendant under the terms of the contract. Hence the title to the stock remained in the packing company, and the defendant really never became a stockholder therein. *Rose v. Foord*, 30 P. 1114, 96 Cal. 152; *Vulcan Fire Ins. Co. v. Jorgensen*, 166 P. 835, 33 Cal. App. 768; 14 Cor. Juris, pp. 428, 429. As shown, defendant asks for no affirmative relief. He merely interposes a defense involving an objection to the enforcement of the note on the ground that it is in law without obligatory force, for the reason that he was procured or induced by plaintiff's assignor to execute and deliver it to the latter by fraud or false representations. That such a defense is available in a case of this character—that is, where defendant has not received anything of value from the other party, as has been shown is true here—is definitely attested by the authorities. See *Toby v. Oregon, etc., R. Co.*, 33 P. 550, 98 Cal. 498; *Russ L. & M. Co. v. Muscupiabe L. & W. Co.*, 52 P. 995, 120 Cal. 521, 527, 65 Am. St. Rep. 186; *Hart v. Church*, 58 P. 910, 59 P. 296, 126 Cal. 471, 77 Am. St. Rep. 195; *Simon Newman Co. v. Lassing*, 74 P. 761, 141 Cal. 174, 178; *Cox v. Schnerr*, 156 P. 509, 172 Cal. 375, 383; *Estate of Cover*, 204 P. 583, 188 Cal. 133, 140; *Mundorff v. Ramm*, 226 P. 825, 66 Cal. App. 553; *California Credit & Coll. Cor. v. Randall* (Cal. App.) 244*P. 958. Nor, in a case of this character, where the consideration has not passed, is it necessary for the defendant to plead and prove damage. *Kelly v. C. C. P. Co.*, 16 P. 386, 74

Cal. 557, 561, 5 Am. St. Rep. 470; *Munson v. Fishburn*, 190 P. 808, 183 Cal. 206, 218; *Vulcan Fire Ins. Co. v. Jorgensen*, 166 P. 835, 33 Cal. App. 763, supra. This statement is to be understood as meaning that damage in such a case—that is, where the effect of the defense set up would only be to vitiate or destroy the binding force of the contract on the ground of fraud and compensation by way of damages is not sought—need not be specially pleaded or proved. Of course, in all such cases damage or injury is of the essence of the action. Every transaction brought about by fraud must result in damage or injury to the party who has thus been drawn into it. Damage necessarily follows from the fraud. This is so whether substantial damage susceptible to appraisal in terms of money has or has not resulted. The damage is in the fact that, because of the fraud by means of which the contract has been procured, the defendant will not, and cannot, secure the thing he contracted for, and which constituted an important part of the consideration for the contract. So, in such case, or even where substantial detriment has been suffered by reason of the fraud, but damages therefor are waived by the defendant, and no other relief is asked for than that of being released from the obligations of the fraudulently procured contract, the mere plea and proof of the fraud is sufficient, and amounts to the plea and proof of the damage or injury which is essentially the concomitant of the fraud. At all events, it would be entirely incompatible with a just conception of a rational system of remedial law to hold it to be true that a party drawn into the making of a contract through fraudulent representations as to the subject-matter thereof may not obtain judicial sanction of an application, in appropriate form, for his release from the obligations of such contract without pleading and proving that by reason of such engagement he has actually suffered substantial damage or damage which must be measured and may be compensated for in money. But such is not the law. Section 3412 of the Civil Code opposes such a theory or notion. That section gives a specific remedy for the cancellation of a contract obtained by fraud or which is voidable for other reasons, or is void, and, as has been shown, the cases above named and others not named are as one in holding that, where a note or other contract has been obtained by fraud, and innocent third parties have not acquired equities therein, the defendant, instead of proceeding under section 3412 of the Civil Code, "may abide his time, and when enforcement is sought against him excuse himself from performance by proof of the fraud." *Hart v. Church*, 58 P. 910, 913, 126 Cal. 471, 479, 77 Am. St. Rep. 195.

[7] The findings are amply supported. It was admitted by the plaintiff that Thomas J. Brooks, the party representing the packing company in the transactions upon which this action is founded, was the duly appointed

and acting agent of the Virden Packing Company, and as such authorized to sell the stock of the company. Defendant admitted the execution by him of the subscription contract and the note in suit. The defendant testified that, at and before the time he executed the contract and the note, the said stock salesman of the packing company stated and represented to him that the company intended locating its packing plant and stockyards at West Sacramento, in Yolo county, and had already purchased land at said place suitable and sufficient for that purpose; that it had laid a—

“spur track connecting with the plant, and had the machinery on the ground to start up business, and he also said that he had sold stock around there to his neighbors, Fred McCullough Bros., Perry Hiatt and Johnny Browning; and he said Mr. Edson had taken a large portion of it.

“Q. Did he tell you the amount of the stock that any of these men had subscribed for? A. Well, he said Fred McCullough had bought a large portion of the amount; that Mr. Edson had bought a large share. He didn't say what Mr. Browning or Hiatt had bought. He said they were going to spend over \$1,000,000 in machinery in fixing up the plant.

“Q. Did he say what kind of a plant it was?

A. A packing house, he said.

“Q. And did you understand what kind? A. He told me we would have a local market for our stock close home in Yolo county.”

Defendant further testified that he was acquainted with Fred McCullough, John Browning, Perry Hiatt, and F. B. Edson, the last named a member of the board of supervisors of Yolo county, and that he knew they were men of extensive business interests, and that he had confidence in their business judgment. Defendant testified that he believed all the said representations, and would not have executed the subscription contract and the note in suit or the note of which it was a renewal, if he had known at the times of those transactions that such representations were untrue. It was shown that, although the Virden Packing Company purchased some land at West Sacramento subsequent to the occurrence of the above-mentioned transactions, it never proceeded further toward the establishment of a packing plant and stockyards at said place, but finally took over an established packing plant in the city of San Francisco, where, ever since, the company has carried on the packing business. It was further shown, and, in fact, not denied, that the company never caused the machinery necessary for the building and equipment of such a business to be brought to West Sacramento. It was further shown that Browning, Hiatt, and McCullough, at the time Goodin entered into the engagements involved herein, had not purchased, or agreed to purchase, a single share of stock in the company. Edson did purchase one share of said stock, but only one share.

[8-10] Defendant testified that he did not

learn of the falsity of the representations until after he had renewed the note. His testimony in that particular was not contradicted. Indeed, there was no attempt to controvert any of the facts to which defendant testified, nor was there any attempt to contradict the testimony of other witnesses to the effect that the packing company never at any time took any steps in the direction of establishing a packing plant at West Sacramento other than the fact that it purchased some land at said place, as to which fact, however, the court, with apparent justness, found, from all the circumstances which the evidence showed preceded, attended, and succeeded such purchase, that the same was not made with any definite or settled intention on the part of the company of building thereon a packing plant and stockyards, or at any time ever had any such intention definitely established in its mind. The statements made to defendant by the agent of plaintiff's assignor, and which statements the court upon sufficient evidence found not to be true, that the company had definitely decided to locate its plant at West Sacramento, in Yolo county, and to that end had voted to appropriate a prodigious sum from its financial resources for the purpose of constructing the necessary buildings and of installing the machinery required for the operation of such an enterprise, and had constructed a spur railroad track to facilitate such construction and for its conveniences otherwise, constituted material representations. They involved more than a mere promise to do certain acts in the future. They involved representations that the company had already fixed or definitely decided and determined to establish its plant in the county in which defendant resided and carried on the stock-raising business, thus making it the more convenient for, and advantageous to, him in the matter of disposing of the products of his business, and that such decision and determination had already been accentuated in a practical manner by making certain essential preliminary arrangements for the establishing of the packing plant and stockyards at said place. While a mere promise to perform an act in the future is not, in a legal sense, a representation, nor the effect of a failure to perform such promise is to convert it into a false representation, yet, if, as is the fact here, “the promise is accompanied with statements of existing facts which show the ability of the promisor to perform his promise, and without which the promise would not be accepted or acted upon, such statements are denominated representations, and, if falsely made, are grounds of avoiding the contract, though the thing promised to be done lies wholly in the future.” *Russ Lumber & Mill Co. v. Muscupiabe L. & W. Co.*, 52 P. 995, 998, 120 Cal. 521, 529, 530 (65 Am. St. Rep. 186). But the representation made to defendant by the packing company's agent, and upon which he in part relied in executing the subscription contract and the

note made at the same time, to the effect that four well-known, well to do, prosperous, and prominent citizens of Yolo county, with whom and whose business success defendant was acquainted, had bought large blocks of stock in said company, when, as a matter of truth, they, with the exception of one, had bought no stock at all therein, and had not at that time agreed to do so, is itself sufficient to vitiate the contract and the note in suit because of the falsity of such representation. *Munson v. Fishburn*, 190 P. 808, 183 Cal. 206, 213, 214. That case expressly approves the following from *Talmadge v. Sanitary Security Co.*, 52 N. Y. S. 139, 31 App. Div. 498, and which applies with cogent pertinency to the proposition presently in hand:

"The fact that other persons had subscribed to the stock of the defendant in a large amount, especially that the two experts mentioned had thought well enough of the scheme to invest in it, would naturally influence the determination of the plaintiffs in reference to subscribing to the stock. With the exception of men of extremely cool judgment and great confidence in their own judgment, we are all apt to be influenced in our action and conduct by the action and conduct of our fellows. Especially is this the case in speculations. * * * Now, of course, what concerns the purchaser is the value of the property. In itself the price paid by the vendor is not of any moment, but it is of vital importance to the purchaser in forming his judgment as to value. The law recognizes this fact and holds a false statement as to price paid actionable. The principle is equally applicable to representations that other persons have purchased similar property or subscribed for stock on the same terms upon which it is sought to induce any person to become a subscriber."

See, also, *Garrett Co. v. Clark*, 87 N. Y. S. 580, 42 Misc. Rep. 610; *Rose v. Merchants' Trust Co.* (Sup. Ct.) 96 N. Y. S. 956; 29 L. R. A. (N. S.) 477, note; 20 N. Y. Ann. Cas. 86, notes; 2 Elliott on Contracts, 105.

Our conclusion is that the decision and the judgment following therefrom are impreguably grounded, and the judgment is, accordingly, affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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**CALIFORNIA CREDIT & COLLECTION
CORPORATION v. CARPENTER.**
(Civ. 2823.)

(District Court of Appeal, Third District, California, March 10, 1926. Hearing Denied by Supreme Court May 3, 1926.)

1. Corporations ⚡92—Defense of fraud held available without rescinding, in suit on note given for unissued corporate stock, where defendant received nothing of value, and sought no affirmative relief.

In suit on note given in payment of unissued corporate stock, where defendant had

received nothing of value, and asked for no affirmative relief, defense of fraud held available without exercise of right to rescind.

2. Corporations ⚡80(7)—Representation of corporation, when inducing defendant to purchase stock, that it had definitely decided to locate a packing plant and stockyard at certain point, related to an existing fact, and was material, and, if false, justified rescission of purchase.

Representation of corporation, when inducing defendant to purchase stock, that it had definitely decided to locate packing plant and stockyards at certain points, and that it had financial ability to properly operate it, held to relate to an existing or present fact, and to be material, and to justify rescission of contract, if false.

3. Contracts ⚡94(6)—Promise, made with intention of not performing it, constitutes a fraud, for which a contract may be rescinded (Civ. Code, § 1572, subd. 4, section 1710, subd. 4).

While a mere promise is not a representation, a promise, made with intention of not performing it, constitutes a fraud for which a contract may be rescinded or avoided, in view of Civ. Code, § 1572, subd. 4, and section 1710, subd. 4.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by the California Credit & Collection Corporation against J. A. Carpenter. Judgment for defendant, and plaintiff appeals. Affirmed.

James R. Cunyningham, of San Francisco, for appellant.

Thomas Rutledge, of Colusa, for respondent.

HART, J. The plaintiff brought this action to recover on three different promissory notes, executed and delivered by defendant to the Virden Packing Company, a corporation. Each of the notes is dated July 17, 1919, and each is for the sum of \$250, with interest after maturity at the rate of 6 per cent. per annum. The notes represented the remainder of the total purchase price of ten shares of stock of the Virden Packing Company subscribed for by defendant after the payment thereon by the latter of the sum of \$250 in cash, and were made payable, respectively, 4, 8, and 12 months after date. The complaint is in three separate counts, and therein the notes are separately declared upon in the order of the seniority of their maturity. It is alleged that the notes were, prior to the commencement of this action, duly assigned to the plaintiff, and that it "is now the owner and holder thereof."

The answer, admitting the execution and delivery of the notes as alleged in the com-

plaint, charges that they were made and delivered by defendant, and that he was induced to make and deliver them to plaintiff's assignor by and upon certain false and fraudulent representations by the latter. The special defense set up to the different counts of the complaint is, *mutatis mutandis*, identical, and is as follows: That the consideration for the notes in suit was the purchase price of certain stock of the Virden Packing Company for which defendant subscribed, and which he agreed to purchase; that, at and prior to the time defendant subscribed for said stock and executed said promissory notes, he (defendant) was engaged extensively in the cattle and live stock business in the northern part of California, "and, as an inducement to defendant to subscribe for, and purchase, said stock, and execute said promissory note, said Virden Packing Company represented, promised, and stated that it would establish a union stockyard and a packing plant at or near the city of Sacramento, which would be a great advantage to the defendant in marketing his live stock and live stock products, and thus enable him to save large sums in freight in so marketing his live stock; that at the time said representations were made there was no stockyard or packing plant for such purposes in the state of California north of the city of San Francisco, and the establishment of such a stockyard and packing plant at the city of Sacramento would have been a great advantage to said defendant, and was the sole inducement to him for subscribing for said stock and the execution of said note; that a copy of the letter of said Virden Packing Company making said representations as aforesaid is hereto attached and made a part of this answer; that said Virden Packing Company did not, and never has, established a stockyard or packing plant, or any stockyard or packing plant, or any plant, market, or place, at or near the city of Sacramento, where said defendant could sell or market his cattle, live stock, or live stock products, but established the same at and near the city of San Francisco, where there was already such a stockyard and market and live stock, and the inducement and consideration for the subscribing for said stock and the execution of said note thereby has wholly failed, and the representations and promises on the part of said Virden Packing Company that said stockyard and packing plant would be located at Sacramento were fraudulent, and made without the intention of performing the same, and made for the purpose of inducing the defendant and other persons to subscribe for said stock."

The letter referred to by and expressly made a part of the answer was written upon the letter head stationery of the plaintiff's assignor, and is here given in full:

"Executive Offices—Capital National Bank Building. Virden Packing Company (and Union Stockyards). Chas. E. Virden, President. J. H. Glide, Vice President. F. F. Atkinson, Secretary. C. M. Hartley, Treasurer. Peter B. Newman, Asst. Treasurer. Capital Stock \$5,000,000.00.

"Sacramento, Cal., May 3, 1919.

"Mr. G. A. Carpenter, Box 741 Colusa, Cal.—My dear Sir: I would like very much to meet you personally, and tell you what the plans of the Virden Packing Company are, what it hopes to do for the live stock men of the West, and how it came into being; but I find it impossible to talk personally to all the cattle, sheep, and hog men of California, and so must write to you instead.

"After a three years' thorough investigation of the live stock and packing situation in the Western States, I came to the conclusion that the most vital need of California's agricultural industries at the present time is a union stockyards, open to all, and large enough to handle the live stock of California and adjacent states, and packing plants capable of handling the raw products of these states.

"A union stockyards means the establishment of a market for live stock near the point of production; not thousands of miles away. A union stockyards open to all buyers and sellers alike, where lean as well as fat marketable stock may be consigned and find a ready purchaser, where prices will be established, and where the stock man will receive fair prices for his products, the same as prevail in Chicago, Kansas City, Omaha, and Portland.

"As it is now, a large percentage of the live stock raised in the Western States is shipped to eastern markets, where higher prices prevail at all times, owing to an open market existing at those points. Thus the live stock men of the West are handicapped by having to ship large quantities of their live stock East in order to obtain satisfactory prices. The freight charge per carload of live stock to Chicago is \$285. Then it costs the consumer of packing house products in California \$2.50 per 100 pounds to have delivered to him these products made from western live stock.

"Naturally, the first question to arise, when the establishment of the union stockyards and packing house plant was contemplated, was the one of location. My associates and I investigated this question thoroughly, for we realized its vital importance. We found that San Francisco is the financial center of the state, Oakland and Stockton the manufacturing centers, Fresno the center of the raisin industry, and Sacramento the agricultural center. San Francisco and Oakland, largely dependent upon the agricultural district of the Sacramento and San Joaquin valleys, are no doubt interested in the growth of these districts.

"Our investigations showed that Sacramento is at the present time the home of the Swanson Packing Company, the Charles F. Silva Company, and many smaller meat concerns, which together with the Virden Packing Company and other packing concerns that will be attracted to Sacramento, creates an immediate demand for a union stockyards at this central point.

"Undisputable facts showed that Sacramento is the natural transportation and packing center of the vast agricultural area. By reason of

her trunk lines of railroads, coming direct from the stock producing districts of the Western States, and her deep sea connections by way of the Sacramento river, Sacramento is capable of handling the vast volume of business which will result from making this the live stock center of the West.

"Will you not agree with me that it is time that, not only the live stock grower of the Pacific Coast, but the consumer of packing house products as well, awaken to the necessity of having at home an institution thoroughly prepared to handle the entire output from all over our own territory, instead of paying the heavy freight toll, which has been, and is being, paid to-day?"

"If a union stockyards is not a necessity to the grower of live stock, permit me to ask you why every state in the union, where live stock is raised, has for many years past maintained its central markets or union stockyards?"

"Although the Virden Packing Company and Union Stockyards is an absolutely independent institution, it extends an invitation to all growers of live stock, meat packers, and consumers of the Western States to co-operate with us for the good of all concerned.

"Sacramento is going to have located within its boundaries a well equipped and up to date packing plant and union stockyards. My associates and I ask you for your support and co-operation.

"I thank you for the time consumed in the reading of this letter, setting forth the plans of what I consider the most important California institution, indispensable if the live stock industry of the West is to keep pace with other agricultural developments.

"Yours very truly,

"Chas. E. Virden, President."

[1] An amendment to the answer, filed by leave of the court, alleged that, prior to the commencement of this action, defendant tendered and offered to restore to the packing company all the right, title, and interest to and in the stock agreed to be purchased by him, and for the balance of the purchase price of which he made and delivered the notes in suit. Defendant did not ask for affirmative relief.

The action was tried by the court, sitting without a jury. Findings as to the charge of fraud as set forth in the answer, and that defendant was induced by such fraud or false representations to subscribe for the stock of the packing company, and to execute the notes in suit as alleged in defendant's said pleading, were made by the court. The court also found that the fact of the fraudulent representations by which defendant was induced to subscribe for the stock and execute the notes in suit was known to plaintiff at the time it took over after their maturity the notes declared upon; that defendant, prior to the commencement of this action, in the year 1920, tendered and offered to the packing company said stock, so agreed to be purchased, and all the right, title, and interest therein and right thereto; that defendant, ever since making such tender and offer, has been ready and willing to "surren-

der up and cancel all his right, title, and interest in and to said stock, and did, with his answer herein," make such tender and offer; that the packing company then and always refused, "and still refuses, to accept return of said stock." In strange contrast to the allegations of the amendment to the answer and the finding that the defendant tendered a return of the stock to the packing company, the court further found "that none of said stock has ever been issued or delivered to the defendant." The evidence shows, however—in fact, it was not disputed at the trial—that the stock was never issued to defendant. But the case here is not, as to either of the parties, strictly one for the rescission of a contract or the notes in issue here. The defendant received nothing of value by reason of the transaction eventuating in the making and delivery of the notes to the packing company, and, as seen, asks for no affirmative relief. He merely sets up a legal excuse from the performance by him of a contract to which, in legal contemplation, he never assented or agreed. In other words, he simply asks for defensive relief, in support of which he has set up fraud, or, in other terms, has set up fraud as a basis of a defense to defeat "an action brought to enforce an apparent obligation or liability." *Toby v. Oregon Pac. R. Co.*, 33 P. 550, 553, 98 Cal. 490, 498. This is one of the three methods for relief or defense afforded defendants in cases of this character (*Toby v. Oregon Pac. R. Co.*, 33 P. 550, 98 Cal. 490, supra; *Field v. Austin*, 63 P. 692, 131 Cal. 379, 382; *J. B. Colt Co. v. J. I. Freitas* [Cal. App.] 244 P. 916), and where, as here, such defensive relief is sought, and no affirmative relief is asked, "it is not necessary for" the defendant "to have exercised an existing right to rescind." *Simon Newman Co. v. Lassing*, 74 P. 761, 141 Cal. 174; 12 Cal. Juris. 786; *J. B. Colt Co. v. J. I. Freitas*, supra. Our views upon these questions are also fully covered in our opinion in the case of *California Credit & Collection Corporation v. Goodin*, 246 P. 121, which was filed in this court March 8, 1926. Further consideration herein of the questions is, therefore, not required.

[2] The plaintiff appeals from the judgment, and submits to us two propositions upon which he principally relies for a reversal. The first is that the statements or representations, as shown by the answer, the findings, and the evidence, by which the defendant was induced, to subscribe for the stock of the packing company, and to execute and deliver to the latter the notes in suit, amounted to no more than a mere promise or agreement to perform some future act, and, therefore, do not possess those elements of the representations which must be present to destroy the binding force of an obligation induced thereby, or, in other words, cannot be made the basis of an action for fraud. The sec-

ond is that the defendant failed to show that he suffered any damage by reason of the fraud alleged to be at the bottom of the transaction involving the making of the subscription contract and the execution and delivery of the notes to plaintiff's assignor.

The defendant testified that he was, at the time he subscribed for the stock, and made and delivered the notes in suit, and had been a long time prior thereto, engaged in the business of raising and selling sheep and cattle in Lassen county, in the northern part of the state of California and north of the city of Sacramento; that an agent of the packing company called on him at his place of residence, and orally made substantially the same representations to him as are contained in the letter above reproduced herein with regard to the purpose of the company to establish a packing plant and stockyards in the city of Sacramento; that, in fact, said agent represented to him that the packing company intended to locate its plant and stockyards in Sacramento; that he emphasized the fact, as did the letter referred to, that it would in a financial way prove advantageous and profitable to him (defendant) and other stockraisers in the northern part of the state to establish a packing plant and stockyards at Sacramento; that he, in effect, said to said agent that he realized that, if, as he (the agent) and the letter stated, a packing establishment and stockyards were located at Sacramento, "there would be a special advantage to me from a hauling standpoint and general marketing conditions; the nearer our market would be to our place of produce, the less the shrinkage in getting our stock to market, and better marketing advantages." Defendant testified that, upon the representations by the agent and those contained in the letter above quoted herein, he subscribed for ten shares of the stock of the packing company at the rate of \$100 per share; that he paid \$250 cash down, and for the balance, or as evidence of the balance he owed on the purchase price, he gave to the packing company the promissory notes described in the complaint. Defendant further testified that, some time after the above negotiations and transaction took place, he made a visit to Sacramento, and thereupon discovered that no steps whatever had been taken by the company or any other person to establish a packing plant and stockyards or either at said place; that thereafter he learned, and found it to be the fact, that the packing company had taken over the Moran Packing Plant in San Francisco; that a packing plant and stockyards or either had never been established at or within the limits of the city of Sacramento by plaintiff's assignor, but that said company had definitely and permanently located its plant, etc., at San Francisco. He testified that, in subscribing for the stock, and making and giving to the packing company the promissory notes which constitute the

foundation of this action, he relied upon the representations made to him by the packing company's agent, and those contained in the letter addressed to him by the packing company, and above incorporated into this opinion, to the effect that said company would establish its plant and stockyards at Sacramento, where, for the reasons given by him and above set forth, such an establishment would be of peculiar advantage and benefit to him and other stockraisers in the northern sections of California, in that they would, by reason of the nearness in proximity of such a plant and stockyards to his and their stock-producing farms, realize increased profits on their products, and that, but for the representations and assurances so made, he would not have subscribed for the stock or given the notes in question. He further testified that, after learning that the packing company had located its plant at San Francisco, as above indicated, and further learned that it did not intend to locate a plant and stockyards in Sacramento, he called at the office of the company in San Francisco, and demanded a rescission of his contract to buy the stock and the cancellation of the notes sued on, and at the same time offered to return, and tendered, to the company any right, title, or interest in and to any stock of the company which he might have acquired therein by reason of said subscription contract, but that the packing company refused to comply with said demand.

The testimony of defendant, of which the foregoing statement embraces a fair résumé, was not disputed by plaintiff, nor was there any attempt to contradict it. The letter from the Virden Packing Company to defendant, above presented herein, was introduced in evidence, and its authenticity was not questioned, nor its contents contradicted or disputed. We think the representations which the evidence shows were made by plaintiff's assignor to defendant and by which the latter was induced to subscribe for the stock and give the packing company the notes in suit were as to an existing or present fact and material.

In *Russ L. & M. Co. v. Muscupiabe L. & W. Co.*, 52 P. 995, 120 Cal. 521, 65 Am. St. Rep. 186, it appears that the defendant, an irrigation company, represented to plaintiff that it had the ability to furnish the plaintiff with sufficient water to satisfy its needs for the purposes of irrigation, and that upon such representations the defendant obtained certain promissory notes from plaintiff as evidence of the latter's agreement to pay the amounts represented by the notes for the water so to be furnished; that said defendant was later shown to be wholly unable to furnish the quantity of water which it had represented to plaintiff that it was able to furnish; and that the representation was false and so known to be by defendant when made. It was there contended that "the representa-

tions were respecting future acts only," and that such representations "do not, in contemplation of law, amount to a fraud," and could be neither false nor true when made. To which proposition the Supreme Court replied:

"But counsel in this contention confuse and fail to distinguish between 'promises' and 'representations.' A mere promise to perform an act in the future is not, in a legal sense, a representation, nor does a failure to perform such promise convert it into a false representation; but if the promise is accompanied with statements of existing facts which show the ability of the promisor to perform his promise, and without which the promise would not be accepted or acted upon, such statements are denominated representations, and if falsely made are grounds of avoiding the contract, though the thing promised to be done lies wholly in the future."

See, also, *California Credit & Collection Corporation v. Goodin*, *supra*.

[3] In this case the plaintiff's assignor not only pointed out to the defendant what would obviously be true, to wit, the beneficial result to him as a raiser of live stock for the market of the establishment of a packing plant and stockyards in closer proximity to his cattle and sheep-raising farm than was any such enterprise then existing in California, but also represented to him, in clear, unqualified language, that "Sacramento was going to have located within its boundaries a well-equipped and up to date packing plant and union stockyards"; thus assuring defendant that the company had a settled and a fixed purpose and the financial ability, at the time such representations were made, to install, establish, and equip a packing plant and stockyards within the limits of the city of Sacramento. These and the other representations, both oral and written, made by the packing company to defendant, that such an establishment would be located at the place just named involved, as we have before declared, the representation of a material existing fact—the fact that the determination had then been fixed upon by the packing company to establish a packing house and stockyards at Sacramento. But the court found that the Virden Packing Company never at any time had any intention of locating a packing plant and stockyards within the limits of the city of Sacramento. All the circumstances, as disclosed by the evidence, indicated that that finding stated the truth, and, indeed, sufficiently support said finding. While, as stated:

"A mere promise is not a 'representation,' a promise made with the intention of not performing it constitutes a fraud for which a contract may be rescinded or avoided." *Russ, etc., Co. v. Muscupiabe, etc., Co.*, *supra*; Civ. Code, § 1572, subd. 4, and section 1710, subd. 4.

The second proposition urged by plaintiff for a reversal, as indicated above, is that, in

order to prevail in this action, it was essential that defendant should plead and prove that he suffered substantial or some actual damage from the fraudulent representation whereby, it is alleged, plaintiff's assignor induced defendant to execute and deliver to it (the packing company) the notes in suit. The precise question thus submitted here is considered and determined against the position of plaintiff here in the opinion of this court in *California Credit & Collection Corporation v. Goodin*, *supra*, and the cases therein cited. Nothing further of special force can here be added to what is said in the opinion in that case upon the proposition.

We have been shown no just reason for disturbing the result arrived at below, and the judgment is, therefore, affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

77 Cal. App. 78

FRANCESCHI v. NARDI et al. (Civ. 5528.)

(District Court of Appeal, First District, Division 2, California. March 13, 1926.)

1. Evidence ⇨471(2)—Partnership ⇨242(5)—Testimony as to when witness finally determined there was loss in partnership business held properly excluded as immaterial and a conclusion in suit on note given to partner on his withdrawal.

In action on promissory note given to partner on his withdrawal from partnership, testimony by son of one of remaining partners as to when he finally determined whether there was loss or profit held properly excluded as immaterial, and as conclusion of witness.

2. Bills and notes ⇨501—Testimony by former partner suing on note given on his withdrawal from partnership as to preparation of bond for employee held properly excluded as immaterial.

In action on promissory note given to partner on his withdrawal from partnership, testimony by plaintiff as to preparation of bond of employee held properly excluded as immaterial.

3. Trial ⇨49.

Where no question is propounded to a witness, there is nothing for court to rule on.

4. Appeal and error ⇨201(2)—Comment of court that loss in business was not within knowledge of parties held not reversible error in suit on note given plaintiff on withdrawal from partnership, in absence of objection or exception.

In action on note given to partner on his withdrawal from partnership, statement by court that loss in business, if any, was not within knowledge of parties, but merely anticipated, held not reversible error, where no objection or exception was made thereto.

5. Appeal and error ⇨1011(1).

Finding on issue fully presented on conflicting evidence cannot be disturbed on appeal.

Appeal from Superior Court, City and County of San Francisco; George H. Caba-niss, Judge.

Action by E. Franceschi against P. Nardi and another, individually and as copartners doing business under the firm name of Nardi Bros. & Co. Judgment for plaintiff, and defendants appeal. Affirmed.

Wm. Klein and Arthur H. Darendt, both of San Francisco, for appellants.

O'Gara & De Martini, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendants to recover the amount due on two promissory notes. The trial court made findings in favor of the plaintiff, and the defendants appealed.

For several months prior to the 1st day of July, 1920, P. Nardi, his son-in-law, E. Franceschi, and F. Baccelli had been partners conducting a wholesale grocery business in San Francisco. On that date they agreed that the plaintiff might withdraw from the firm. Later, on the 24th day of July, 1920, he did withdraw. Following his withdrawal the two notes were given; one on September 27th and one on September 30, 1920. It was the contention of the plaintiff that the amounts represented by the notes were to be ascertained, and in fact were ascertained, by an accounting had and completed by Burt & Co., a firm of public accountants. The Burt accounting was completed on July 23, 1920. On the other hand, it was the contention of the defendants that the notes were accommodation notes, and that the settlement between the plaintiff and the defendants was to be based on an accounting to be had after the 24th day of July, 1920, and that by the agreement of the parties the dissolution would not be completed until such accounting was had, and that the plaintiff would be liable for his share of the losses that might have been incurred between the date of his retirement and the completion of such subsequent accounting. No question is presented to the effect that the theory of each party was not sufficiently set forth in the pleadings. Among other things, the trial court found that an accounting was had and a report thereof made to the plaintiff and defendants on the 23d day of July, 1920, and prior to the plaintiff's retirement; that that was the only accounting had between the partners; that plaintiff never consented to the taking of any other accounting; and that the plaintiff never promised or agreed to pay any losses which should be incurred in the said business after the date of his retirement.

As we understand the appellants, they claim that the trial court committed error by sustaining objections to the introduction of evidence to the effect that, after the plaintiff retired from the firm, it transpired that the firm had suffered heavy losses on certain un-completed business ventures which were

pending on the date that the plaintiff withdrew. Before proceeding, it should be stated that there was not a particle of evidence in the record to the effect that any one of the contracting parties knew of any alleged loss at or prior to the dates on which the notes were executed. There was some evidence to the effect that at that time certain losses were anticipated.

[1] When Mr. Julius Nardi, a son of Mr. P. Nardi, was on the stand, the attorney for the appellants asked him:

"Q. When did you finally determine whether there was any loss or profit upon the business in which he was interested, from the time he entered this business until the time he left—in other words, his copartnership business?"

"Mr. O'Gara: Now, if your honor please, we object to that on the ground it is incompetent, irrelevant, and immaterial. It involves a conclusion of the witness; the determination of loss or profit. * * *

"The Court: The only way that can be determined is by a reference."

Assuming that the remark made by the trial court was a ruling, such ruling was not erroneous. The question did call for the conclusion of the witness; furthermore, it was immaterial. The plaintiff was claiming that he sold out on the basis of the Burt accounting. The question propounded was clearly not germane to that subject. The appellants were claiming that the rights of the parties were to be ascertained by an accounting to be had subsequent to the 24th day of July, 1920. If such an accounting was had, then the question should have been addressed to that fact, and not to secondary and tertiary facts connected therewith.

[2] While the plaintiff was a member of the firm a Mr. Torazani was employed. When the plaintiff was on the stand as a witness, he was asked the question:

"A bond was prepared to be executed so as to protect you against him, was it not?"

"The Court (interrupting): I am inclined to think, although there has been no objection, that these matters concerning which you are interrogating the witness, are not germane to the issues."

The ruling was clearly correct.

[3] The question and ruling just disposed of brought forth a somewhat extended colloquy between the court and the respective attorneys. No question was propounded to a witness, and consequently there was nothing to rule on. The court made some statements of fact, but no exception was taken to any one of the statements. Indeed, the remarks of the court were very conservative, and seem to have been addressed toward the assistance of counsel.

[4] When Mr. Henry Nardi was being examined as a witness at one time, the trial court remarked:

"I think, assuming that there was a loss, it was not within the knowledge of the parties but more or less anticipated."

That remark did not rule any objection; again no objection or exception was made to the remark; furthermore, the remark was altogether proper, and within the facts as contained in the record.

[5] Asserting at all times that the notes were accommodation notes, the appellants contend they were without consideration. Asserting that an accounting had not been had and no settlement had been had, they claim the respondent was liable for losses on business on hand. Those issues were fully presented, and the evidence was conflicting. The trial court made findings against the appellants. We may not disturb those findings.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

77 Cal. App. 158

PEOPLE v. ROGANOVICH et al. (Cr. 1311.)

(District Court of Appeal, Second District, Division 1, California. March 18, 1926.)

1. Arson ☞37(1).

Evidence held sufficient to sustain conviction of first degree arson.

2. Criminal law ☞1158(1), 1159(2)—Appellate court cannot substitute its opinion of facts for that of jury and trial judge, being limited to passing on whether facts justified judge in denying motion for instructed verdict.

Appellate court cannot substitute its opinion of facts for that of the jury and trial judge, being limited to passing on the question as to whether the circumstances justify the judge in denying motion of defendants for an instructed verdict.

3. Arson ☞37(1)—Evidence held to establish corpus delicti.

Evidence, in prosecution for arson, held sufficient to produce a conviction in an unprejudiced mind that fire was of incendiary origin and to establish corpus delicti.

4. Criminal law ☞517(4)—Where there has been received substantial evidence tending to prove corpus delicti, defendant's confession may be admitted as cumulative evidence to prove corpus delicti and to prove that defendant committed crime.

Where there has been received evidence of a substantial weight tending to prove corpus delicti, defendant's confession may be admitted as cumulative evidence to prove corpus delicti and to prove that defendant committed crime.

5. Criminal law ☞781(4)—Requested instruction that defendants' statements could not be used to establish any necessary element of commission of crime with which they were charged held properly refused, in view of other substantial evidence tending to prove corpus delicti.

In a prosecution for arson, where there was substantial evidence tending to prove corpus delicti, court properly refused an instruction that, in order to prove corpus delicti, all elements of crime must be made to appear before defendants' statements were admissible for any purpose, and that they could not be used to establish any element of the commission of the crime for which defendants were charged.

6. Criminal law ☞829(18)—Refusal to give requested instructions on weight of circumstantial evidence held not error, where court fully instructed on doctrine of reasonable doubt, and that it was duty of jury to acquit if two opposing conclusions could be, with equal propriety, drawn from evidence.

In prosecution for arson, refusal to give defendant's requested instructions on weight of circumstantial evidence held not error, where court gave jury full and correct instructions on the law of reasonable doubt and instructed an acquittal if two opposing conclusions could, with equal propriety, be drawn from the evidence.

Appeal from Superior Court, San Diego County; L. D. Jennings, Judge.

John Roganovich and Nick Duzich were convicted of first degree arson, and they appeal. Affirmed.

R. A. McKay and A. A. Howell, of San Diego, for appellants.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

YORK, J. Defendants were charged with the crime of first degree arson and were convicted as charged. They moved the court for an arrest of judgment, and moved for a new trial, which motions were by the trial court denied and judgment was thereupon entered. They appeal to this court from the order of the trial court denying their motion for a new trial, and from the judgment of the court entered on the verdict of the jury.

[1, 2] The first objection urged by defendants is the denial of their motions for a directed verdict, but they make only general reference to the transcript for a statement of what the evidence was without making any precise statement of what they claim the facts to be. A review of the reporter's transcript shows evidence that the defendants purchased the business, stock, and equipment of a restaurant, where the fire was alleged to have occurred, for \$200. They were renting a portion of the building of one Max Stiller, who testified that about midnight on May 3d, or 15 days before the fire, he was awakened

by the defendant Roganovich, who stated that the telephone pole near the building was on fire. Before he could proceed to the building, said defendant "came running back, and said the fire was all out." Later, after the fire in the building, he examined the telephone poles near the building and could not find any sign of any fire. The fire broke out in the restaurant; fires were burning through the floor and an odor of gas was noticed by firemen extinguishing the fire. Shortly before the fire defendants were seen in and near the building. It was unusual for them to be in the building at such an early hour of the morning. A sack, which had coal oil on it, and which was partly burned, was found in the restaurant after the fire. There is direct evidence that no coal oil was in the restaurant before the night of the fire, and the evidence strongly tended to show that the fire was purposely set. The evidence showed, although the defendants had purchased the restaurant for \$200, they had their bill of sale recite a much larger sum, and reported that they had paid \$750 for this stock and equipment, and attempted to obtain insurance at a \$2,000 valuation, and actually did obtain insurance for \$1,000 on the equipment and \$500 on the stock prior to the fire. These facts, none of which was disputed, were of themselves sufficient to justify the verdict of the jury. It is not for this court to substitute its opinion of the facts for that of the jury and the trial judge. We are limited to passing upon the question as to whether the circumstances justify the judge in denying the motion of the defendants for an instructed verdict. A careful examination of the transcript herein convinces us that the evidence adduced in this case was sufficient to produce a conviction in an unprejudiced mind that the fire in question was incendiary and not of accidental origin. There was no explanation as to why the defendants were in the restaurant at an unusual hour in the morning just before the fire broke out. Besides, their conduct at that time, taken in connection with the fire that followed, was unusual and of such a nature as to excite suspicion and tend to produce a conviction of the defendants' guilt. *People v. Lang*, 76 P. 232, 142 Cal. 488. This disposes of the contention that the corpus delicti was not established. In *People v. Vertrees*, 146 P. 890, 169 Cal. 404, cited by appellants, the court was considering an extrajudicial confession of defendant, admitted without other evidence establishing the corpus delicti. Held, that defendant's confession cannot be used to prove a necessary element of the crime that would be wholly lacking without such confession.

In the brief for appellants, it is claimed that the court erred in failing to give certain instructions requested by defendants. Of these the most important, apparently, were (a) upon the question of corpus delicti; (b) an

instruction requested by them to the effect that there was no evidence to go to the jury warranting them to convict the defendants under the testimony in the case and the information filed therein; (c) defendants' requested instructions upon the weight of circumstantial evidence. It is further charged "that the court erred in refusing all of defendants' requested instructions." None of these proposed instructions is set forth in the brief. However, we have examined them in the clerk's transcript, and have examined the instructions given by the court to the jury.

[4] The proposed instruction (a) reads as follows:

"The corpus delicti involves the elements of crime, and, in order to prove it, all the elements of the crime must be made to appear before the defendants' statements (if any) are admissible for any purpose; and they cannot be used to establish any necessary element of the commission of the crime for which they have been charged under the information filed in this case."

The instructions given by the court relating to the matter of proof of the corpus delicti consist of a definition of the phrase "corpus delicti," together with the instruction that "the burden of proof is upon the prosecution to prove the corpus delicti in this case"; that mere proof of the burning of a building alone does not establish the corpus delicti of the crime of arson; that, where the evidence fails to show beyond a reasonable doubt that the building was criminally burned, there can be no conviction of arson; and that no conviction can be had without satisfactory proof beyond a reasonable doubt that the building described in the information was feloniously, willfully, and maliciously burned "by the defendants, or either of them, and was not accidentally burned." The jury was not instructed upon the proposition contained in the proposed instruction, to the effect that the defendants' statements, if any, "cannot be used to establish any necessary element of the commission of the crime for which they have been charged under the information filed in this case." In *People v. Jenkins*, 228 P. 405, 67 Cal. App. 631, it was decided by this court, pursuant to authorities there cited, that evidence of a confession of the defendant should have been excluded, for the reason that there was no separate and independent evidence tending to establish the corpus delicti. But it does not follow that, where there has been received evidence of substantial weight tending to prove the corpus delicti, a confession made by the defendant may not be used by the jury as cumulative evidence further tending to establish the fact of the corpus delicti, as well as to prove the fact that the defendant committed the crime. In *People v. Jenkins*, *supra*, and in the decisions there cited, the courts have gone no further than to hold

in effect that proof of the corpus delicti may not rest solely upon the confession of the defendant. We therefore are of the opinion that the court did not err in refusing the instruction as offered by the defendants.

Enough has been said herein to show that the court did not err in refusing the instruction (b) above mentioned. The proposed instructions referred to under point (c), supra, relate to circumstantial evidence. It should be noted here that the so-called "confessions," assumed to have been made by the defendants, do not appear to have been actual confessions of guilt, but were limited to admissions of certain facts tending to support the theory of their guilt.

[5] The argument of appellants in support of their contention that the court erred in refusing to give their requested instructions "upon the weight of circumstantial evidence" is limited to a quotation from an Indiana decision, together with the citation of decisions from other states, declaring the rule that, where the state relies upon circumstantial evidence for a conviction, every circumstance necessary to constitute the chain relied upon must be established beyond a reasonable doubt. Very probably many decisions to like effect could have been cited from the reports of our own state. Without searching through the rejected instructions to find other grounds of criticism than those proposed by appellants, we think it sufficient to say that as to the suggested objections they are met by the fact that the same proposition in other terms was contained in instructions which were given by the court. For the court in this case did instruct the jury fully upon the doctrine of reasonable doubt, and also in relation to circumstantial evidence, including therein an instruction that, "if one set or chain of circumstances leads to two opposing conclusions, one or the other of such conclusions must be wrong, and therefore, if you have any reasonable doubt as to which of said conclusions the chain of circumstances points to, a reasonable doubt would be thereby created, and you should give the defendants the benefits of the doubt and acquit them"; also that, "until every material allegation and every ingredient of the crime has been proved to the entire satisfaction of the jury beyond a reasonable doubt," it was the duty of the jury to acquit the defendants; and the further statement that, "if two opposing conclusions could with equal propriety be drawn from the evidence, that conclusion which favors innocence should be adopted, and the one which points to the guilt of the accused should only be adopted when convincing beyond a reasonable doubt."

Judgment affirmed; order denying motion for new trial affirmed.

We concur: CONREY, P. J.; HOUSER, J.

77 Cal. App. 187

HAURET v. PEDELABORDE. (Civ. 3080.)

(District Court of Appeal, Third District, California. March 18, 1926.)

1. Partnership ¶5.

Agreement to divide profits and losses is imported by every partnership agreement, independently of any stipulation.

2. Joint adventures ¶4(1).

Parties engaged in what in law is joint enterprise are entitled to accounting in equity on termination thereof.

3. Joint adventures ¶4(1).

Where contract is silent as to joint adventurers' duties and obligations, law implies right to equal division of profits.

4. Appeal and error ¶516.

Minute orders are not part of judgment roll, under Code Civ. Proc. § 670, and cannot be considered, though set forth and certified as correct.

5. Appeal and error ¶519.

Stipulations ordinarily constitute no part of judgment roll, under Code Civ. Proc. § 670.

6. Partnership ¶328(3)—**Court's finding in suit for accounting that receipts exceeded expenditures and liabilities by stated amount held not supported by evidence and stipulations, where figures stipulated as correct and others set forth in brief did not appear in clerk's minutes or reporter's transcript.**

Court's finding, in action for partnership accounting, that receipts exceeded expenditures and liabilities during certain period by stated amount, held not supported by evidence and stipulations, where figures stipulated as correct were not set forth in clerk's minutes or reporter's transcript, and latter did not contain figures set forth in briefs nor any testimony showing what conclusions should be drawn therefrom.

7. Partnership ¶344—**Finding that allegation in complaint that defendant collected large sum of money and refused to account therefor to plaintiff was true held not to warrant judgment against defendant for definite sum, finding that he collected and had possession of, or had converted, definite sum, to which plaintiff was entitled, being necessary.**

Finding that allegation of complaint in action for accounting, that defendant collected large sum of money and refused to account therefor to plaintiff was true held not to warrant judgment against defendant for definite sum, finding that he collected and had possession of, or had converted to his own use and withheld from plaintiff, definite sum of money to which plaintiff was entitled being necessary.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Henri Hauret against Vincent Pedelaborde. Judgment for plaintiff, and defendant appeals. Reversed.

Edward Schary, of Fresno, for appellant.
Harris & Hayhurst and R. C. Gibson, all
of Fresno, for respondent.

PLUMMER, J. Action for an accounting. Plaintiff had judgment against the defendant for \$300. Defendant appeals.

On or about the 7th day of February, 1921, pursuant to an agreement relative to the purchase and sale of an interest in a certain laundry business conducted in the city of Fresno, county of Fresno, state of California, the defendant executed and delivered to the plaintiff an instrument in writing, of which the following is a true copy:

"February 7, 1921.

"Received of Henry Hauret the sum of four hundred (\$400.00) dollars on account of the sum of twelve hundred (\$1,200.00) dollars, which said latter sum is the full purchase price of an undivided one-half ($\frac{1}{2}$) interest in and to that certain business known as the "Parisian Laundry" in the city of Fresno, county of Fresno, state of California, together with a one-half ($\frac{1}{2}$) interest in and to all the property, leasehold interest, and good will of said business; the balance of eight hundred (\$800.00) dollars payable on or before September 1, 1921.

"It is understood and agreed by the parties hereto that the said Henry Hauret may, at his option, withdraw from the purchase of the business and property aforesaid, and that if in the event he so desires to withdraw therefrom, the above said four hundred (\$400.00) dollars will be returned to him without any deduction.

"Upon the payment of the aforesaid eight hundred (\$800.00) dollars, the undersigned will deliver to the said Henry Hauret a bill of sale to the one-half ($\frac{1}{2}$) interest as aforesaid.

"V. Pedelaborde."

[1-3] At the time of the execution and delivery of said writing the plaintiff paid to the defendant the sum of \$400 mentioned therein. Immediately after the execution and delivery of said writing and the payment by the plaintiff to the defendant of said sum of \$400, the plaintiff and the defendant began and continued, until on or about the 1st day of May, 1921, to conduct the laundry business mentioned in said writing. The court found that the plaintiff and defendant conducted said business during said period of time as partners. The writing referred to is silent as to any division of profits, or as to the manner in which the business should be conducted, nor has our attention been called to any testimony showing any specific agreement as to the division of profits and losses. The testimony does show that the plaintiff and defendant at the expiration of every week during the period of time when the plaintiff and defendant were engaged in the conduct of said laundry business, that the cash receipts, after deducting the expenses of the enterprise, were equally divided between the plaintiff and the defendant. The absence of anything in the writing on this subject is wholly immaterial. As said in 20 Cal. Jur. p. 692,

§ 11, "An agreement to divide profits and losses is imported by every agreement of partnership, independently of any stipulation in this respect by the parties to the relationship," and as said in *Duryea v. Burt*, 28 Cal. 569, quoting from the opinion on page 577, "it is not necessary that there should be an express stipulation between the partners to share the profits and losses, as that is an incident to the prosecution of their joint business." Irrespective of whether the plaintiff and defendant were or were not partners, as that term is applied to relationships expressly created and stipulated to be such, the plaintiff and the defendant were engaged in a joint enterprise or undertaking, and therefore entitled to an accounting in the event of a termination of such enterprise. That an accounting may be had of the relationship which, in law, constitutes a joint enterprise in equity has been expressly decided by this court. *Peardon v. White*, 224 P. 263, 65 Cal. App. 463, and cases there cited. Where parties have entered into a joint enterprise and the contract is silent as to their respective duties and obligations, it has been held that the law implies that the parties are entitled to an equal division of profits. *El Paso Ice Co. v. Consumers' Ice Co.* (Tex. Civ. App.) 141 S. W. 551. Other cases might be cited supporting what has just been said, but we think the foregoing sufficient.

The court did not err in holding that the plaintiff was entitled to an accounting, as that would necessarily follow from the relationship constituting the partnership or a joint enterprise. Upon the termination of the business relation between the plaintiff and the defendant on the 1st day of May, 1921, the defendant returned to the plaintiff the \$400 mentioned in the writing hereinbefore set forth, and the controversy now relates only to a settlement of accounts appearing on the books kept of the business conducted by the plaintiff and defendant during the continuance of their business relations.

[4, 5] The main reason urged by appellant for reversal herein is that the record contains no testimony supporting finding No. 12, which finding is as follows:

"The court further finds from the evidence and the stipulation made in open court by the attorneys representing the respective parties, that the receipts from February 1st to May 1st, during the year 1921, exceeded all expenditures and liabilities incurred during said period, by the sum of six hundred dollars and eighty-five cents (\$600.85)."

There is nothing in the reporter's notes, certified by the judge of the trial court to be correct, showing what the stipulations referred to in the finding may have been, or that there were, in fact, any such stipulations. It is true that in the clerk's transcript, included with the papers constituting the judgment roll, as provided by section 670, Code of

Civil Procedure, there appears the following copy of the clerk's minutes:

"The above-entitled cause came on this day for further hearing, Rue Gibson appearing as counsel for the plaintiff, and Edward Schary appearing as counsel for the defendant. Henri Hauret is recalled and testifies for the plaintiff, and it is adjudged that a partnership existed between the parties, and, by stipulation of counsel, it is agreed that the figures given the court as taken from the books are correct, and that the court may render judgment without an accounting. It is ordered that judgment be, and it is hereby entered herein in favor of the plaintiff for the sum of \$300.42, each party to pay his own costs."

This copy has since been certified by the clerk of the trial court of Fresno county as being a true and correct copy of the original minute order entered in said cause. Minute orders, however, do not constitute any part of the judgment roll, and cannot be considered even though set forth and certified as being correct. In deciding this question, the Supreme Court in *Knowles v. Baldwin*, 57 P. 988, 125 Cal. 224, used the following language:

"We cannot notice the entries in the transcript purporting to be minute orders. They are inserted after the certificate of the clerk to the judgment roll and are not certified as being a part of it, and if so certified they would not be a part of it."

That minute orders are not any part of the judgment roll is also held in *Harper v. Minor*, 27 Cal. 107; *Von Schmidt v. Widber*, 34 P. 109, 99 Cal. 511, 515. This court, in *Brown v. Canty*, 159 P. 1056, 31 Cal. App. 183, ruled as follows upon this question:

"The statute does not make these minute orders part of the judgment roll. * * * They are, therefore, improperly in the record—there being no bill of exceptions—and we cannot notice the points attempted to be made in regard to them."

See, also, *Bossen v. Bean*, 216 P. 404, 62 Cal. App. 293.

[6] Likewise stipulations ordinarily constitute no part of the judgment roll. *Spreckels v. Ord*, 13 P. 158, 72 Cal. 86; 2 Cal. Jur. 519, § 258. Even if the minutes of the court could be resorted to in this case, they are so indefinite and uncertain as to the stipulations of counsel in relation to the figures given to the court that no inferences can be drawn therefrom to support the challenged finding. What the figures were does not appear. They are not set forth in the clerk's minutes, nor do they appear in the reporter's transcript of the testimony. It is true that counsel for the respective parties have set forth in their briefs certain figures and argued that certain conclusions should be drawn therefrom. We have no means of ascertaining the correctness of the figures, whether they were introduced in evidence or which conclusion

is correct. The figures nowhere appear in the transcript as having been introduced in evidence, nor is there any testimony in the transcript to show what conclusions should be drawn therefrom. It may be here stated that the findings do not show the receipts of the partnership, nor do they show the expenditures and liabilities of the partnership.

[7] There is a conclusion to the effect that the receipts from February 1 to May 1 exceeded all expenditures and liabilities in the sum of \$600.85. As the cause must be reversed and sent back for want of testimony to support the finding referred to, we also call attention to the fact that the findings do not show that the defendant has collected and has possession of the sum of money referred to in the finding. There is an allegation in the complaint that the defendant has collected a large sum of money and refused to account therefor to the plaintiff, and that such allegation is true, but that is not a finding as to the amount of money which the defendant has collected and has in his possession to which the plaintiff is entitled. It must be found that the defendant has collected and has in his possession a definite sum of money to which the plaintiff is entitled, or has converted to his own use and withheld from the defendant a definite sum to which the plaintiff is entitled, before judgment can be entered in favor of the plaintiff against defendant for such definite sum of money. Being controlled by the decisions to which we have referred and section 670 of the Code of Civil Procedure, it becomes necessary on account of the reasons herein stated to reverse the judgment of the trial court, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

77 Cal. App. 193

FRANK MELINE CO. v. KLEINBERGER.
(Civ. 5303.)

(District Court of Appeal, First District, Division 1, California. March 19, 1926.)

1. Brokers $\Leftrightarrow$ 49(1)—Broker has earned commission on producing ready, able, and willing purchaser on satisfactory terms, and obtained binding and valid contract for sale, or when he has brought seller and buyer together, enabling entry into contract, or produced purchaser who verbally accepts seller's terms and offers to enter binding contract.

Broker has earned commission when, within life of contract, he has produced person ready, able, and willing to purchase property on terms satisfactory to seller, and obtained valid contract for sale, or when he has brought seller and buyer together, and enabled them to enter contract, or has produced purchaser who has verbally accepted seller's terms, and offered to enter binding written contract.

2. Brokers ⇐52.

To entitle broker to commission, intending purchaser must enter binding contract, or offer to do so to vendor, and not merely to broker.

3. Brokers ⇐52—Intending purchaser's instruction to broker to buy property, if he considered it good, and broker's intention to buy, is not production of purchaser who has accepted seller's terms, entitling broker to commission.

Intending purchaser's instruction to broker to buy property for him, providing broker considered it good buy, and broker's intention to close deal and pay deposit, is not sufficient production of purchaser, who has verbally accepted seller's terms, and offered to enter binding contract, entitling broker to commission, offer being made merely to broker, and not to vendor.

4. Brokers ⇐8(3).

Evidence held to show that exclusive listing contract for 30 days and thereafter until notice of termination, to which was added extension until certain date, expired on last day of extension.

5. Brokers ⇐60—Broker is entitled to commission under exclusive listing contract when seller accepts purchaser, regardless of whether written contract is executed or sale consummated as required by statute of frauds to effect valid transfer of realty. (Code Civ. Proc. §§ 1971, 1973.)

Broker is entitled to commission under exclusive listing contract involving payment of compensation for services in connection with sale, when seller accepts agent's purchaser, regardless of whether written contract of sale is actually entered into, or whether sale is consummated, as required by statute of frauds (Code Civ. Proc. §§ 1971 and 1973) to effect valid transfer by realty.

6. Brokers ⇐88(1)—Nonsuit improper where evidence made prima facie showing that property was sold by another prior to explanation of plaintiff's exclusive listing contract.

In action for broker's commission under exclusive listing contract, evidence held to make prima facie showing that property was sold by another before expiration of plaintiff's contract, and, therefore, nonsuit was improper.

7. Trial ⇐139(1).

Motion for nonsuit should be denied if there is any substantial evidence which, with aid of legitimate inferences favorable to plaintiff, tends to establish averments of complaint.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by the Frank Meline Company against Mrs. L. Kleinberger to recover real estate commissions. From a judgment of dismissal, entered after nonsuit, plaintiff appeals. Reversed.

Ward Chapman and L. M. Chapman, both of Los Angeles, for appellant.

Milton K. Young, Lyndol L. Young, Wil-

liam K. Young, Forrest F. Murray, and Young & Young, all of Los Angeles, for respondent.

KNIGHT, J. This is an appeal by plaintiff from a judgment of dismissal entered after a nonsuit had been granted, in an action brought to recover real estate commissions.

The material provisions of the contract out of which the controversy grew are as follows:

"Los Angeles, California, Feb. 24, 1922.

"I hereby appoint Frank Meline Company sole agent for the exclusive sale of the here(i)n described property, upon the terms stated; and in case the said property is sold by me or any agent, or any agent of said company sends or introduces to me a customer who buys it, I agree to pay said company five (5) per cent. of such a price as I may accept. In consideration of Frank Meline Company using their efforts to sell said property, this agency shall extend for a period of 30 days from date hereof and until such further time as I shall notify said Frank Meline Company in writing of the termination of this agency." * * *

"[Signed] Mrs. L. Kleinberger."

Later a supplementary clause was added, reading:

"We hereby extend the exclusive sale until April 5, 1922 (Inc.). Mrs. Kleinberger."

The sale price was fixed at \$45,000, one-half of which was to be a cash payment, but the terms for the payment of the balance were not specified.

Appellant's cause of action as set forth in the complaint was based upon the theory that within the period of the exclusive agency respondent sold the property through another agent, and that, therefore, under the terms of the contract, appellant was entitled to a commission on that sale. The complaint alleges in this regard that—

"Up until the 5th day of April, 1922, plaintiff was diligently engaged in the effort to sell the property, and did have responsible prospective buyers negotiating for the purchase of the same when the defendant herself made a sale of said property through an agent, by name James J. Donahue, for a price plaintiff * * * alleges to be \$55,000, and defendant thereupon attempted to repudiate said agency contract, and claimed that the same had terminated."

Defendant, answering, denied any attempted repudiation of the contract, alleged that the same expired on April 5, 1922, and that on the day following, April 6, 1922, the property was sold, together with certain furniture, through the said Donahue, as agent, for the sum of \$55,000. At the trial, as here, the parties presented the additional issue of whether or not within the life of the agency appellant performed the contract by procuring a purchaser who was ready, able and willing to buy the property on respondent's terms.

The substance of the evidence offered in support of appellant's case was that, after obtaining the agency contract, appellant advertised the property for sale, and endeavored to interest several buyers. When the 30-day period mentioned in the contract was about to expire, appellant sought a 20-day extension, which respondent refused to give, but consented to an extension to and including April 5, 1922. Prior to that date appellant had procured a prospective buyer named Oesterreich, with whom Frank Meline, the principal owner of the appellant corporation, had been associated in other business transactions. On the afternoon of April 5th one of appellant's salesmen drove Oesterreich and his wife to the premises to be sold, where they met and talked with respondent. Oesterreich offered respondent \$43,000 for the property, which offer respondent refused to accept. Thereupon Oesterreich, his wife, and the salesman retired to their automobile, which was standing at the rear of the premises, and, after discussing the matter between themselves, the salesman, acting under instructions from Oesterreich, re-entered the house, and on behalf of Oesterreich, but out of his presence, offered respondent \$45,000 for the property, \$25,000 thereof to be paid in cash, and the balance to be secured by a mortgage bearing interest at 6½ per cent. per annum. Respondent declined the offer, demanding 7 per cent. interest. The Oesterreich party then left, saying they would notify respondent by 6 o'clock that evening whether or not they would meet respondent's terms. They drove to appellant's office, where Oesterreich discussed the matter at some length with Frank Meline. Finally Oesterreich told Meline that, if Meline believed the purchase would be an advantageous one, out of which he, Oesterreich, would be able to make money, to close the sale on the best terms obtainable. Oesterreich thereupon departed, taking with him a check for \$2,000, which he had previously deposited with Meline for the purpose of making a deposit on the prospective purchase. Meline, accompanied by two salesmen, then proceeded to respondent's premises for the purpose, as Meline claims, of closing the sale. As they entered respondent's house they were met by respondent, who informed them that they were too late; that she had waited for an answer from them until 6 o'clock, and, having received none, sold the property, including the furniture, through an agent named Donahue to a Mr. Hart, and had accepted Hart's check. One of the salesmen asked respondent if she had not been a "little hasty," stating that the exclusive contract held by his company did not expire until midnight of that night, to which respondent replied that it was useless to discuss the matter further, because the property had been sold. Respondent then asked Meline if he desired to inspect the property, to which the latter re-

plied that, since the property had been sold, an inspection would avail nothing, and he departed. Meline testified that his object in going there that night was to verify his belief that the prospective purchase was a good one, whereupon he intended to pay a deposit. After respondent refused to continue the negotiations with him, however, no tender of deposit was made. The trial court held that appellant failed to establish a prima facie case either upon the theory that appellant had procured a purchaser within the life of the agency or that the property had been sold within that time by any other agent.

[1, 2] In regard to the first proposition, it seems to be well settled that, in the absence of any specific agreement to the contrary, a broker employed to sell real estate has earned his commission when, within the life of his contract or any extension thereof, he has produced a person who is ready, able, and willing to purchase the property on terms satisfactory to the seller, and has obtained a binding and valid contract for a sale on terms proposed by the seller, or has brought the seller and buyer together, and thus enabled them to enter into a contract of sale, or has produced such a purchaser who has verbally accepted the seller's terms and offered to enter into a written contract embodying the said terms and binding upon both parties (*Twogood v. Monnette*, 215 P. 542, 191 Cal. 103); but, unless the intending purchaser has entered into such binding contract, or has offered to the vendor, and not merely to the broker, to make such an agreement, the broker has not earned his commissions (*Hicks v. Christeson*, 164 P. 395, 174 Cal. 712).

[3] Appellant concedes that no written agreement was ever entered into by Oesterreich for the purchase of the property, and it was neither alleged in the complaint nor proved at the trial that he was a ready and willing purchaser within the meaning of the rule just stated, the evidence in this respect showing without conflict that on the afternoon of April 5th, the only occasion on which the parties were brought together, Oesterreich declined to buy the property on respondent's terms. The fact that later Oesterreich instructed Meline to buy the property, providing the latter considered it a good buy, and that accordingly Meline went to respondent's house intending to "close the deal" and to pay a deposit—which was not authorized by the agency contract—was not sufficient to meet the requirements of the law; the final offer of Oesterreich, if it may be called such, being made merely to the broker and not to the vendor. *Hicks v. Christeson*, *supra*. We conclude, therefore, that as to the first point mentioned the ruling of the trial court must be sustained.

[4] In reference to the other branch of the case, the question presented is whether, as the complaint alleges, the property was "sold" by respondent through another agent

during the life of appellant's contract. If it was, appellant, under the terms of the contract, was entitled to the stipulated commission on the sale. *Kimmell v. Skelly*, 62 P. 1067, 130 Cal. 555. The evidence shows beyond much doubt, we think, that the agency expired on April 5th. As originally written and signed, the contract fixed no time limit to the duration of the agency. It provided that it should continue "for a period of thirty days from date, and until such further time as I shall notify said Frank Meline Company in writing of the termination of this agency." If the contract had been allowed to stand in that form, it would have been immaterial, as appellant contends, so far as the payment of appellant's commissions were concerned, whether respondent sold said property on the 5th or the 6th of April, because at no time did respondent attempt by written notice to terminate the agency. *Kimmell v. Skelly*, supra; *Knox v. Modern Garage, etc., Shop*, 229 P. 880, 68 Cal. App. 583. But, when the 30-day period mentioned in the contract was about to expire, the parties added a clause thereto, the plain effect of which was to definitely limit the life of the agency to April 5th, and the declarations and conduct of the parties clearly indicate that such was their intention and understanding. *Elsea v. Fassler*, 154 P. 1067, 29 Cal. App. 187. It is apparent, therefore, that, in order to collect a commission on the sale made through Donahue, it was essential for appellant to prove that the property was "sold" by Donahue on or prior to April 5th.

[5] Respondent contends that a sale was not established because the evidence failed to show that on or before April 5th there was a conveyance of title, or that any written agreement of sale was entered into between respondent and Hart, and that, therefore, in view of the statute of frauds (Code Civ. Proc. §§ 1971 and 1973), the oral declarations of respondent to the effect that the property had been sold were insufficient in law to prove that fact. As to the meaning of the word "sold" as it is employed in said contract, it should be kept in mind that this controversy does not involve the relationship of vendor and vendee, and, therefore, the questions of whether or not the transaction which took place on April 5th between respondent and Hart constituted a valid sale or was legally sufficient to support an action between them for specific performance are not important. The contract here is the usual one between an intending seller and the broker, involving merely the payment of compensation for personal services to be rendered in connection with a sale, and the language of the contract must be construed in the light of that relationship. *Purcell v. Firth*, 167 P. 379, 175 Cal. 746. Under a contract of that nature, the property is deemed to be "sold" so far as the matter of the agent's commissions are concerned when the seller accepts

the agent's purchaser, regardless of whether a written contract of sale is afterwards actually entered into with him or whether the sale is ever consummated. *Purcell v. Firth*, supra; *Twogood v. Monnette*, supra, citing cases; *Hicks v. Christeson*, supra. The case of *Houston v. Williams*, 200 P. 55, 53 Cal. App. 267, is not unlike the instant one upon this point. There the issue was as to whether under the agency contract the owner reserved the right to make a sale himself, and, if so, how far it was necessary for him to proceed in his negotiations with a prospective buyer before the transaction constituted a sale which would deprive the agent of his commissions. The court said that "there can scarcely be any doubt that, if the power to sell without liability was reserved by the owner, it included the right to secure a purchaser ready to buy and thereby avoid the payment of any commission," even though the sale was not fully consummated by the owner until after the agent had procured a purchaser.

[6] The evidence in the case at bar is to the effect that about 6:30 o'clock on the evening of April 5th respondent declared to appellant's representative that at five minutes past 6 on that same evening she sold the property to Hart through Donahue, who was admittedly a real estate broker, and at that time she accepted Hart's check. She further stated "they were here before 6, but I made them wait until 6:05." These declarations were proved by three witnesses, whose testimony on this point was not conflicting, nor was it in any manner contradicted. The only fair inference to be drawn from this evidence is that on the evening in question respondent accepted the purchaser procured by Donahue, agreed with him upon terms, and accepted his check as payment on the purchase price. It was furthermore established by respondent's answer that on the next day the sale was consummated with Hart for a selling price of \$55,000, including the furniture, which was ample proof that on April 5th Hart was ready, able, and willing to buy the property. In our opinion the evidence narrated was sufficient under the authorities cited to establish prima facie that Donahue, as agent, "sold" the property on April 5th within the meaning of the agency contract. That being so, we believe the motion for a nonsuit was improperly granted.

[7] The question of the amount of weight that should be attached to the evidence of the oral declarations of respondent is immaterial. A motion for nonsuit presents for determination a question of law, and, if there is any substantial evidence which, with the aid of legitimate inferences favorable to plaintiff, tends to establish the averments of the complaint, the motion for nonsuit should be denied.

The judgment is reversed.

We concur: TYLER, P. J.; CASHIN, J.

77 Cal. App. 179

JOHNSON v. TYRRELL et al. (Civ. 3062.)

(District Court of Appeal, Third District, California. March 18, 1926. Hearing Denied by Supreme Court May 17, 1926.)

1. Mortgages $\hookrightarrow$ 516—Deputy of officer making sale is prohibited from becoming purchaser at foreclosure sale of mortgaged property, and purchase may be set aside by any one having sufficient interest in property to give him right of action (Code Civ. Proc. §§ 684, 694, 726).

In view of Code Civ. Proc. §§ 684 and 726, *held*, that section 694, prohibiting officer holding execution or his deputy from becoming purchaser at sale, applies to foreclosure sale of mortgaged property, and, where deputy purchased at such sale, any one interested in property sufficient to give him right of action can have such sale set aside as to him.

2. Mortgages $\hookrightarrow$ 512—Failure to sell real property consisting of several lots separately is mere irregularity, for which sale will not be set aside, where judgment provided for sale in one parcel (Code Civ. Proc. § 694).

Failure to comply with Code Civ. Proc. § 694, requiring sale of real property consisting of several lots to be sold separately, is a mere irregularity, and, where judgment provides for sale in one parcel, a mortgage foreclosure sale will not be set aside on that ground alone, and judgment directing such sale when not appealed from becomes final.

Appeal from Superior Court, Yuba County;
E. P. McDaniel, Judge.

Action to quiet title by F. E. Johnson against T. J. Tyrrell and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded for further proceedings.

Frank A. Duryea and Crofton & Wetmore, all of Marysville, and Russell P. Tyler, of San Francisco, for appellant.

W. H. Carlin, of Marysville, for respondents.

PLUMMER, J. Action by plaintiff to quiet title to the south half of lot 6 and the north quarter of lot 7, in block 5, range F, city of Marysville, and for other relief. The defendant had judgment, and the plaintiff appeals.

The record shows that on or about the 26th day of February, 1917, Emma A. Boggess and her husband, E. A. Boggess, for a valuable consideration, made, executed, and delivered to the defendant T. J. Tyrrell a mortgage on the above-described property to secure the payment of a promissory note for \$4,500; that thereafter, and on or about the 17th day of March, 1917, the said Emma A. Boggess and R. A. Boggess made, executed, and delivered a certain deed of trust to Harold E. Haven and Lloyd D. Hare, as trustees, to secure the payment to C. F. Oldham and Joan Oldham of a certain promissory note in the sum of \$1,000; that on or about the 23d day of February, 1922, one R. E. Colling, to whom the said T.

J. Tyrrell had assigned the note and mortgage for collection, began suit against the said Emma A. Boggess and others to foreclose the mortgage executed and delivered as aforesaid on the 26th day of February, 1917; that on or about the 17th day of August, 1922, a decree of foreclosure of said mortgage was entered in the superior court of the county of Yuba, in which said action was pending; that on or about the 19th day of August, 1922, an order of sale was issued out of said court directing the sheriff of the county of Yuba to sell the said property, pursuant to the decree of foreclosure entered in the case just referred to; that thereafter the sheriff of said Yuba county proceeded to sell said property, and on or about the 25th day of September, 1922, at the time and place specified in the notice previously given of said sale, did offer said mortgaged property for sale at public auction, and that at such sale T. J. Tyrrell became the purchaser thereof; that said T. J. Tyrrell, the defendant in this case, at all the times during the pendency of the foreclosure proceedings herein referred to, and at the time of the sheriff offering said property for sale, and at the time of the purchase thereof by the said defendant T. J. Tyrrell was a deputy sheriff of the county of Yuba, holding such office by appointment from the sheriff of said county, making the foreclosure sale; that, after the foregoing proceedings were taken and had, the trustees appointed in the trust deed herein referred to proceeded to make sale of the property, and at such sale one Mabel I. Reisner became the purchaser thereof, and on the 22d day of March, 1923, said Mabel I. Reisner and J. Reisner, her husband, transferred and conveyed said property to the plaintiff in this action.

It further appears that on or about the 28th day of September, 1923, the sheriff of the county of Yuba made, executed, and delivered to the defendant T. J. Tyrrell a sheriff's deed to the property hereinbefore described, purporting to convey the same to the said defendant T. J. Tyrrell. This action is prosecuted for the cancellation of said deed as a cloud upon the plaintiff's title, and for a decree of the court finding and declaring the sale of said property under said decree in the foreclosure action null and void. It is also a part of the prayer of the complaint that the decree of foreclosure and sale made and entered in said foreclosure be also declared null and void.

The complaint in the action also alleges that said property consists of two known lots and parcels, and should have been sold separately instead of en masse; that, if sold separately, a much higher price would have been obtained therefor; that said property was sold for the sum of \$5,582.72; that the south half of said lot 6 was of the market value of \$4,500, and the north quarter of lot 7 was of the market value of \$4,000. The

court found that the market value of the property was not in excess of the sum paid therefor by the defendant. It further appears that the amount bid by the defendant for said property was the amount due upon the mortgage assigned by the defendant in the foreclosure proceedings for the purposes of collection. The court further found that the plaintiff in this case has no title to the premises referred to, and at no time has had any such title. This finding is based apparently upon the conclusion of the court that the foreclosure sale conveyed an absolute and indefeasible title to the defendant in this case.

[1] There is but one question to be determined upon this appeal. Has the plaintiff, as the possessor of the right, title, and interest of the mortgagors in and to the property in question, a right to have the deed referred to canceled and the sale set aside, for the reason that the sale was made by a sheriff, the principal, to his deputy? Section 694, Code of Civil Procedure, among other things specifies as follows:

"Neither the officer holding the execution nor his deputy can become a purchaser, or be interested in any purchase, at such sale."

The same section also provides that, when a sale is made of real property consisting of several known lots or parcels, they must be sold separately. Section 726, Code of Civil Procedure, provides that there can be only one action for the enforcement of any right secured by a mortgage, directs that the property may be sold by the sheriff, or by a commissioner or by an elisor. In relation to the power given to the commissioner, that section reads:

"If the court appoints a commissioner for the sale of the property, he must sell it in the manner provided by law for the sale of like property by the sheriff upon execution; and the provisions of chapter one, title nine, part two, of this Code are hereby made applicable to a sale made by such commissioner, and the powers therein given and the duties therein imposed on sheriffs are extended to such commissioner."

It has been held in this state that sections 684 and 694 of the Code of Civil Procedure are applicable to foreclosure proceedings. *Ontario Land, etc., Co. v. Bedford*, 27 P. 39, 90 Cal. 185. The court there said on this subject:

"The process under which the judgment in this class of cases is enforced if [is] provided for in section 684 of the Code of Civil Procedure, and the subsequent section, 694, which is a part of the same chapter, dealing with the general subject of the execution of judgments, is applicable to sales of real property under judgments of foreclosure; and when, as in this case, the judgment is silent as to the manner or order in which the separate parcels shall be sold, the judgment debtor has the right to require that separate lots or parcels shall be sold

separately, and may also direct the order in which they shall be sold."

The applicability of section 694 of the Code of Civil Procedure to foreclosure proceedings was before the Supreme Court in the case of *Marston v. White*, 27 P. 588, 91 Cal. 37. The court there followed and reaffirmed the ruling had in the *Ontario Land, etc., Co. Case*. Section 684, Code of Civil Procedure, referred to as applicable in the foregoing cases, reads, with regard to the sale of real property:

"When the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment, by making the sale and applying the proceeds in conformity therewith," etc.

It thus appears to be settled that the words "neither the officer holding the execution nor his deputy can become a purchaser at such sale," found in section 694, Code of Civil Procedure, are applicable to the case at bar. The fact that the mortgaged property in question was sold by the sheriff to his deputy is admitted, but the applicability of the prohibitory section just referred to, found in section 694, *supra*, is denied by the respondent. This claim is based upon the decision in *Jackson v. Collins*, 3 Cow. (N. Y.) 89, where it was held that, where a deputy sheriff was the plaintiff in the writ, or otherwise was so interested in the property to be sold that excluding him from the right to purchase might result in the sacrifice of his interest, the sheriff or deputy would not be regarded as disqualified even under the statute forbidding a sheriff, or any of his deputies, from bidding at a sale. The case of *Cowles v. Hardin*, 7 S. E. 896, 101 N. C. 388, 9 Am. St. Rep. 36, is referred to in one of the cases cited by respondent supporting this rule. An examination of this latter case, however, reveals the fact that the court held that a sale by the sheriff to his deputy did not render the sale absolutely void, and that, where the property had been conveyed to an innocent purchaser, the purchaser's title would be held good. Thus the decision rested upon the doctrine of innocent purchasers intervening.

In none of the cases called to our attention has a violation of the prohibitory provision referred to, contained in section 694, Code of Civil Procedure, been held a mere irregularity. The only question seems to be whether such a sale is voidable at the instance of an interested party, or absolutely void. Some of the states have statutes reading that such sales shall be regarded as fraudulent and void. Following the rule laid down having to do with transactions by debtors, where the statute provides that certain transfers as to creditors are void, it would seem to us that the addition of the words "fraudulent and void" add nothing to our statute in legal effect, as such sales would only be declared

void at the instance of some interested party possessing an interest in the property. Thus, whether the statute reads void or voidable would make no material difference in its application to the facts of such prohibited sale. The words of our Code are prohibitory. They say that a deputy cannot become a purchaser or be interested in any purchase at such sale, which actually means that any one interested in the property sufficient to give him a right of action can have such sale set aside as to him, on the ground of its being by the statute made a legal fraud.

2 Freeman on Executions (3d Ed.) § 292, sets forth the law on this subject as follows:

"In many of the states statutes have been enacted forbidding the officer executing the writ, and all of his deputies, from purchasing at or being interested in the sale; and declaring that any sale in which he or they shall be interested shall be regarded as fraudulent and void. These statutes but give expression to the policy which was everywhere respected long anterior to their passage. It was always understood that the officer holding an execution should be removed from all temptations to the fraudulent exercise of his authority. To accomplish this object, it has ever been held that he should, under no circumstances, be interested in the sale. Hence, when, in a proceeding instituted to vacate a sale, it is shown that the officer purchased in his own name, or that some other person made the purchase for the officer's benefit, the vacation must be made; and this result cannot be avoided by showing that the transaction was fair, the bidding spirited, and the price paid was the full value of the property. *Mills v. Goodsell*, 5 Conn. 475, 13 Am. Dec. 90; *Mapps v. Sharpe*, 32 Ill. 13; *Mark v. Lawrence*, 5 Har. & J. (Md.) 64; *Robinson v. Clark*, 52 N. C. 562, 78 Am. Dec. 265; *Johnson v. Pryor*, 5 Hayw. (Tenn.) 243; *Scott v. Mann*, 36 Tex. 157; *Dempster v. West*, 6 Chic. L. N. 335; *McConnell v. Gibson*, 12 Ill. 128; *Downing v. Lyford*, 57 Vt. 507."

To the same effect is the case of *Miller et al. v. Winslow*, 126 P. 906, 70 Wash. 401, Ann. Cas. 1914B, 833, and note appended to the case as last cited, where a number of cases are collected supporting the rule holding such sales voidable at the election of interested parties. See, also, 11 Cal. Jur. § 30, p. 74; 11 Cal. Jur. § 7, p. 307; 23 C. J. § 554, p. 617; 23 C. J. § 604, p. 643. See, also, note to *Credle v. Baugham*, 136 Am. St. Rep. 790 et seq.

The reasoning in the few cases upholding the right of a deputy to purchase at a sale made by his principal is entirely wanting in this state, where provision is made for the appointment of a commissioner or an elisor to make the sale, and this provision further extends the right to have such appointment made at any time after the decree of foreclosure is entered.

A somewhat similar case was before this court in the case of *Henderson v. Fisher*, 176 P. 63, 38 Cal. App. 270, involving the validity of a sale under a chattel mortgage. After re-

ferring to the prohibitory provision we are considering set forth in section 694 of Code of Civil Procedure, the court there said:

"Since it appears, both from the pleadings and the evidence, that the mortgagee, through his agent, conducted the sale and became a purchaser of the mortgaged property at such sale the position of appellant was analogous to the sheriff in conducting an execution sale, and, hence, the effect as to appellant of said sale would be the same as if the sheriff had bid at an execution sale. But, in the latter instance, under the decisions, there can be no doubt that the sale would be, at least, voidable, if not void"—citing cases.

[2] As laid down in *Freeman on Executions*, as shown by the paragraph quoted, the fact that the transaction was otherwise fair, that the bidding was spirited, and the price paid was the full market value of the property, cannot be relied upon to sustain such a sale; it being a prohibited sale and purchase, and not a mere irregularity. It is further set forth in *Freeman on Executions* that, where there is no statute on the subject, such sales are held void as against public policy, and may be avoided on that ground by the mortgagor, or his successors in interest. As to the question as to the sale en masse, this state has held that failure to comply with such provision of the statute is an irregularity, and that, where a judgment so provides, a sale will not be set aside upon that ground alone. *Hopkins v. Wiard*, 13 P. 687, 72 Cal. 259. The judgment in the foreclosure proceeding under consideration directed the sale of the property to be made in one parcel, and, not having been appealed from, that judgment had become final in that respect cannot be interfered with in this case.

The *Winslow Case*, to which we have referred, is identical with the case at bar, in that it was an action to set aside a deed and vacate the sale. It also included the right to redeem from certain delinquent street assessments. The court held the deed void at the instance of the plaintiffs, interested parties, and remanded the cause for further hearing to ascertain the amount due the defendants, and to fix a time within which the same should be paid.

No other issues were presented to the trial court for determination than those which we have considered herein, and the cause has been submitted to us upon the one question set forth in this opinion. Upon the case made as set forth in the transcript and presented to us, we think the plaintiff should have had judgment canceling the deed executed by the sheriff to his deputy, and, also, vacating and setting aside the sale made by the sheriff to his deputy. There appears no reason why any further relief prayed for in the plaintiff's complaint should be granted. The right of the defendant to proceed under his decree of foreclosure and have the premises resold according to law appears to be well founded.

It is therefore ordered that the judgment of the lower court be, and the same is hereby, reversed, and the cause remanded for further proceedings in accordance with this opinion.

We concur: FINCH, P. J.; HART, J.

77 Cal. App. 219

MILES v. MILES et al. (Civ. 4650.)

(District Court of Appeal, Second District, Division 1, California. March 20, 1926.)

1. Appeal and error $\S$ 1008(1)—Findings not claimed to be unsupported are accepted as conclusive of facts on appeal.

Where appellants do not contend that evidence is insufficient to support findings, they must be accepted as conclusive of the facts on appeal.

2. Contracts $\S$ 354—Contention that contract was breached by party not performing his part thereto could not be sustained, in view of finding of full performance by such party.

In action for breach of contract to pay money for use of plaintiff on receipt of telegram from plaintiff's divorced husband at certain city, contention that husband breached agreement by going to city only for purpose of sending telegram could not be sustained, in view of finding that he fully performed his part of agreement.

3. Contracts $\S$ 258—Unsuccessful attempt by son to defraud parents, obligated under agreement with son to pay money to use of son's divorced wife, does not justify parents in denying wife her rights under contract by rescinding contract after she parted with valuable consideration.

Unsuccessful attempt by son to defraud parents by not carrying out his part of agreement with parents, obligated to pay money for benefit of son's divorced wife, does not justify parents in denying wife her rights under the contract by rescinding contract after she had parted with valuable consideration for benefits to accrue to her.

4. Contracts $\S$ 187(3)—Plaintiff may maintain action on contract to pay money for her benefit made in consideration of expatriation of her husband on discharge of debt to her.

Action may be maintained under agreement by defendants to pay money for use of plaintiff made to benefit plaintiff by expatriation of her divorced husband in consideration of discharge of indebtedness by husband to plaintiff.

5. Contracts $\S$ 187(1)—To enforce benefit derivable from agreement by others, contract need not be made exclusively for benefit of person seeking to establish such right.

That one may be entitled to enforce benefit under an agreement entered into by others it is not necessary that contract be made exclusively for benefit of person seeking to establish such right; it being sufficient if among benefits arising from performance of agreement there exists right sought to be established.

6. Contracts $\S$ 28(3)—Evidence held sufficient to warrant finding that mother entered into agreement to pay money for use of her son's divorced wife.

Evidence held to sustain finding that mother entered into agreement to pay money for use of her son's divorced wife in consideration of son's going away and discharge of debt by son to wife.

7. Trusts $\S$ 234—Trustee holding funds for use of plaintiff under agreement with plaintiff is liable therefor on breach of trust.

Under agreement whereby trustee was selected to hold funds to be paid for use of plaintiff under memorandum between plaintiff and trustee, plaintiff is presumed to have relied on representations of trustee in memorandum, and, trustee returning money to defendant in violation of his agreement, is liable for amount of trust funds.

8. Damages $\S$ 120(1)—Defendants breaching contract to pay money for use of plaintiff cannot limit liability to sums payable to plaintiff personally.

Defendants breaching contract to pay sums for use and benefit of plaintiff cannot limit their liability to amounts payable to plaintiff personally and avoid liability for amounts to be paid in discharge of plaintiff's debts.

9. Appeal and error $\S$ 1073(1)—On establishment of cause of action for breach of contract, second count for money had and received is immaterial.

Where cause of action for breach of contract was adequately sustained, question whether second count for money had and received is maintainable becomes immaterial.

10. New trial $\S$ 99—Granting new trial is within sound discretion of trial court, where affidavits showing newly discovered evidence on which motion is based are contradicted.

Where defendants' affidavits setting forth newly discovered evidence as basis for new trial were contradicted by counter affidavits by plaintiff, the granting or denying of new trial was within sound discretion of trial court.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Naomi Schultz Miles against Sue Miles, James E. Kelby, and another. Judgment for plaintiff, and defendants named appeal. Affirmed.

Schweitzer & Hutton and H. S. Clewett, all of Los Angeles, for appellants.

Joseph H. Call and Asa V. Call, both of Los Angeles, for respondent.

HOUSER, J. This is an appeal from a judgment in favor of plaintiff against the defendants Sue Miles and James E. Kelby for the sum of \$2,500.

The action originally included Joseph Harvey Miles as one of the defendants. Judgment was rendered in his favor, and no appeal has been prosecuted therefrom. The de-

defendants Sue Miles and Joseph Harvey Miles are husband and wife, and plaintiff is the divorced wife of Warren Miles, who is the son of Sue Miles and Joseph Harvey Miles. The complaint is in two counts, by the first of which a judgment is sought for damages for breach of contract alleged to have been made by the three defendants with Warren Miles for the benefit of plaintiff; and the second count of the complaint states a cause of action on account of money had and received by the three defendants for the use of plaintiff. The findings of fact by the trial court, although somewhat lengthy, nevertheless tell the whole story. They are in part as follows:

"That on or about March 21, 1921, defendant Sue Miles entered into an agreement with Warren C. Miles, the son of defendant Sue Miles and Joseph Harvey Miles, for the use and benefit of plaintiff, Naomi Schultz Miles; and that on or about said date Sue Miles entered into an agreement with Naomi Schultz Miles directly, both of which agreements are in substance as follows: That Sue Miles would pay to Naomi Schultz Miles the sum of \$2,500, which sum was to be in full satisfaction of a certain \$3,000 obligation then owing from Warren C. Miles to Naomi Schultz Miles upon the happenings in the manner and at the times following:

"Warren C. Miles was to proceed to Falls City, Neb., and upon his arrival there, \$750 was to be expended from said sum of \$2,500 to redeem a diamond ring of Naomi Schultz Miles, then in pawn for that amount; a sum not exceeding \$150 was to be expended from said total sum of \$2,500 to pay interest on an aggregate principal amount of \$1,750, the repayment of which sum of \$1,750 was secured by the pledge of five other diamond rings of Naomi Schultz Miles; the sum of \$600 in cash was to be paid from said total sum of \$2,500 to Naomi Schultz Miles, and Naomi Schultz Miles agreed that, upon the receipt of this money, she would pay to Ross Schultz, her brother, at Omaha, Neb., the sum of \$150 and a like amount to one Silvernail, who was a druggist doing business in Ocean Park, Cal.; and that in addition to the foregoing payments, which were to be made upon the arrival of Warren C. Miles at Falls City, Neb., the following sums were to be paid in cash to Naomi Schultz Miles at the times specified: \$250, 30 days after March 21, 1921; \$250, 60 days after March 21, 1921; \$250, 90 days after March 21, 1921; \$250, 120 days after March 21, 1921.

"That said sum of \$2,500 was to be placed beyond the control of Sue Miles, and in the hands of some third person to be approved by Naomi Schultz Miles, for the purpose of paying it to her upon the happenings at the times and in the manner above specified.

"That Naomi Schultz Miles and Sue Miles did agree that Sue Miles should deliver the sum of \$2,500 to one James E. Kelby for the purpose of paying it to Naomi Schultz Miles upon the happenings at the times and in the manner herein set forth, and the said Kelby did accept the said trust, and consented to act as trustee, and to perform the terms of said trust for the use and benefit of plaintiff; and that, in pursuance

of the provisions of said agreements, as hereinabove set forth, the said Sue Miles did deposit with said Kelby the sum of \$2,500, upon the terms hereinabove set forth, for the use and benefit of the plaintiff. That said Kelby did accept said sum of \$2,500 for the purpose of paying the same to the plaintiff herein, in the manner hereinabove set forth. That said Kelby, to show his good faith toward plaintiff in said matter, and to provide her with a written memorandum of the aforesaid agreements, and to set forth the terms of his trust and obligation to her, made, executed, and delivered to plaintiff a certain declaration of his said trust in writing, which is in words and figures as follows:

"To Mrs. Naomi Schultz Miles:

"March 21, 1921.

"This memo witnesseth that I, the undersigned, hold and am payee of checks of Mrs. J. H. Miles aggregating \$2,500 for the purposes specified as follows, and to be paid by me upon the following conditions:

"(1) \$750 to redeem a diamond ring from pawn, which ring I am to hold until I receive a telegram from Warren C. Miles from and announcing his arrival at Falls City, Neb., at which time I am to deliver said ring to Mrs. Naomi Schultz Miles, at Los Angeles, Cal.

"(2) To pay interest, not exceeding \$150 on five (5) other diamond rings in pawn for an aggregate principal amount of \$1,750, payable upon the same condition as "(1)" hereof.

"(3) \$600 cash to Mrs. Naomi Schultz Miles, upon receipt by me of said telegram; it being understood that Mrs. Miles shall pay out of this \$150 to her brother at Omaha, Neb., and the like amount to one Silvernail.

"(4) In addition to the foregoing payments, made as above provided for, I agree to pay to said Mrs. Miles, in person at my office, W. P. Story Building, Los Angeles, Cal., the following amounts at the following dates respectively, viz.: \$250, 30 days after date; \$250, 60 days after date; \$250, 90 days after date; and \$250 120 days after date.

"[Signed] James E. Kelby."

"That said Naomi Schultz Miles did repose special confidence in said James E. Kelby, and did agree to his acting for her in the manner hereinabove specified because she refused to trust or rely upon Sue Miles. That said moneys were delivered to James E. Kelby, in the manner and for the purposes aforesaid, because Naomi Schultz Miles did not trust Sue Miles or have confidence in her, and by reason of the special confidence reposed by her in said James E. Kelby. That in agreeing to the delivery of said moneys to James E. Kelby, as aforesaid, Naomi Schultz Miles did rely upon the following statements and representations that this court finds James E. Kelby did make to her, for the purpose of inducing her to enter into said agreement: That he, James E. Kelby, was a trustworthy person, in whom Naomi Schultz Miles could place her confidence; that he was a reputable practicing attorney at law; that he represented a number of large corporations that required a man of special integrity, and in whom was reposed unusual confidence, and that when he placed his signature to a document he could not, by reason of his position in his profession and the community, fail to perform it, and that he would in all respects protect her.

"That the following facts were, at the time of

the making of said agreement, well known to the defendants Sue Miles and James E. Kelby. That at the time of the execution of said agreement Warren C. Miles was the son of defendant Sue Miles, and was residing in the city of Los Angeles, Cal. That it was the desire of Sue Miles to have Warren C. Miles proceed to Falls City, Neb., and associate himself with an agricultural enterprise near that town. At said times Warren C. Miles refused to leave the city of Los Angeles until he had paid, or caused to be paid, certain obligations then owing from him to Naomi Schultz Miles, the plaintiff herein. That said obligations consisted of \$3,000, evidenced by a promissory note dated December 30, 1920, executed by Warren C. Miles in favor of Naomi Schultz Miles, for the principal amount of \$3,000, bearing interest at the rate of 2 per cent. per month, payable 90 days from its date. That said \$3,000 obligations represented cash loaned from Naomi Schultz Miles to Warren C. Miles to the extent of at least \$3,000, and that a part of which loan were moneys borrowed by Naomi Schultz Miles for the use and benefit of and given to Warren C. Miles, and secured by the pledge of jewelry and other personal property of Naomi Schultz Miles. That at said times Naomi Schultz Miles was unwilling to agree to Warren C. Miles leaving the state of California until his obligation to her had been satisfied.

"That at the time of the making of said agreement Naomi Schultz Miles distrusted and expressed to Sue Miles, Joseph Harvey Miles, and James E. Kelby, and each of them, her distrust of Sue Miles and Joseph Harvey Miles, and refused to make or perform any agreement, and in particular refused to agree to permit Warren C. Miles leaving the state of California and canceling her obligation due from him until said Joseph Harvey Miles and Sue Miles should perform and complete the agreement of Sue Miles to pay the sum of \$2,500 to her as above specified, at least, to the extent of placing the payment of the moneys specified beyond their control or power in any manner to interfere therewith. That said sum of \$2,500 was, on or about March 21, 1921, delivered by Sue Miles to James E. Kelby for the purposes herein set forth.

"That Naomi Schultz Miles did, on or about March 22, 1921, cancel and deliver up to Warren C. Miles her said promissory note for \$3,000, and did satisfy the obligation represented thereby. That Warren C. Miles did, on or about March 21, 1921, leave the city of Los Angeles and state of California, and did, on or before May 1, 1921, which this court finds to be a reasonable time under all the circumstances, proceed to Falls City, Neb., and did associate himself with said agricultural enterprise known as the Miles Ranch. That Warren C. Miles did communicate by telegram with James E. Kelby, Sue Miles, and Naomi Schultz Miles, upon his arrival, and announced his arrival at Falls City, Neb.; and, further, that said Warren C. Miles was in the company of, and did live with, Joseph Harvey Miles, defendant herein, and father of said Warren C. Miles, upon said Miles Ranch near Falls City, Neb., within 30 days from March 21, 1921.

"That Sue Miles and James E. Kelby, and each of them, have frequently been requested by plaintiff, Naomi Schultz Miles, to perform the said agreements as hereinabove specified, and in

particular to pay said sum of \$2,500 to her in the manner, upon the happenings and at the times as hereinabove specified. That Sue Miles and James E. Kelby, and each of them, have failed and refused, and still fail and refuse, to pay to plaintiff, Naomi Schultz Miles, the said sum of \$2,500 or any part thereof upon the happenings, at the times, in the manner, and subject to the conditions, hereinabove set forth, or at all, and that no part thereof has been paid to or on behalf of the plaintiff in any manner whatsoever.

"That after the performance of all the acts and things hereinabove set forth, and, in particular, after Warren C. Miles had proceeded to and arrived at Falls City, Neb., and after said \$3,000 note had been delivered up and canceled, and the obligation represented thereby satisfied, defendant Sue Miles did notify James E. Kelby that said sum of \$2,500 should be returned to her, and that no part thereof should in any manner be paid to the plaintiff. That James E. Kelby, prior to the commencement of this action, did deliver said sum of \$2,500 to Sue Miles. That plaintiff has been damaged in the sum of \$2,500.

"That on or about the 21st day of March, 1921, the defendant Sue Miles and the defendant James E. Kelby, and each of them, became indebted to the plaintiff for and on account of money had and received to and for the use and benefit of the plaintiff in the sum of \$2,500, and that said sum of \$2,500 is now due from the said defendants and each of them to said plaintiff; that plaintiff has repeatedly demanded the payment of said sum of \$2,500, but that defendants and each of them have refused, and still refuse, to pay the same or any part thereof. That the same is now due and owing from the defendants to plaintiff."

[1] It is not contended by appellants that the evidence is insufficient to support the findings. They must, therefore, be accepted as conclusive as to the facts.

[2] Appellants suggest that no recovery may be had by plaintiff because the contract "was never carried out." It is claimed that Warren Miles breached the agreement entered into for the benefit of plaintiff, in that when Warren Miles left the city of Los Angeles, instead of going directly to the ranch in Nebraska, he went to Kansas City, where he remained for several days, and then proceeded to the ranch for the purpose only of sending a telegram to defendant Kelby in accordance with the terms of the memorandum given by defendant Kelby to plaintiff, and that immediately thereafter the said Warren Miles returned to Kansas City. But the findings of fact are that within 30 days from the date of the agreement the son and the father were living upon the ranch, and that the son "did associate himself with said agricultural enterprise," which the trial court further found was "a reasonable time under all the circumstances." Appellants' point, therefore, cannot be sustained.

[3] It is next urged that defendants Sue Miles and Joseph Harvey Miles rescinded the contract because Warren Miles had attempt-

ed to defraud them by not carrying out the terms of the agreement, and consequently that plaintiff may not recover. But the mere fact (assuming it to be such) that Warren Miles made an unsuccessful attempt to commit a fraud upon his parents by not performing in good faith the acts which he was obligated to perform would not be sufficient to justify the parents in taking advantage of that fact to the extent of denying to plaintiff the rights to which she was entitled in accordance with the terms of the agreement. Plaintiff was as much concerned in the matter as was any one of the other parties. She gave a valuable consideration for the benefits which were to accrue to her, and her rights in the premises were just as much entitled to protection as were the rights of either of the other parties to the transaction. Besides, whatever may have been the secret intention of Warren Miles with reference to the commission by him of any fraud upon his parents, the findings by the trial court are to the effect that no fraud was actually committed, for the reason that by the strict letter of the agreement, and within a reasonable time after the contract had been entered into, Warren Miles fully performed the acts which he was obligated to perform.

[4, 5] The appellants advance the point that the action was not maintainable for the reason that the contract among the parties was not made expressly for the benefit of plaintiff. It is clear, however, that the facts as found by the trial court do not sustain appellants' contention. The evidence shows that Warren Miles negotiated with his parents concerning the subject-matter of the contract solely on the basis that plaintiff should benefit by the expatriation of Warren Miles, and that plaintiff consented to the banishment of Warren Miles solely on the condition that the indebtedness which he owed to plaintiff, and which was evidenced by a promissory note which plaintiff surrendered to Warren Miles, should be satisfied and discharged by and through the funds which the defendants were obligated to make available to plaintiff. There were no other visible "benefits" in the transaction, unless the fact that Warren Miles was to go from California to the Nebraska ranch, and there to "associate himself with an agricultural enterprise," may be so considered; and, if so, that "benefit" was realized and accomplished. In order that a person may be entitled to enforce a benefit derivable from an agreement entered into by other persons, it is not necessary that such contract be made exclusively for the benefit of the person seeking to establish such right. It is sufficient if among the benefits arising from the performance of the agreement there exists the right sought to be established. *Riverside Land Co. v. Jarvis*, 163 P. 54, 174 Cal. 316.

[6] That defendant Sue Miles was not in

any way a party to the contract upon which the action was based is also suggested by appellants as a reason why the judgment should be reversed. Among other things, Sue Miles testified that she had "put up the money"; that she did the greater part of the talking; and that her "whole heart was set" on getting her "boy" away. Considering other evidence introduced at the trial of the action, it is clear that all the acts performed by Joseph Harvey Miles and defendant Kelby in the matter were at the instigation and request of defendant Sue Miles; and the finding by the court that she entered into the agreement to which reference has just been had is amply sustained by the evidence.

Appellants present the further point that defendant Kelby was not a party to the contract, but that he was acting only as an attorney and agent for the disbursement of the moneys in question, and, consequently, that he incurred no liability.

[7] From the findings heretofore herein set forth, it appears that by agreement of all the parties to the contract defendant Kelby was selected as a trustee of the funds which were to be placed in his keeping for the purpose of paying them to plaintiff upon the happening of the contingencies specified in the memorandum which defendant Kelby executed and delivered to plaintiff. It must, therefore, be presumed that it was partly because of the representations made to plaintiff by defendant Kelby as to his own trustworthiness, and that he was acting for plaintiff, that plaintiff was induced to agree to the arrangement by which defendant Kelby was to handle the monetary part of the transaction. She had placed absolute confidence in him—he was her agent, as well as the agent of the other parties. The conditions of the contract on the part of plaintiff having been performed by her, in that she surrendered the promissory note which evidenced the indebtedness of Warren Miles to her, Mr. Kelby was in no position to return to defendant Sue Miles the money which theretofore she had intrusted to him to be paid to plaintiff in accordance with the terms of the agreement among the parties. It was a violation of the trust reposed in defendant Kelby for him not to retain in his possession the funds which were to become the property of plaintiff upon the performance of the conditions of the contract which were to be performed by plaintiff and Warren Miles. Having in effect thus breached the contract, his liability therefor follows as a matter of course.

[8] Appellants claim that because the entire sum of \$2,500 mentioned in the agreement was not to be paid directly to plaintiff, but that certain sums of money included in the total consideration of \$2,500 were to be paid on account of debts owing by her, the recovery, if any, should be limited to the amount of money which would be paid to plaintiff personally. It can be of no conse-

quence to the defendants to what use the money was to be put. Upon the compliance with the conditions of the contract by plaintiff and Warren Miles, the money was to become the property of plaintiff, subject, in part, to be paid out in accordance with her directions. Manifestly the intention of the parties was that \$2,500 was to be paid for the use and benefit of plaintiff. The defendants breached and repudiated the agreement, and it would be inequitable by reason of defendants' wrong to permit them to make a profit by paying to plaintiff only the net amount which she would have received had the original arrangement been carried out by all the parties. If by plaintiff's direction, or with her consent, a part of the fund was to be used in discharging certain of her obligations, that fact cannot militate against the direct obligation of the defendants to pay to plaintiff the amount of money which was agreed to be paid to her or for her benefit.

[9] It is further urged by appellants that the judgment on the second count of the complaint for money had and received cannot be sustained. But conceding (without deciding) the point to be well taken, it could not help appellants' position. The first cause of action is unquestioned as to its sufficiency. It having been proven on the trial of the action and sustained by the judgment of this court, whether the second count, affecting the same transaction, is maintainable becomes immaterial.

[10] The appellants finally contend that the trial court erred to the prejudice of the defendants in refusing to grant their motion for a new trial. The motion was based on the theory that, if a new trial were granted, "newly discovered evidence" would result in a judgment for the defendants. The substance of such "newly discovered evidence" is contained within certain affidavits which were filed by the defendants in support of their motion for a new trial. A counter affidavit by plaintiff contradicted practically each material fact set forth in the affidavits presented by the defendants. In such circumstances the granting or the denying of the motion for a new trial rested within the sound discretion of the trial court.

In the case of *People v. Oxnam*, 149 P. 165, 167, 170 Cal. 211, 215, it is said:

"It is the established rule in this state that a new trial should be granted on this ground only where the newly discovered evidence is such as to render a different result probable, and it has been said that the question as to the effect upon the case of newly discovered evidence is from its nature peculiarly one that is addressed to the discretion of the trial court. 'Unless the appellate court can plainly see that this discretion has been abused, that the showing made was of such a character as to make it manifest that the case would or should result differently on a new trial in view of the newly

discovered evidence, the order of the trial court refusing a new trial will not be disturbed.' *People v. Sing Yow*, 78 P. 235, 145 Cal. 1."

To the same effect see *Fresno Estate Co. v. Fiske*, 157 P. 1127, 172 Cal. 583; *People v. Taminago*, 169 P. 696, 35 Cal. App. 238; *Spotiswood v. Weir*, 22 P. 289, 80 Cal. 448.

So far as this court is able to determine, the trial court did not abuse its discretion in refusing to grant the motion for a new trial.

No prejudicial error appearing in the record, it is ordered that the judgment be, and the same is, affirmed.

We concur: CONREY, P. J.; FINLAYSON, Justice pro tem.

77 Cal. App. 231

PEOPLE v. ALEXANDER. (Cr. 1296.)

(District Court of Appeal, Second District, Division 2, California. March 20, 1926.)

1. False pretenses $\S$ 42—In prosecution for issuing fictitious checks, other postdated checks given as part of same transactions held properly admitted in evidence (Code Civ. Proc. $\S$ 1850, 1854).

In prosecution for issuing fictitious checks, postdated checks other than those made basis of charge, which were given as part of same transactions, held properly admitted in evidence, in view of Code Civ. Proc. $\S$ 1850, 1854.

2. False pretenses $\S$ 42—In prosecution for issuing fictitious checks, complaining witness' testimony that defendant had telephoned her to hold check, that he could pay cash, held properly stricken as not tending to show honest intent.

In prosecution for issuing fictitious checks in connection with purchase of automobiles, testimony of complaining witness on cross-examination that defendant (after he had borrowed money, pledging car) telephoned her telling her to hold check that he would pay cash, held properly stricken as having no tendency to show honest intention when checks were issued.

3. Witnesses $\S$ 268(9)—In prosecution for issuing fictitious checks, defendant's cross-examination of complaining witness regarding an alleged telephone conversation held not prejudicially limited.

In prosecution for issuing fictitious checks, defendant's cross-examination of complaining witness regarding alleged telephone conversation on day after check was given held not limited to defendant's prejudice.

4. Witnesses $\S$ 379(1), 388(2)—Refusal to permit defendant to cross-examine complaining witness' son affecting matters related to him by her held not prejudicial; there being no conflicts in witness' testimony and no foundation laid for such impeaching evidence.

In prosecution for issuing fictitious checks, court's refusal to permit complaining witness' son to be cross-examined affecting matters

which she had related to him *held* not prejudicial; there being no conflicts in complaining witness' testimony or foundation laid for such impeaching testimony.

5. Criminal law ⚖656(2)—Court's remark directing counsel not to argue particular matter during cross-examination of witness held not prejudicial.

In prosecution for issuing fictitious checks, court's remark that counsel, in cross-examining witness, should not argue particular matter, that it was apparent witness was mistaken, *held* not prejudicial.

6. False pretenses ⚖49(1).

Evidence *held* to sustain conviction for issuing fictitious check.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Allen Alexander was convicted of issuing a fictitious check, and he appeals. Affirmed.

John A. Holland and Jos. R. Marquette, Jr., both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Edwin W. Widney, Deputy Atty. Gen., for the People.

CRAIG, J. Appellant was charged by information and convicted of having issued and delivered to one Frank Prott a check for the sum of \$100, and to a Mrs. Ada I. Bailey a check for \$212.50, without having money, funds, or credit at the bank with which to meet them. A motion for new trial was presented, and overruled and this is an appeal from the ruling upon such motion, and from the judgment.

It appeared from the testimony of the prosecuting witnesses that each of them had advertised an automobile for sale, and that appellant negotiated for the purchase, and obtained possession, of both machines, in each instance displaying a passbook of the First National Bank of Long Beach, where he claimed to have an account. An officer of the bank was sworn and testified that appellant had some months previously opened an account with said bank, but that he withdrew all but 50 cents on the next day, and that he made no further deposits, and had no account with the bank at the time of giving the checks in question.

Prott testified that the transaction occurred on a Saturday afternoon, and that he hesitated about accepting a check, but that appellant assured him that he was a member of the Automobile Club of Southern California, and at the same time signed and delivered to Prott a check for \$500 on the California Bank, which was postdated. Mrs. Bailey and her son each testified that appellant told them that he was a member of said club, and exhibited one of its membership cards. He also gave her a postdated check for \$500, drawn on the Long Beach bank. On one check which he gave to Prott

appellant wrote his address as the Torrey Pine Apartments and on the \$500 check to Mrs. Bailey he gave his residence as 1103 Thirty-Seventh place, Los Angeles. An officer of the California Bank testified that appellant had no account with that institution. An attorney for the Automobile Club swore that appellant had ceased to be a member of the club some six months previously to giving the checks, and a police officer testified upon investigation he found that appellant did not reside at either of the addresses which he gave. Each of the prosecuting witnesses detailed the circumstances of their respective sales, and the checks were introduced in evidence. An officer also stated that the defendant admitted when arrested that the check for \$212.50 was not good, but asserted that he had the money with which to take it up. It appeared that appellant borrowed about \$320 from a loan company on the Bailey car, for which he had paid with the worthless checks, and this he admitted upon the trial, but denied that he had shown a bank book or membership card of the Automobile Club, or that he had claimed to be a member thereof.

[1] It is first contended that the trial court erred in permitting the evidence as to postdated checks to be introduced, and in receiving the checks themselves in evidence. However, it clearly appears that the respective \$500 checks were component parts of the transactions in which they were given, and that they were offered for the purpose of showing intent. Such evidence was properly admitted in accordance with the provisions of sections 1850 and 1954 of the Code of Civil Procedure, as declarations and writings embraced within the same transaction, and as tending to throw light on the question before the court and jury.

[2] In cross-examining one of the complaining witnesses, Mrs. Bailey, appellant's counsel, asked if the defendant did not in fact telephone her to hold the check for \$212.50 and state that he would pay her in cash, to which she replied in the affirmative. It developed, however, that such conversation occurred on the day following the issuance of the spurious paper, after the defendant had procured a loan on Mrs. Bailey's car, and after she had discovered that the check was worthless and had called the officers. The testimony was therefore stricken out on motion of the district attorney, and appellant assigns this ruling as prejudicial error. It is urged in his brief that a case could be imagined where one who had issued a worthless check and fled might telephone back: "Hold the check. It is not good. I will bring you the money." It is asserted that, while under such conditions the ruling would be proper, appellant should have been allowed to show an honest intent to pay the amount of the check, that he actually had the

money, and that, when he appeared at the Bailey residence, he was arrested. We are unable to substantially distinguish the cases. Having obtained possession of an automobile on the strength of two fraudulent checks and upon false representations, and having pledged the car elsewhere upon other false representations, and thus being enabled to raise funds with which to cover up the previous crime, the offer to use such funds so obtained for that purpose is no evidence of honest intentions at the time appellant issued the check in question. The ruling of the trial court was proper.

[3] The next point urged for reversal is that the defendant was precluded from cross-examining Mrs. Bailey regarding an alleged conversation between herself and the defendant on the next day after the check was given. There was some colloquy between the court and counsel as to whether or not the witness had testified upon direct examination as to such conversation, wherein it developed that she had not, and objections to the defendant's questions were thereupon sustained. However, he later cross-examined her upon the subject, and it then appeared that the only conversation on that day consisted of a telephone message that Alexander was going to Long Beach for some money, that he would accompany his wife to a doctor's office, and that he would see the witness in the afternoon and pay her the \$212.50, to which she replied, "All right." Appellant testified in his own behalf that when he gave the check to Mrs. Bailey he asked her to hold it, but this she unqualifiedly denied. The result was that appellant was not limited in his cross-examination of the witness, and the only question presented was one of fact for the jury, upon conflicting testimony, as to the sincerity of his intentions. We see no error in the ruling below.

[4] It is insisted that the court also committed prejudicial error in sustaining objections of the district attorney to appellant's cross-examination of Mrs. Bailey's son, when he was asked: "When you returned at 9:30 on that morning, did your mother tell you he had telephoned?" "What did she say relative to that?" and "Had your mother told you that he was coming out to the house with the money that afternoon?" The witness replied that his mother did inform him of the telephone call, but was not permitted to answer the questions following such answer, and it is urged that the purpose of them was to impeach her testimony. But she did not testify that she had not so stated; no inconsistent or contradictory statements of Mrs. Bailey are cited, nor was any foundation laid for such impeaching evidence. The objections were therefore properly sustained. *People v. Ronsse*, 146 P. 65, 26 Cal. App. 100.

[5] Again, appellant contends that the cross-examination of L. R. Bailey, the son, was erroneously and prejudicially limited,

and that the trial court usurped the functions of the jury. The witness at first stated that his mother presented the \$212.50 check and the \$500 check at the bank on the same day, but not at the same time, but later corrected himself when asked, "What do you mean by 'the same day'?" He answered, "Perhaps she did present both checks at that time." Asked which was right, he replied, "She presented them both." "Q. Then you were mistaken a moment ago? A. I was. Q. When you were so positive? A. I am." The court then interposed, saying: "I would not argue that. It is apparent he is mistaken. You don't need to take time further."

Counsel did not object nor assign the remarks of the court as prejudicial, but, had he done so, it is a familiar rule that counsel are not permitted to argue with a witness, and the only other statement of the court to which exception is taken consisted of a repetition of the witness' own admission that he was mistaken. This was also doubtless apparent to the jury from other evidence in the case, and we do not coincide with appellant's assertion that a "glaring discrepancy was glossed off as an apparent mistake" of a "lying witness." If constrained to hold that the remarks of the court added weight to the statement of the witness in this trivial respect, the jury were instructed to disregard the remarks of both counsel and the court, and we must assume that such instruction was observed.

[6] Appellant's only remaining point consists of the assertion that he was charged "with having given to one Frank J. Prott a check for \$600 in payment for a secondhand car." And it is urged that there is no evidence to support a conviction upon count II of the information, involving such charge. It appears upon the face of the record that he was charged with having given Prott a check for \$100, and the evidence shows that he gave one for \$500 at the same time, which he asked Prott to hold. We have heretofore briefly set forth a summary of the facts, gathered from a careful perusal of the evidence. Appellant was not charged with having given a \$600 check, nor do we find any mention of such a document. There was an abundance of evidence tending to show that the defendant issued and delivered the check for \$100 as alleged, and that he had no money in the bank at the time to meet it. This constituted ample ground upon which to base the verdict and judgment, and is supported by other evidence of the defendant's false representations and manipulations in the realms of "high finance," from all of which we think the jury wholly justified in convicting him.

The judgment and order denying the motion for new trial are affirmed.

We concur: FINLAYSON, P. J.;
WORKS, J.

77 Cal. App. 137

HESLIN v. LAPHAM. (Civ. 5030.)

(District Court of Appeal, First District, Division 1, California. March 18, 1926.)

1. Appeal and error $\hookrightarrow$ 704(2)—Appellate court will not determine that trial court erred in construing contract, where intent of parties is not clear, and evidence of circumstances is not before it (Civ. Code, § 1647; Code Civ. Proc. § 1860).

Appellate court will not determine that trial court erred in construing contract to construct addition to building, where intent of parties is not clear from language of writing, and evidence of circumstances, admissible under Civ. Code, § 1647, and Code Civ. Proc. § 1860, is not before it.

2. Limitation of actions $\hookrightarrow$ 24(2)—Defendant's "general conditions and specifications" for constructing sun porch held to create binding obligation on both parties which was founded on such writing as to defendant (Code Civ. Proc. § 337, subd. 1).

Instrument entitled "General conditions and specifications for construction of sun porch for garage," followed by detailed description of work and materials and statement of price, held to create binding obligation on both parties, which as to defendant who signed it was founded on such writing within Code Civ. Proc. § 337, subd. 1, as to limitation of actions so founded, as "general conditions" referred to conditions under which he would perform, and "specifications" to detailed statement.

3. Appeal and error $\hookrightarrow$ 694(1)—Where evidence was not brought up on appeal, its sufficiency to support finding against defense that action was barred by two-year statute of limitations cannot be questioned (Code Civ. Proc. § 337, subd. 1, and section 339, subd. 1).

Where defendant appealed on judgment roll, and evidence was not brought up, its sufficiency to support finding against defense that action was barred by two-year statute of limitation (Code Civ. Proc. § 339, subd. 1) cannot be questioned, since it cannot be said that there was no evidence to justify finding that four-year statute (section 337, subd. 1) applied.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by L. Heslin against R. E. Lapham. Judgment for plaintiff, and defendant appeals. Affirmed.

Marvin C. Hix, of San Francisco, for appellant.

Grover O'Connor, of San Francisco, for respondent.

CASHIN, J. An action for damages upon a contract for the construction of additions to a building. Judgment was entered for plaintiff, from which defendant has appealed upon the judgment roll, his grounds for reversal being that the action was not one upon a contract, obligation, or liability founded up-

on an instrument in writing, as found by the trial court, and was therefore barred under subdivision 1 of section 339 of the Code of Civil Procedure.

It was found, in accordance with the allegations of the complaint, that a contract in writing was entered into between the parties, by which appellant agreed to construct certain additions to a garage owned by respondent; that the latter paid a portion of the consideration for performance; that appellant partially performed, but failed of full performance, to the damage of respondent in the sum of \$300. It was further found that the writing hereinafter considered was executed by appellant alone, and was the only writing between the parties. The evidence taken at the trial was not brought up on appeal.

[1] It is contended by appellant that the language of the writing is not sufficient to express the terms of a contract or create an obligation or liability within the provisions of subdivision 1 of section 337 of the Code of Civil Procedure. The material portions of the writing are brief. Following the initial paragraph, which read, "General conditions and specifications for construction of sun porch for garage," was set forth a detailed description of the work to be done and the materials to be used, concluding with the following: "Price complete, \$685." "Double French doors in rear of house, \$78"—the writing being subscribed by appellant. The trial court construed this writing to express a promise to perform the work described in consideration of that of respondent to pay upon completion of the work the sum therefor stated therein. The intention not being clear from the language of the writing, for its proper construction the circumstances under which it was written might properly have been considered by that court. Civ. Code, § 1647; Code Civ. Proc. § 1860. As said in *Eulless v. Westphal* (Cal. App.) 235 P. 742, it is the function of the trial court to determine the meaning and effect of an alleged contract in the light of all the facts and circumstances shown by the evidence; and when its meaning is doubtful it cannot be said on appeal that the conclusion of the trial court was incorrect when none of the evidence is before the appellate court.

[2] Aside from any facts and circumstances which may have been considered by the trial court in that connection, it appears to us as a fair conclusion that by the use of the words "general conditions" was meant the conditions under which appellant was willing to perform, namely, an acceptance by respondent and the payment of the price fixed therefor, and that the word "specifications"—the meaning of which is well settled in connection with building contracts—referred to the detailed statement of the materials to be used and the manner of performing the work. *Nave v. McGrane*, 113 P. 82, 85, 19 Idaho, 111;

Fowler v. Bushby, 125 N. Y. S. 890, 69 Misc. Rep. 341. While the cause of action is not founded upon an instrument in writing within the meaning of subdivision 1 of section 337, Code of Civil Procedure, unless the writing contains the promise for the nonperformance of which the action is brought (Scrivner v. Woodward, 73 P. 863, 139 Cal. 314), in O'Brien v. King, 164 P. 631, 174 Cal. 769, it was held that, where the promise might be inferred from the language of the writing, the action was brought within the section. In this case was cited and quoted with approval that part of the decision in Reyburn v. Casey, 29 Mo. 129, which reads as follows:

"The broad and comprehensive language of the statute evidently embraces all kinds of written instruments, without regard to their mere form or phraseology, which imply a promise or agreement to pay money, and is not restricted to such as have the requisites of promissory notes or to such instruments as contain an express promise * * * on their face to pay,"

—the court in its decision stating the rule that in determining whether a promise or obligation is shown by a writing all promises or obligations must be regarded as contained therein which the words necessarily import, therein distinguishing those merely implied by law (i. e., quasi contracts), as held in Scrivner v. Woodward, supra.

The language of the writing in the present case fairly supports the conclusion that an offer was thereby intended to be expressed, which offer, as impliedly found, was accepted by respondent and was acted on by both parties. These facts created an obligation which, as to appellant, was expressed by and founded upon the writing (Bloom v. Hazzard, 37 P. 1037, 104 Cal. 310), and likewise created an obligation which was binding upon respondent (Heffernan v. Davis, 140 P. 716, 24 Cal. App. 295; Gallagher v. Equitable Gas Light Co., 75 P. 329, 141 Cal. 699, 706).

[3] The defense that the action was barred under the provisions of subdivision 1 of section 339 of the Code of Civil Procedure was pleaded by the answer, upon which plea the court found against appellant. It is contended by the latter that the court, having expressly found that the contract was in writing, and that the only writing executed by either party was that signed by appellant, it follows that the finding on the plea mentioned was based solely upon the conclusion of the court that the writing was an instrument within the meaning of subdivision 1 of section 337, Code of Civil Procedure. We cannot say, however, the evidence not being before us, that this finding was not otherwise supported by evidence adduced at the trial. That a contract for the work described at the price mentioned was entered into by the parties is admitted by the pleadings, one of appellant's defenses to the action being that the

contract was oral, and therefore barred by the statute. As said in Murphy v. Stelling, 97 P. 672, 8 Cal. App. 702, 706 (an appeal upon the judgment roll), the evidence not being before the court, a finding against a plea of the statute would be supported by evidence that the defendant was absent from the state for a sufficient time to prevent the running of the statute; and in the instant case, for the same reason, it cannot be said that the writing, if determined not to be sufficient within the provisions of subdivision 1 of section 337, Code of Civil Procedure, was the only evidence upon which the court based its finding against the plea. As held in Archer v. Harvey, 128 P. 410, 164 Cal. 274, 276, where the evidence is not brought up on appeal, its sufficiency to support a finding against the bar of the statute cannot be questioned.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

77 Cal. App. 257

AUSTIN v. BULLION. (Civ. 5543.)

(District Court of Appeal, First District, Division 2, California. March 24, 1926. Hearing Denied by Supreme Court May 19, 1926.)

Frauds, statute of § 118(5) — Exclusion of written agreement to lease for indefiniteness of description held erroneous, in view of offer to prove contemporaneous execution of definite plat agreed to.

In action for damages for refusal to execute lease, exclusion from evidence for indefiniteness of description of written agreement to lease held erroneous, in view of offer to prove by competent witnesses that, contemporaneously with execution of agreement, definite plat was drawn showing outline and boundaries of property to be leased, and that parties agreed thereon.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Leo Austin against A. H. Bullion for damages for refusal to execute a lease. From a judgment of dismissal on granting motion for nonsuit, plaintiff appeals. Reversed.

Hearing denied by Supreme Court; WASTE, C. J., and SHENK, J., dissenting.

Albert I. Loeb, of San Francisco, for appellant.

Walter E. Dorn, of San Francisco, for respondent.

LANGDON, P. J. Plaintiff appeals from a judgment against him in an action for damages for refusal to execute a lease to a certain store in San Francisco, Cal. The con-

tract forming the basis of the action is as follows:

"Received of Leo Austin the sum of four hundred (\$400.00) dollars, being a deposit of the first month's rent to secure a lease of the center store at No. 220 Post street, for a term of ten (10) years at a monthly rental of four hundred (\$400) dollars.

"Said store is to have a frontage of 8 feet running back 22 feet and then widening out to 10 feet for the balance of the depth which extends to rear street. Delivery of premises to be made any time when ready, but in no event to be later than September 1st, 1921. Said premises to be used as a linen, silk, and lace shop.

"Owner to install modern front and put the premises in good condition. Tenant agrees to deposit the sum of one thousand (\$1,000) dollars with the owner to secure the lease; interest at the rate of four (4) per cent. per annum to be allowed the tenant on said money.

"This deposit is accepted subject to the owner's approval, and if this proposition is not accepted by him, said deposit is to be returned and accepted by said Leo Austin when tendered.

"Harrigan-Weidenmuller Co.,

"By L. A. Weidenmuller."

"The above proposition is accepted by me subject to the understanding that the lease is to contain all provisions protecting lessor's rights and interests as are customary in leases generally drawn by owners.

"[Signed] A. H. Bullion."

When plaintiff sought to introduce in evidence the foregoing instrument, it was objected to because of the indefiniteness of the description, the objection was sustained, and, later, defendant's motion for nonsuit was granted.

The only point involved upon the appeal is as to the sufficiency of the contract between the parties. The trial court based its conclusion upon the case of *Rohan v. Proctor*, 214 P. 986, 61 Cal. App. 447. In that case the uncertainty had reference to the beginning of the term of the lease. As stated in the opinion, this uncertainty arose primarily out of the fact that alterations and improvements were to be made by the landlord before the tenant could enter into the occupation and beneficial use of the premises, and that the writing did not contain a definite description of what said improvements were to consist of, nor did it contain a fixed date when such improvements were to be completed. The court stated that, the landlord having agreed to make alterations and improvements in the premises for the tenant's uses, without specifying in the writing what those alterations and improvements were to consist of, the uncertainty in that respect was one which might have been removed by oral evidence as to the kind and character of the alterations and improvements which were within the contemplation and understanding of the parties to the written agreement at the time it was made. The case was decided against the plaintiff up-

on the point that his pleading disclosed that there was no understanding and agreement between the parties upon this matter at the time the contract was entered into, but that such oral understanding and agreement was reached subsequently and was not a part of the original agreement.

The instant case is free the objection pointed out in the case of *Rohan v. Proctor*, supra, for we find that, at the time of offering the written instrument in evidence, the plaintiff also offered to prove, by competent witnesses, that, contemporaneously with the execution of the agreement, a definite plat was drawn showing the outline and boundaries of the property to be leased, and that the parties then agreed upon those boundaries and fixed them with absolute certainty. This offer, assuredly, takes the case out of the operation of the rule applied in the case last cited, and brings it clearly within the general rule announced therein.

Consequently, the refusal to receive the evidence of the written contract and the contemporaneous oral agreement clarifying the description of the property was error, as was the granting of the motion for a nonsuit and the judgment that followed.

The judgment is reversed.

We concur: STURTEVANT, J.; NOURSE, J.

77 Cal. App. 241

MITCHELL v. FLEMING et al. (Civ. 4144.)

(District Court of Appeal, Second District, Division 2, California. March 22, 1926. Hearing Denied by Supreme Court May 17, 1926.)

1. Account stated $\S$ 18(1)—Complaint in action on account stated, alleging that account was stated between parties, and that it was agreed that certain sum should be due and unpaid to plaintiff when specified amount should have been collected by defendants, held to sufficiently plead an "account stated."

Complaint in action on account stated, alleging that on certain date an account was stated between plaintiff and defendants, and that it was then ascertained and agreed that there would be owing and unpaid to plaintiff from defendants a certain sum when a specified amount should have been collected by defendants, held to sufficiently plead an "account stated" as against defendants' contention that it was based on a contingency; an "account stated" being an agreed balance of accounts, an account which has been examined and accepted by the parties.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Account Stated.]

2. Account stated $\S$ 4.

An account stated need not ordinarily be in writing to be valid as such.

3. Account stated **14—An account stated cannot be enforced at once, where promise to pay is conditioned for future performance.**

An account stated cannot be enforced at once, where promise to pay is conditioned for future performance, but creditor must await arrival of time at which performance is promised.

4. Frauds, Statute of **44(1)—Account stated, in which time of payment is postponed for more than a year, is within statute, and must be in writing.**

An account stated, under which payment is not made within a year, is within that part of the statute, which requires a promise to be in writing when it is not to be performed within a year.

5. Judgment **527—Finding in former action held not res judicata, where it went beyond judgment rendered (Code Civ. Proc. § 1911).**

Recital in finding that a certain sum will be due and payable to defendants on happening of certain event held not, in view of Code Civ. Proc. § 1911, res judicata in subsequent action on account stated by defendants against same plaintiff, based on such sum, where such finding went beyond the judgment, which merely held that plaintiff was not indebted to defendants, and that amount claimed by defendants was not due when action was commenced.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action on an account stated by R. C. Mitchell against C. S. Fleming and another. Judgment for plaintiff, and defendants appeal. Reversed.

G. C. DeGarmo and H. B. Cornell, both of Los Angeles, for appellants.

William Hazlett and Merton A. Albee, both of Los Angeles, for respondent.

WORKS, J. Plaintiff instituted suit against defendants for the recovery of the sum of \$400. The complaint consisted of three counts; each attempting to state, in a different form from the other two, a cause of action to recover a single judgment for the amount. Plaintiff had judgment as prayed, and defendants appeal.

[1] The first cause of action attempted to be set forth in the complaint was demurred to on the ground that it failed to state facts sufficient to constitute a cause of action, and the demurrer was overruled. It is now contended that the ruling was error. The first count alleges facts showing that one Parker was bound to pay to appellants, who were assignees of one McFarland, as rental under a certain sublease, the sum of \$300 per month for a term of years, commencing on August 1, 1918. Then follow allegations tending to show that prior to June 25, 1918, appellants were obligated to pay to respondent the sum of \$400. There is next this averment, in which is embodied the gist of the count:

"That on or about the 25th day of June, 1918, an account was stated between plaintiff and said defendants, and it was then ascertained and agreed that there would be due, owing, and unpaid to plaintiff from said defendants the sum of \$400, when the sum of \$5,500 should have been collected by defendants on said sublease by McFarland and to Parker, and defendants then agreed to pay said plaintiff said sum of \$400 in the event and at the time as hereinbefore set forth."

Appellants contend that the first count of the complaint is insufficient, for the reason that an account stated cannot arise from an agreement which is based upon a contingency, and rely upon 1 C. J. 700; Tuggle v. Minor, 18 P. 131, 76 Cal. 96, and Baird v. Crank, 33 P. 63, 98 Cal. 293. Respondent, on the other hand, insists that these California cases show that the first count of the complaint states a cause of action. It therefore becomes necessary to determine what the two cases decide—for there are apparently no later ones in this jurisdiction on the exact point here under examination—and then to measure the effect of the questioned count by them. So far as the two cases are relied upon by appellants they announce the rule stated in the language in Corpus Juris, which appellants also cite, that is: "An account cannot be stated with regard to a debt payable on a contingency." Respondent relies upon both the cases as upholding the doctrine that, where an account is attempted to be stated in such manner as to make the agreed amount payable at a future date, it is not payable upon a contingency. He takes the position that the paragraph of the first count which states the gist of the cause of action there pleaded in effect makes the amount here in question payable at a future time, and nothing more. The rule for which respondent contends has been stated thus: "The promise, if express, need not be to pay at once; but, where the promise is to pay at a future time, a recovery cannot be had on the stated account until the expiration of such time." 1 C. J. 698. In Tuggle v. Minor, supra, the Supreme Court decided that an account stated is not rendered ineffective, where the promise is to pay "on my return from New York." In Baird v. Crank, supra, plaintiff sued to recover the sum of \$500 upon an account stated, and had judgment. Upon appeal it was contended that "the evidence did not justify the finding that an account was stated between the parties, because, according to the testimony for the plaintiff, defendant was to pay the five thousand dollars upon his return to Los Angeles, and upon making a settlement there with a Mr. Jewett," who was the agent of defendant at that place. In passing upon this contention, the court said:

"The claim of plaintiff was not a debt payable on a contingency, but was clearly such a one as might be agreed upon and stated by the par-

ties; and the facts proved by plaintiff, if true, clearly show that the transaction constituted a full and complete statement of the account. It is true that the money was to be paid when defendant should settle with Jewett, but that did not affect the statement. If two parties, having accounts between them, examine the accounts and a balance is then struck and agreed upon, and admitted to be due from one to the other, the statement is complete, though the debtor reserves the right to pay the balance at some future day."

We can perceive no difference between the present cause and *Baird v. Crank*, viewing the phase of the latter upon which respondent pins his faith. In that case the Supreme Court evidently regarded the agreement as to the settlement with Jewett as doing nothing more than fixing a future time at which the plaintiff's promise to pay would be fulfilled. That agreement, in our opinion, is in no wise different from the promise in the present case to pay when the collection was made from Parker. It is true that the first count of the complaint, now before us, is somewhat unusually couched, and of that fact appellants take full advantage. They point out that in the paragraph containing the reference to the account stated it is alleged that the amount sued for "would be due, owing, and unpaid," when the money due under the sublease "should have been collected," and that "defendants then agreed to pay said plaintiff" the amount. When the entire count is examined, although the pleading is not as plain as it might have been made, it exhibits clearly enough an attempt on the part of the pleader to show a present account stated; the time of payment being postponed. In support of this view it is to be observed that an allegation immediately preceding the paragraph to which we have alluded as containing the gist of the count is to the effect that appellants at the time the account is alleged to have been stated, were obligated to pay to respondent the amount for which judgment is prayed, and that the paragraph itself opens with the allegation that on a specified date "an account was stated, * * * and it was then ascertained and agreed," this language being followed by the clauses above quoted. An account stated is "an agreed balance of accounts; an account which has been examined and accepted by the parties." *Merchants' Nat. Bank v. Carmichael*, 173 P. 999, 178 Cal. 446. We are of the opinion that the first count of the complaint sufficiently pleads such an account.

[2-4] The second count of the complaint is based also upon an account stated, pleaded in a form somewhat different from that alleged in the first count. The evidence under the allegations concerning each of the two accounts stated was to the effect that the promise to pay was not in writing, and it is now insisted that the promise was invalid under

the statute of frauds, for it appears from the record that the payments to be collected by appellants from Parker could not have been realized within a year from the alleged statement of the account. The payment of the amount contemplated by each of the alleged accounts stated was postponed, under both pleadings and evidence, until the collection from Parker should be made. It is undoubtedly the law that an account stated need not ordinarily be in writing to be valid as such (*Converse v. Scott*, 70 P. 13, 137 Cal. 239; *Bennett v. Potter*, 183 P. 156, 180 Cal. 736), but appellant contends that the promise arising from the statement of such an account, if it is not to be performed within a year, is within the statute of frauds like any other promise the performance of which, according to its tenor, is postponed for a time longer than that named. While in some states it is perhaps the law that an account stated may be enforced at once, even if the promise to pay is conditioned for future performance as the promise was in this instance (see *Mattingly v. Shortell*, 85 S. W. 215, 120 Ky. 52, 8 Ann. Cas. 1134), that is not the law in California. Here the creditor must await the arrival of the time at which performance is promised. *Baird v. Crank*, supra. We are unable to see why such a promise is not within the statute of frauds. "An account stated is a mere unperformed promise by one party to pay a stated sum to another, and it is therefore an executory contract." *Bennett v. Potter*, supra. "The account stated is a new and independent contract, and the whole action is based upon that contract." *Converse v. Scott*, supra. "There can be no doubt that a promise to pay money, as much as a promise to do any other act, after the expiration of a year, is within the statute [of frauds]." *Swift v. Swift*, 46 Cal. 266. It is the rule in other jurisdictions that an account stated is within that portion of the statute of frauds which requires that the promise of one to answer for the debt, default, or miscarriage of another shall be in writing. *Chace v. Trafford*, 116 Mass. 529, 17 Am. Rep. 171; *Martyn v. Arnold*, 18 So. 791, 36 Fla. 446. We think the accounts stated here in question are within that part of the statute which requires a promise to be in writing when it is not to be performed within a year.

[5] Appellants make the point that the trial court erred in admitting certain evidence over their objection. The claim which is being pressed in the present action was the subject of litigation in a former action between the parties. Appellants and defendants here were the plaintiffs in that action, and respondent and plaintiff here was the defendant there. The claim here in suit was presented by cross-complaint or counterclaim in the former action. It appeared that the claim was being prematurely urged, and the court thereupon rendered judgment:

"That defendant R. C. Mitchell do not recover anything from plaintiffs or from either of them in this action under his counterclaim or cross-complaint herein, and that said counterclaim and cross-complaint be and the same hereby are dismissed, but without prejudice to the bringing of an action at the proper time by defendant R. C. Mitchell against plaintiffs."

The matter here set forth includes everything embraced in the judgment in the former action which refers to the claim sued on in the present action, but in its findings of fact in the earlier action the court included the following:

"The plaintiffs are not indebted to defendant R. C. Mitchell in the sum of \$400, and that said sum was not due or payable at the time this action was commenced, nor at the time when said defendant filed his cross-complaint herein, but will be due and payable from plaintiffs to said defendant at the time when plaintiffs shall have collected the sum of \$5,500 at the rate of \$300 per month, commencing on the first day of August, 1918, as the rental payable under that certain sublease made by Charles McFarland as lessor and C. C. Parker as lessee for a part of the Copp Building in the city of Los Angeles, Cal."

It was the judgment roll in the former action, including the finding which we have just stated, that was admitted in evidence in the present action over the objection of appellants. We do not see how the ruling admitting the evidence can be upheld. Respondent insists that the recital of the finding that "the sum of \$400 * * * will be due and payable * * * when plaintiffs shall have collected the sum of \$5,500" from Parker is res judicata. But observe what an anomaly arises from such a contention. In the former action the court decided, in effect, that respondent here take nothing, while he insists that something of which he may now avail himself was adjudged in his favor. The court rendered judgment against respondent. He now says that a judgment was rendered against appellants. The argument is not convincing.

Respondent would support his contention under the well-known rule of law, carried into the Code of this state, that by a judgment that is adjudged which appears upon its face to have been adjudged, "or which was actually and necessarily included therein or necessary thereto." Code Civ. Proc. § 1911. But the matter in the finding which respondent would have us declare so potent had nothing whatever to do with what appears on the face of the judgment. The only portion of the finding which supports the judgment is that to the effect that the plaintiffs in the former action were not indebted to the defendant therein, and that the amount claimed was not due when the action was commenced, nor when the cross-complaint was filed. There the finding should have stopped. There, in contemplation of law, it did stop, for the re-

mainder of it was both gratuitous and useless. The contention that the recital in the finding is res judicata is without merit.

Other points are urged upon us by appellants, but it is not necessary that they be decided. In truth, some of them are in effect determined by what has already been said.

Judgment reversed.

We concur: FINLAYSON, P. J.; CRAIG, J.

77 Cal. App. 248

McOMIE v. BOARD OF DIRECTORS OF VETERANS' HOME OF CALIFORNIA et al. (Civ. 3040.)

(District Court of Appeal, Third District, California. March 22, 1926.)

1. Appeal and error ⇨553(1)—Appellant may proceed under alternative method even where there was no reporter present at hearing (Code Civ. Proc. § 953a).

Appellant may proceed under alternative method set out in Code Civ. Proc. § 953a, even where there was no office for reporter to perform at hearing, and consequently there was no reporter present.

2. Appeal and error ⇨612(2)—Appeal from order denying motion to set aside default will be dismissed, where record was authenticated by clerk and not by trial judge (Code Civ. Proc. § 953a).

Appeal under Code Civ. Proc. § 953a, from order denying motion to set aside default will be dismissed, where record was authenticated by clerk, and there was no certificate of trial judge authenticating notice, affidavit, and order, which were intended to constitute record; function of clerk bring limited to authentication of judgment roll and notice of appeal.

Action by Henry McOmie against the Board of Directors of the Veterans' Home of California and another. A default judgment was entered in favor of the plaintiff, and defendants' motion to set aside such default was denied. On motion to dismiss defendants' appeals from the order denying motion to set aside default, and from the judgment. Granted as to the order denying motion to set aside default; denied as to appeal from judgment.

U. S. Webb, Atty. Gen., and Frank L. Guereña and R. L. Chamberlain, Deputy Attys. Gen., for appellants.

E. L. Webber, of Napa, for respondent.

HART, J. The plaintiff brought this action to recover the sum of \$794.38 which the complaint alleges was held by the defendants in trust for one Henry McOmie, father of the plaintiff here, who, at the time said money was deposited with said defendants and at the time of his death, was an inmate of the

Veterans' Home of California. The complaint alleges that the said defendants, as by the law required, are holding said sum of money until the same shall be "claimed by any heirs at law of said Henry McOmie, deceased," and that the plaintiff herein "is the only person entitled to share in any estate of said Henry McOmie, deceased, and as such is entitled to all of the moneys now held by said defendants in trust for the heirs at law of said Henry McOmie, deceased." The date of the filing of the complaint is not made to appear. The summons, however, was served on the defendants on the 9th day of March, 1925, and on the 19th day of said month of March the defendants, through the Attorney General, interposed a general demurrer to the complaint. On May 22, 1925, the court made an order overruling the demurrer, and gave the defendants ten days from the date of said order within which to answer the complaint. The defendants failed to file an answer within the time allowed by the court, and on the 9th day of June, 1925, upon the application of the plaintiff, the default of the defendants was entered and judgment entered accordingly for the sum of \$794.38, with interest thereon at the rate of 7 per cent. per annum from the date of the entry of said judgment. On the 22d day of June, 1925, the defendants gave notice of a motion to set aside said default and the judgment thereupon entered, "upon the ground that the notice of overruling the demurrer of defendants was served by mail, and that defendants' time to plead had not elapsed when said default was taken." The notice stated that it would be based "on this notice and the affidavit of R. L. Chamberlain and the records and files of the action." Certain affidavits were filed, setting forth the facts upon which the motion to set aside the default was founded, and upon the hearing of said motion the court denied the same. Thereafter the Attorney General filed a notice of motion to set aside the order denying the motion to set aside the default and in said notice stated that the same would be supported by certain affidavits and the records of the case. Said motion was subsequently heard and denied. The defendants have taken an appeal from the order denying their motion to set aside the default, and also from the judgment rendered and entered in said action upon said default. The present proceeding is a motion to dismiss the appeal on the ground that there is no reviewable record before the court.

[1, 2] As to the appeal from the order denying the motion of defendants to set aside the default of the defendants and the judgment thereupon entered the point is well taken. The appeal from the order was attempted to

be taken under section 953a of the Code of Civil Procedure. It is now by our decisions settled that even where, as here, there "is no office for the reporter (phonographic) to perform at the hearing of a motion or other proceeding, and consequently there is no reporter present, nevertheless, the appellant may proceed under the alternative method," and so prepare his record on appeal. *Lake et al. v. Harris, etc.* (Cal. Sup.) 243 P. 417; *Pierce v. Works*, 154 P. 852, 171 Cal. 684. But to authorize a review by an appellate court of a record so made up, the same must be authenticated by the trial judge and not by the clerk of the court, whose function as to records on appeal is limited to the authentication of the judgment roll and the notice of appeal. Cases above cited, and also, *Muzzy v. McEwen Lumber Co.*, 98 P. 1062, 154 Cal. 685. The transcript in the present case, aside from the judgment roll, contains a notice of motion to set aside the default, an affidavit of a Deputy Attorney General filed in support of the motion, and the order denying the motion, but there is no certificate of the trial judge authenticating these latter papers, etc., which were intended to constitute the record on the motion to set aside the default, or (in other words) to the effect that the affidavit and other files, records, and papers, which the notice of the motion stated would be relied upon as in support of the motion, were used on the hearing and consideration thereof. In fact, though a matter of no importance here, even the clerk has not certified to the authenticity of the record on the motion or that the affidavit and other papers relied upon to support the motion were used at the hearing thereof. It follows, of course, as has been before stated, and as counsel for respondent contends, that there is no record presented to us here on the motion to set aside the default which enables this court to review the action of the court in denying the motion. Therefore the motion to dismiss the appeal from the order refusing to set aside the default and the judgment thereupon entered must be allowed. This leaves no reviewable matter before us but the judgment on the judgment roll alone, the same being authenticated by the clerk of the court.

In conformity with the requirements of the situation as above disclosed, the motion to dismiss the appeal from the order denying the motion of defendants to set aside the default entered against defendants for their failure to answer the complaint within the time allowed by the court and the judgment thereupon entered is granted, and the motion to dismiss the appeal from the judgment is denied.

We concur: FINCH, P. J.; PLUMMER, J.

77 Cal. App. 252

Sue CHITTIN et al., Plaintiffs and Respondents, v. BOARD OF DIRECTORS OF THE VETERANS' HOME OF CALIFORNIA and C. de Colmesnil, as Secretary-Treasurer Thereof, Defendants and Appellants. (Civ. 3041.)

(District Court of Appeal, Third District, California. March 22, 1926.)

Motion to dismiss appeals by defendants from an order denying motion to set aside default judgment and from the judgment of the Superior Court of Napa County, Percy S. King, Judge, in an action by heirs to recover money alleged to have been deposited. Granted as to order, and denied as to judgment.

U. S. Webb, Atty. Gen., and Frank L. Guarena and R. L. Chamberlain, Deputy Attys. Gen., for appellants.

E. L. Webber, of Napa, for respondents.

HART, J. The appeal is from an order denying a motion of defendants to set aside a default judgment and from the judgment. The plaintiffs have moved to dismiss the appeal.

The action is by a number of alleged heirs of one Sanford Search, who died on the 13th day of March, 1922, while an inmate of the State Veterans' Home, located in Napa county, to recover the sum of \$868.90, which, the complaint alleges, had been deposited by deceased, while such inmate, with the defendants, and which sum, so it is alleged, "said defendants are holding until the said sum is claimed by any heirs at law of said Sanford Search, deceased." The defendants interposed a general demurrer to the complaint, the same was overruled by the court, and defendants granted ten days from the date of the order overruling the demurrer within which to file an answer. The defendants failed to file an answer within the time so allowed, and thereupon the plaintiffs applied for and took judgment by default. Subsequently, the defendants moved to set aside the default and the judgment thereupon entered, supporting the motion by the papers, records and files in the case and the affidavit of a Deputy Attorney General. The motion was denied. The defendants attempt to support the appeal from the order by a record purporting to be prepared under the provisions of section 953a of the Code of Civil Procedure. The appeal from the order is abortive, for the reason that there is no certificate of the trial judge authenticating the record upon the motion to open up the default and to set aside the judgment thereupon entered, or certifying that the papers, affidavit, etc., filed in support of the motion were used upon the hearing thereof. In brief, the situation here with respect to the record on appeal from the order is precisely the same as that with respect to the record on appeal from the order in *McOmie v. Board of Directors of Veterans' Home et al.* (Civ. No. 3040) 246 P. 155, an opinion in which was filed this day, and upon the authority of that case and the cases therein cited, the appeal from the order must be dismissed.

The judgment roll in the instant case is properly authenticated by the clerk of the court; hence the motion to dismiss the appeal from the judgment must be denied. Accordingly, the

motion to dismiss the appeal from the order is granted, and the motion to dismiss the appeal from the judgment is denied.

We concur: FINCH, P. J.; PLUMMER, J.

77 Cal. App. 146

PEOPLE v. DECKERT. (Cr. 1233.)

(District Court of Appeal, Second District, Division 1, California. March 18, 1926.)

1. Witnesses $\Leftrightarrow$ 255(2)—Phonographic reporter may refresh his memory from his shorthand notes, and therefrom give testimony as to statements made by witnesses in former trial.

While generally notes or memoranda made by witness are not admissible on direct examination, it is well established that a phonographic reporter may refresh his memory from his shorthand notes, and therefrom give testimony as to statements made by witnesses in former trial.

2. Criminal law $\Leftrightarrow$ 547(2)—Shorthand reporter may read to jury his phonographic notes of testimony of witnesses taken on former trial (Code Civ. Proc. § 2047).

Under Code Civ. Proc. § 2047, a shorthand reporter, under appropriate circumstances, may read to jury his phonographic notes of testimony of witnesses taken on a former trial of the cause.

3. Witnesses $\Leftrightarrow$ 255(2)—Witness testifying as to statements made by defendant held properly permitted to refresh his memory by reading to jury transcribed notes of shorthand reporter, made at his direction and request at time statements were made (Code Civ. Proc. § 2047).

Under Code Civ. Proc. § 2047, witness testifying in murder trial as to statements made by defendant was properly permitted to refresh his memory by reading to the jury from transcribed notes of the shorthand reporter, where it appeared from preliminary testimony that defendant's statement was taken by stenographer at witness' request; that stenographic notes were written within a few hours after made; and that witness immediately read transcript, and knew it was correct.

4. Criminal law $\Leftrightarrow$ 1169(2)—Permitting witness to read into evidence transcribed notes of shorthand reporter of defendant's statement, if error, held harmless, where there was further evidence that on later hour on same day defendant repeated statement to other persons.

In prosecution for murder, permitting witness to read into testimony transcribed notes made by shorthand reporter as to defendant's statement, if error, held harmless, where it further appeared in evidence that at a later hour on same day defendant repeated statement in substance to others.

5. Witnesses $\S$ 380(5) — Where district attorney was surprised and misled by failure of witnesses to testify in accordance with former statements to him, he could impeach testimony and refresh witnesses' memories by reading to jury certain statements theretofore made by them (Code Civ. Proc. $\S$ 2049).

Where district attorney was surprised and misled by testimony of state's witnesses given in variance with previous statements made by them to district attorney, district attorney, under Code Civ. Proc. $\S$ 2049, could impeach the testimony by such witnesses and refresh their memories by reading to the jury certain statements made theretofore by each of such witnesses respectively.

6. Witnesses $\S$ 386—Difference between testimony of state witness and his former statement regarding ownership of gun by defendant, and as to whether it was loaded, held damaging to prosecution, authorizing impeachment of witness.

In murder prosecution, difference between testimony of state's witness and his former statement regarding the ownership of a gun by defendant, and as to whether it was loaded, held damaging to prosecution authorizing impeachment of witness, in view of defendant's testimony denying ownership of gun or that he had any cartridges.

7. Witnesses $\S$ 386—Discrepancy in testimony of state's witnesses as to hour at which they had seen defendant with former statement held damaging to prosecution, where defense was alibi, authorizing their impeachment.

In murder prosecution, discrepancy in testimony of state's witnesses as to time they had seen defendant with statement formerly made to district attorney held damaging to prosecution, in view of fact that defense was alibi, and authorized their impeachment by showing discrepancy of testimony with former statements.

8. Criminal law $\S$ 1170½(1)—No harm held to have resulted to defendant by reason of attempted impeachment of state witness by state's attorney, where testimony was materially same as statement made to district attorney.

In murder prosecution, where state's witness testified that in telephone conversation with defendant defendant had inquired, "Any one there?" and he had replied, "Yes, the cops," held that such testimony was substantially similar to former statement made to prosecuting attorney that defendant had asked, "Is any one else there?" to which he replied, "Yes, the cops," and hence attempted impeachment of witness by prosecuting attorney did not result in any harm to defendant.

9. Witnesses $\S$ 386—Discrepancy between testimony of state's witness as to defendant's appearance shortly after murder with former statement to prosecuting attorney held damaging, and to authorize his impeachment.

In murder prosecution, testimony of state's witness that shortly after murder defendant's manner was ordinarily as it always had been held damaging to prosecution, where, in former statement to prosecuting attorney, he had stated that defendant "appeared slightly nervous"

at that time, and impeachment of witness by state's attorney was authorized.

10. Witnesses $\S$ 386—Where witness simply fails to testify to all that party calling him expects but has not given testimony against him, it is not permissible to prove witness had previously made statements which would tend to make out his case.

Where witness, called by a party, simply fails to testify to all that party expects or desires, but has not given testimony against him, it is not permissible for party calling him to prove witness had previously made statements which, if sworn to at trial, would tend to make out his case.

11. Witnesses $\S$ 255(9)—Where witness testified he did not recall conversation between him and defendant, district attorney did not commit error in eliciting such conversation by permitting witness to read transcript of his former statement to refresh memory and questioning him with respect thereto.

In murder prosecution, where state's witness testified he did not recall a certain conversation between him and defendant as to defendant's wanting to stay with witness on a particular night, and being tired, held, there was no error committed by prosecuting attorney in eliciting such conversation by permitting witness to read transcript of statement he formerly made for purpose of refreshing his memory, and then questioning him relative to such statements.

12. Criminal law $\S$ 1186(4)—Alleged error by district attorney in manner of eliciting from his own witness statements made by defendant to him as to wanting to stay with witness, and being tired, held immaterial, where there was direct evidence received that defendant did stay with witness on night in question (Const. art. 6, $\S$ 4½).

In murder prosecution, where there was direct evidence received that up to the time of his arrest defendant did remain with state's witness on a particular night, held that any error committed by district attorney in eliciting information from state's witness as to his conversation with defendant as to wanting to stay all night with witness, or whether defendant was tired, was immaterial, and not reversible error, in view of Const. art. 6, $\S$ 4½.

13. Criminal law $\S$ 1178—Specification of error in permitting witness to testify as to time and distance it took him to travel over route taken by defendant, which was neither supported by argument nor authority, deemed abandoned.

In murder prosecution, specification of error that trial court erred in permitting witness to testify as to time and distance it took him to travel over route taken by defendant deemed abandoned, where neither supported by argument nor authority other than mere statement that such evidence was an attempt to prove an experiment, and was incompetent, irrelevant, and immaterial.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Matthew Deckert was convicted of murder, and he appeals. Affirmed.

Henry C. Huntington, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

HOUSER, J. Defendant was convicted of the crime of murder, and sentenced to life imprisonment. He appeals from the judgment and from an order denying his motion for a new trial.

Because of the fact that no claim is made by appellant that the evidence was insufficient to support the verdict, it becomes unnecessary to make a statement of what was shown by the evidence produced by the prosecution other than so much thereof as may be pertinent to illustrate such points as are raised by appellant as grounds for a reversal of the judgment.

Appellant's first specification of prejudicial error, alleged by him to have been committed by the trial court, is that, over the objection of defendant, the district attorney was permitted to refresh the memory of a certain witness introduced by the prosecution as to conversation had in his presence with defendant by reading into the record from a transcript of stenographic notes which were taken by a stenographer who was present at the time such statements were made.

Section 2047 of the Code of Civil Procedure provides that a witness may be "allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. * * *

It appears that on the morning following the day on which the crime was committed defendant made a statement covering some 35 or 40 pages of the record on appeal, which statement was elicited by means of questions which were propounded to him by two police officers and a deputy district attorney, and which questions and the answers thereto were "taken down in shorthand," and within a few hours thereafter transcribed on a typewriter.

The witness who gave testimony with reference to such statement by defendant, in response to the question as to whether the statement was taken under the direction of the witness, testified that it was done at his request; that on the same day, and "after the statement was taken down in shorthand and written in typewriting," he had read it, and found that it was "a true transcription of the statement that was given"; and that at the time he gave his testimony, in order to refresh his memory as to what the defendant had said, it would be necessary for the witness to read such statement. The witness then proceeded to read the statement to the jury—the situation, as expressed by the

court, being that "the witness is reading from this statement his recollection of what occurred."

[1] While as a general rule notes or memoranda made by a witness are not admissible on direct examination, it would seem to be well established that a phonographic reporter may refresh his memory from his shorthand notes, and therefrom give testimony as to statements made by witnesses in former trials. *People v. Ammerman*, 50 P. 15, 118 Cal. 23; *People v. Sexton*, 64 P. 107, 132 Cal. 37; *People v. Vogel*, 171 P. 978, 36 Cal. App. 216; *Benton v. Benton*, 63 P. 775, 131 Cal. 472.

And it has been held that the shorthand reporter may read his notes by questions and answers. In the case of *Watrous v. Cunningham*, 11 P. 811, 71 Cal. 30, error was predicated upon the fact that the stenographic reporter was permitted to read by question and answer the testimony of a witness taken in a former trial of the cause. In ruling that no error was thus committed, the court said:

"That was not allowing the testimony of Campbell in shorthand to be read as a deposition, but was permitting Hood, who could recollect the testimony given on a former trial of the same cause, to state from such recollection, refreshed by the reading of his shorthand notes, what Campbell (who at the time of the present trial was without the jurisdiction of the court) had formerly sworn to in the reporter's hearing. And such action of the court was proper."

In *Burbank v. Dennis*, 35 P. 444, 449, 101 Cal. 90, 104, where a similar situation was presented, the court used the following language:

"But the question here presented is whether the reporter, not having a definite and well-defined recollection of the statements so made after he had refreshed his recollection as far as possible from the writing, will be allowed to read the contents of the memoranda to the court. There appears to be some difference of opinion among courts and law writers as to the proper practice at common law. But under our statute (Code Civ. Proc. § 2047) the course here adopted is expressly allowed. In the case of *People v. Lem You* [32 P. 11] 97 Cal. 224, the practice was approved as justified by the foregoing provision of the Code. And in the case of *People v. Gardner* [32 P. 880] 98 Cal. 127, the identical question was presented, and this court said: 'The remaining objection to the admission of the evidence of the witness, Briar, does not seem to be well founded, in view of the last provision of section 2047 of the Code of Civil Procedure.' Appellant's contention that the reporter's original notes are the basis from which he should have been required to refresh his recollection will not be considered, as such objection was not brought to the attention of the trial court. However, we do not intimate there is any merit in the point."

In the case of *People v. Lem You*, 32 P. 11, 97 Cal. 224, it was expressly held that it was proper to permit a phonographic reporter to

read testimony to the jury from his shorthand notes.

In the case of *People v. Sexton*, 64 P. 107, 132 Cal. 37, the instant point was considered, and it was said:

"The stenographer had the right to read from her notes of his evidence taken at the time, if she was so inclined. The statute contemplates that she may thus refresh her recollection."

[2] It would thus appear to be settled that, at least so far as a shorthand reporter is concerned, in appropriate circumstances, no valid objection can be raised to the reading by him to the jury of his phonographic notes of testimony of witnesses taken on a former trial of the cause. The situation here presented goes but one step farther. The statute (section 2047, Code Civ. Proc.) under which the basic authority is found for permitting a shorthand reporter to read his stenographic notes to the jury provides, in substance, that a witness may refresh his memory by anything written by himself, or under his direction, etc. The witness who read the transcription of the stenographic notes here under consideration testified preliminarily that the statement made by the defendant was taken by the stenographer at the request of the witness; that the stenographic notes were typewritten within a few hours after they were made; that the witness immediately read such transcription, and knew that it was correct, and that on the trial of the action, in order to refresh his memory, it would be necessary for the witness to read from such transcribed notes. The witness, therefore, occupied a position similar in all respects to that which would have been presented had the shorthand reporter read from the transcript—the only difference being that the shorthand reporter would have been the person who made the stenographic notes—and that condition is covered by the circumstance, as provided by the statute, in that the writing was prepared under the direction or request of the witness.

In the case of *People v. Brown*, 84 P. 670, 3 Cal. App. 178, it was held:

"There was no error in permitting a witness to refresh his memory from a memorandum written under his direction at a time when the facts were fresh in his memory and he knew that the same were correctly stated in the writing."

In *Estate of Moore*, 182 P. 285, 291, 180 Cal. 570, 584, a witness was shown a transcript of a bill of exceptions setting forth what purported to be the testimony theretofore given by another person in another trial. The witness (Mr. Olney) testified that he recognized the bill of exceptions as containing a correct statement of what transpired in court at the time stated in the document; and that the witness had himself prepared the bill of exceptions while its contents were fresh in his memory, "using the court report-

er's notes to check it." In the course of the opinion, among other things, the court said:

"The court refused to allow the witness, testifying from the document, to state what Mr. Moore testified to while on the witness stand on the occasion indicated and also denied the offer of defendant to put parts of the transcript in evidence to show the date and nature of the proceeding and Mr. Moore's testimony. Mr. Olney's testimony was clearly admissible. Code Civ. Proc. § 2047. Respondents' counsel concede that perhaps the reporter who made and transcribed the notes of Mr. Moore's testimony would be permitted to read from his transcript, but deny that anyone else might do so. They also call attention to the fact that the transcript did not purport to contain all the testimony of the witness. Both contentions are without force."

[3, 4] In reason and in the light of the authorities heretofore cited herein, the contention of counsel that error was committed by the trial court in thus permitting defendant's statement to be read to the jury (in connection with and as a part of the testimony of the witness) cannot be sustained. But, even though the practice of permitting a witness, circumstanced as was the witness as to whose testimony complaint is here made, to read into evidence the transcribed notes made by a shorthand reporter might be open to question, if further appears in evidence in the instant case, without contradiction, that at a later hour on the same day the defendant repeated the statement in substance to other persons. It is therefore apparent that in any event defendant was in nowise harmed by the reading of defendant's first statement by the witness to whom reference has been had.

It is next urged by appellant that the trial court erred in permitting the prosecution, over the objection of defendant, to cross-examine and to impeach certain witnesses called on behalf of the prosecution, and (for the purpose of refreshing the memories of such witnesses as well as to impeach them) to read to the jury certain statements theretofore made by each of such witnesses respectively.

Considering the point as to the testimony given by each of the several witnesses, it may be noted that as to the first witness he had testified that at a time approximately ten days before the murder occurred a certain "gun" belonging to defendant was either loaded, or that cartridges for it were produced at that time. Whereupon the deputy district attorney in charge of the prosecution directed the attention of the witness to the fact that on a former occasion he had stated that the "gun" "was loaded—all but one chamber." Thereupon the witness stated that:

"A. My best recollection is that there were loads for the revolver. They were probably in the chambers, but I would not want to say with certainty at this time, because my memory is not entirely clear."

As to the second and third witnesses, each of whom was similarly impeached, it appears that he had testified to having seen defendant at a given place at a certain named hour; whereas in the statement theretofore made by the witness to the district attorney he had placed the occurrence as having happened at a different hour.

Regarding the testimony of the fourth witness, it appears that in narrating an alleged telephonic conversation had between him and defendant the witness stated that in the course of such conversation defendant had inquired, "Any one there?" and that he had replied, "Yes, the cops." The former statement made by the witness was that defendant had asked, "Is there anyone else there?" to which question the witness had replied, "Yes, the cops."

The difference between the testimony given by the fifth witness and the statement which theretofore he had made to the district attorney consisted in that, in regard to the manner of defendant shortly after the time when the murder was committed, the witness testified that "his manner was ordinarily as it always was at that time"; while in the statement made to the district attorney the witness had stated, "Well, he appeared slightly nervous."

On a separate occasion, the same witness had testified that he did not recall a certain conversation between him and defendant; whereupon the deputy district attorney, after inquiring of him if he had not just refreshed his recollection, asked whether defendant had said anything to the witness "about wanting to stay there all night," and "whether or not he was tired," to which questions the witness replied that—

"Oh, yes; he said he was going to stay there; wanted to stay there that night. * * * He said he was tired; he had done a lot of walking, or had a long walk."

Section 2049 of the Code of Civil Procedure provides that—

"The party producing a witness * * * may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony. * * *"

In the case of *Zipperlen v. Southern Pacific Co.*, 93 P. 1049, 1054, 7 Cal. App. 206, 216, the rule is laid down that, in order to thus impeach one's own witness, it must appear that the witness has given testimony damaging to the party producing him, and that such party "has been misled and taken by surprise, and that he had reason to believe that the witness would give testimony favorable to his side." See, also, *Rystinki v. California Traction Co.*, 165 P. 952, 175 Cal. 336; *People v. Mallicoat*, 149 P. 1000, 27 Cal. App. 355.

[5] As reflecting upon the testimony given by each of the several witnesses to which attention has been directed, it will at once appear that, because of the fact that in each in-

stance the witness admitted having made the former statement to the district attorney, that official was justified in believing that on the trial of the action the witness would testify to the same effect as he had formerly declared to the district attorney, were the facts within his knowledge, and, consequently, that the failure of the witness to so testify had both misled and surprised the district attorney. In such circumstances the right of the prosecution to impeach the testimony of the witness is fully sustained by the cases of *People v. Ross*, 46 P. 1059, 115 Cal. 233, and *People v. Bushton*, 22 P. 127, 549, 80 Cal. 160. The propriety of the procedure adopted by the district attorney in the instant case is illustrated in the case of *People v. Durrant*, 48 P. 75, 84, 116 Cal. 179, 214, where it is said:

"When a witness called by a party fails to testify to matters previously within his recollection, or gives evidence in apparent variance with that formerly given, it is not incumbent upon the party producing the witness to wait for the assaults of the cross-examination to expose seeming inconsistencies and discrepancies. While he may not impeach his witness (saving under certain exceptional circumstances), he may with propriety refresh his recollection, to the end that the witness and his present evidence may both be put fairly and in their proper light before the jury."

[6] Considering, then, the point as to whether the several witnesses had given testimony which was damaging to the prosecution: In the statement made by defendant, he had denied that he owned a "gun," or that he had any cartridges. The damage to the prosecution resulting from the difference in the testimony of the witness and his former statement regarding the ownership of a "gun" by defendant, and as to whether it was loaded, would be that, if the witness had testified in accordance with the statement made by him to the district attorney, as a matter of fact defendant would have been shown to have been the owner of a "gun" within a short time next preceding the date when the murder was committed. In addition thereto, it would thus appear that defendant had made false statements with reference to the ownership by him of a weapon capable of producing the injury which resulted in the death of the person who was murdered, and by reason thereof the credibility to be attached to the testimony given by defendant would be seriously affected.

[7] The defense relied upon by defendant consisted of an alibi. It was of importance to such defense that his presence at a given place and at a certain fixed time of day be established. In order that evidence of that nature might be successfully rebutted, the prosecution relied upon the testimony of certain witnesses, including those whose testimony was sought to be impeached, by showing a state of facts differing from the evi-

dence given by defendant with relation to his alibi. If such witnesses produced by the prosecution failed to testify in accordance with their respective former statements made by them to the district attorney, and by such failure in a measure corroborated the evidence offered by defendant, the damage to the prosecution would be apparent. It was, therefore, advisable, if not necessary, that the attention of the witnesses be called to the discrepancy existing in their several statements, to the end that their memories might possibly be refreshed, and, failing therein, that the position assumed by the district attorney in introducing such witnesses might be placed in a proper light before the jury.

[8] Regarding the fourth witness for the prosecution, whose testimony was sought to be impeached, there is no material difference between the statement which the witness made to the district attorney and the testimony given by the witness on the trial of the action. It is clear that no harm could have resulted to defendant by reason of the attempted impeachment of the witness.

[9] The matter to which the attention of the fifth witness for the prosecution was directed related to the manner of the witness shortly after the murder had occurred. If, as the witness had stated to the district attorney, defendant "appeared slightly nervous" at the time in question, such nervousness might be taken as an indication of a guilty conscience. On the other hand, if, as the witness testified, "his manner was ordinarily as it always was at that time," a clear conscience on the part of defendant might be indicated. The resultant damage to the prosecution by reason of the alteration in the declaration of the witness becomes at once apparent.

[10, 11] As to the specification of error resulting from impeachment of the same witness because of his lack of memory of the facts to which his attention was directed, it is unquestionable that the law as expressed in the authorities sustains appellant's position that—

"Where a witness called by a party has simply failed to testify to all that party expected or desired, but has not given testimony against him, it is not permissible for the party calling him to prove that such witness had previously made statements which, if sworn to at the trial, would tend to make out his case." *People v. Creeks*, 141 Cal. 529, 532, 75 P. 101, 102.

See, also, *Estate of DeLaveaga*, 133 P. 307, 165 Cal. 607, 631.

The circumstances surrounding the matter to which appellant refers, however, were not such as to indicate that the rule announced in *People v. Creeks*, supra, is applicable. The transcript of the court reporter's notes taken on the trial of the case shows that on the direct examination of the witness he was asked to relate a conversation had between him and defendant, and for the purpose of refreshing

the memory of the witness he was permitted to read to himself, and not to the jury, a transcription of the statement which he had formerly made to the district attorney, after which the following questions and answers appear in the record:

"Q. What was the conversation? A. I don't know what the conversation was now.

"Q. Well, didn't you just refresh your recollection? A. Yes, but I don't understand that. I can't—

"Q. Well, did Mr. Deckert say to you anything about wanting to stay there all night? A. Oh, yes; he said he was going to stay there; wanted to stay there that night.

"Q. Did he say anything to you about whether or not he was tired? A. Yes; he said he was tired, he done a lot of walking, or had a long walk."

[12] It thus appears that, after the witness had properly refreshed his recollection, and likewise had had his attention called to a particular part of the conversation, he made the statement to which the criticism of appellant is directed. No attempt on the part of the district attorney was made to prove that the witness had "previously made statements which, if sworn to at the trial, would tend to make out his case." *People v. Creeks*, 75 P. 101, 102, 141 Cal. 529, 531. There was nothing improper in the course pursued by the district attorney in eliciting from the witness the statement here under consideration. Moreover, we are not prepared to reach the conclusion that a miscarriage of justice resulted, even though it might be assumed that the jury could properly receive evidence that defendant wished to "stay there (with the witness) that night," and that defendant said "he was tired; he had done a lot of walking, or had a long walk." Direct evidence was received that up to the time of his arrest defendant did remain with the witness on that night. That feature of the evidence having been otherwise admitted without objection, any question of its introduction on the occasion referred to in appellant's specifications becomes immaterial. With reference to the testimony that defendant said "he was tired; he had done a lot of walking, or had a long walk," while it may have had a bearing upon the question of defendant's guilt, it was not of so great importance as that its omission from the evidence could have produced any change in the verdict, and consequently did not result in a miscarriage of justice. In accordance, therefore, with the constitutional provision, section 4½, article 6, affecting errors of the nature of that here presented, the judgment cannot be set aside, nor a new trial granted because of such assumed error.

[13] Appellant's final assault upon the judgment herein consists in a specification of error on the part of the trial court in permitting a witness "to testify over defendant's objection to time and distance it took him to travel over the route taken by defendant, ac-

cording to the defendant's statement to the district attorney." In support of his contention, neither argument nor authority is presented by appellant other than the mere statement that such evidence "was an attempt to prove an experiment, and was incompetent, irrelevant, and immaterial," in view of which it must be assumed that appellant has abandoned the point.

No prejudicial error appearing in the record, it is ordered that the judgment and the order denying defendant's motion for a new trial be and the same are affirmed.

We concur: CONREY, P. J.; YORK, J.

77 Cal. App. 201

WELTON v. SMITH. (Civ. 5343.)

(District Court of Appeal, First District, Division 2. California. March 19, 1926.)

1. Appeal and error ⇨1011(1)—Conflict in testimony as to cause of sale falling through held for trial court in action for broker's commissions, and ruling thereon will not be disturbed on appeal.

In action for broker's commissions, conflict in testimony as to whether sale of hotel fell through by act of vendor or vendee is for trial court, and ruling thereon will not be disturbed on appeal.

2. Brokers ⇨65(1)—Vendor, sued for broker's commissions, accepting vendee is not estopped to question vendee's ability and willingness to purchase, where broker is guilty of fraud.

Rule estopping vendor, sued for broker's commissions, from questioning whether vendee is ready, able, and willing to purchase after acceptance of vendee does not apply in presence of fraud by broker.

3. Brokers ⇨65(1)—Conduct of broker, receiving deposit from vendee for account of vendor and returning deposit on refusal of vendee to continue with sale, held not to be free from fraud.

Where broker as agent of vendor procured deposit from vendee for vendor's account and turned over mortgage to vendor, who refused to continue with sale until receipt of note, and on production of note and vendee's refusal to proceed with sale broker returned deposit, held that conduct of broker could not be said to be free from fraud.

4. Brokers ⇨65(1)—Broker returning deposit received for account of vendor in violation of contract with vendor cannot recover commissions from vendor.

Where broker, as agent of vendor, returned deposit to vendee in violation of his contract with vendor, who was to have held deposit on vendee's default, he cannot recover commissions from vendor.

5. Assignments ⇨90.

Assignee of broker in suit for commissions has no greater rights than assignor.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by J. Welton against W. J. Smith, doing business as the Glencairn Inn, in which defendant filed a cross-complaint. Judgment for defendant, and plaintiff appeals. Affirmed.

Theodore L. Breslauer, of San Francisco, for appellant.

R. J. Scholz, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff, as assignee, sued for commissions alleged to have been earned by his assignor in negotiating the sale of a hotel. The defendant filed an answer in which he denied the allegations of the complaint, and he also filed a cross-complaint. The cross-complaint was answered, and on the issues so made a trial was had in the lower court before the court sitting without a jury. The trial court made findings of fact in favor of the defendant, and from a judgment entered thereon the plaintiff has appealed under section 953a of the Code of Civil Procedure.

The appeal involves the question as to whether the sale fell through by reason of the act of the vendor or by reason of the act of the vendee. The property involved consisted of the business and the furnishings of the Glencairn Inn, located at 815 Bush street. Prior to December 28, 1923, the defendant was the lessee of the building and the owner of the business and furnishings, and the property was mortgaged to Alta M. Bates by and under the terms of a mortgage executed on the 23d day of May, 1923, to secure the payment of a promissory note in the sum of \$2,500. On the 28th day of December, 1923, the vendor by a written authorization employed plaintiff's assignor to negotiate a sale of his interest. Later the agent caused the parties to sign an executory agreement as follows:

"San Francisco, Cal., Dec. 28, 1923.

"I, a purchaser, ready, willing and able to perform this agreement, hereby deposit with Paramount Realty Co. the sum of five hundred (\$500.00) dollars as part payment of the purchase price of the Glen Carin Inn, consisting of all furniture furnishings, stock, equipment pertaining thereto as per inventory to be attached to agreement of sale together with leasehold interest thereof. Lease has about three years and nine months to run. Located at 815 Bush street in the city and county of San Francisco, state of California, owned by W. J. Smith and listed by said owner thereof with Paramount Realty Co. as the agent for the sale thereof under a contract dated December 28, 1923, and hereby agree to buy said property upon

the following terms and conditions, to wit: The full purchase price of said property to be \$6,400.00 the sum of \$3,100.00 consisting of \$600.00 in cash and mortgage for the amount of \$2,500.00 described below, cash to be paid on or before January 2, 1924, and agreement of sale to be executed and delivered by said owner upon the following conditions: Free and clear of incumbrances excepting chattel mortgage on personal property, to secure the lease of the Glen Carin Inn. Balance of thirty three hundred (\$3,300.00) dollars due on said purchase price the undersigned purchaser agrees to pay at the rate of one hundred (\$100.00) dollars a month graduating to one hundred and twenty-five (\$125.00) six months thereafter and one hundred fifty (\$150.00) dollars a month twelve months thereafter, first payment to commence thirty days after taking possession of said hotel. Interest on all deferred payments at the rate of six per cent. (6%) per annum. The purchaser agrees to assign all of her right, title and interest of that certain mortgage hereto attached, to the amount of \$2,500.00 to W. J. Smith (the seller). Said mortgage executed on the 23d day of May, 1923, by and between Frank and Ruby Cummings to Alta M. Bates and recorded on June 9, 1923, at recorder's office, San Luis Obispo, Cal. No. 2365. It is expressly understood that this agreement contains all conditions upon which I am to purchase said property and no representations or conditions are to be considered at any time, for any purpose, which are not set forth.

"In the event I fail to complete the purchase as hereinafter stated, the said sum of \$500.00 deposited as aforesaid shall be retained by said agent for the owner of said property, and is hereby fixed as the amount of damage sustained by my breach hereof, as it is impracticable and extremely difficult to fix the actual amount, it being expressly understood, however, in consideration hereof, that the owner of said property shall forbear the bringing of any action against me by reason of my breach of this agreement.

"Time is the essence of this agreement.

"[Signed] Alta M. Bates.

"Witness: [Name undecipherable.]

"Approved and ratified by W. J. Smith."

[1] When the paper was signed by the parties the vendee delivered to plaintiff's assignor for the account of the vendor \$500 and the mortgage. The agent delivered to the vendor for examination the mortgage, but without the note, the payment of which the mortgage was executed to secure. About the same date the vendee attended at the hotel to take an inventory. While the inventory was being taken the vendor commenced to examine the validity of the mortgage, and, on learning that the mortgage note had not been tendered, he stopped the taking of the inventory. Later the vendee produced the note, and the vendor testified that thereupon he notified the vendee to proceed with the taking of the inventory. As stated by the trial court: "He (the vendor) did not refuse it (the mortgage); he simply investigated it, as he had the right to do. * * *" In re Pearsons, 33 P. 451, 98 Cal. 603, 613. In accordance with that ruling the trial court made its findings. The most that

can be said in behalf of the appellant is that there were some conflicts in the testimony, but those conflicts were addressed to the trial court for solution. Under the record as made we may not disturb its ruling thereon.

[2, 3] The appellant calls attention to the fact that the parties executed the written instrument which we have quoted above. Thereupon the appellant makes the contention that the act of the vendor in executing that writing constituted an acceptance of the vendee as a purchaser, and that the vendor is estopped from questioning the fact that the vendee was able, ready, and willing to purchase. *Freeman v. Creelman*, 212 P. 56, 60 Cal. App. 14, 24, and cases there cited. The appellant never presented grounds for this contention in his pleading nor in any other form in the trial court, and presents the point in this court for the first time. In the trial court the appellant assumed that it rested with him to prove that the vendee was ready, able, and willing, and proceeded to introduce evidence on those issues. Later the respondent, without objection by the appellant, introduced his evidence in reply. Furthermore the doctrine of the case last cited never applies in the presence of fraud, and it cannot be said that the appellant's assignor was wholly clear of the charge of fraud. It was the agent of the vendor. As such agent it received \$500 for respondent's account. It was authorized to sell the vendor's property for a consideration including a mortgage for \$2,500. In execution of that authorization it attempted to turn over to the vendor the mortgage without the note—a hollow performance. When the respondent demanded the note and stopped the proceedings in taking the inventory until the note was produced, then the note was brought forward; but the vendee at the same time refused to proceed further, and the appellant's assignor returned the deposit which it held. We cannot say this conduct was free of fraud.

[4, 5] Moreover the record in this case has certain features that differentiate in from the cases that have been cited by the appellant. The appellant's assignor was at all times the agent of the vendor. When it brought the vendor and the vendee together it received from the vendee a deposit of \$500, which, under the terms of the contract, was a part payment on the purchase price, and in the event the vendee should fail to complete the purchase said deposit was to be held for the vendor. However, the agent did not so retain the deposit and pay it to the vendor, but repaid it to the vendee. In doing so it acted in violation of its contract with the vendor. Having breached the contract it could not have recovered from the respondent. Its assignee has no greater rights.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

77 Cal. App. 207

(246 P.)

**FIRPO v. SUPERIOR COURT OF CITY
AND COUNTY OF SAN FRANCISCO
et al. (Civ. 5601.)**

(District Court of Appeal, First District, Division 1, California. March 19, 1926.)

1. Justices of the peace ⇨84(4)—Defendant, moving to quash service of summons and dismiss action, as not brought in township wherein he resided, property was found, or obligation was incurred or to be performed, held not to submit to court's jurisdiction and waive right to quash service, and court might dismiss.

While motion to dismiss for want of jurisdiction of subject-matter is in legal effect a demurrer to complaint on that ground, defendant, moving to dismiss action of claim and delivery in justice court, as not brought in township in which he resided, subject-matter was found or obligation was incurred or contracted to be performed, did not submit to court's jurisdiction and waive right to quash service of summons, and court did not exceed jurisdiction in entering judgment of dismissal, though notice of motion also stated that defendant did not waive objection or consent to jurisdiction.

2. Justices of the peace ⇨72—Replevin by seller, after demand, on buyer's default, held not based on contract to be performed in city and county of venue, where seller retained title (Code Civ. Proc. § 832, subd. 7).

Where title was retained by seller, stipulation for retaking possession on default in payment of purchase-money installment did not create right to repossess on default, which existed independently of such provision, so that action of claim and delivery after default was not on contractual obligation to be performed in city and county wherein suit was brought, within Code Civ. Proc. § 832, subd. 7; gist of action being wrongful detention after demand for possession, notwithstanding stipulation for payment of expenses of repossessing property, which would constitute elements of damage incidental to detention.

3. Justices of the peace ⇨72—Defendant's residence in judicial township in which sued is jurisdictional requirement, in absence of showing that he is within any statutory exception.

Action in justice's court must be commenced in township or city in which defendant resides, and, in absence of showing that he is within any statutory exception, his residence in judicial township in which sued is jurisdictional requirement.

4. Justices of the peace ⇨84(4)—Where defendant specially appeared to move for dismissal of seller's action of claim and delivery, on default in payment of purchase-money installment, on ground that suit was not brought in township of defendant's residence, justice did not exceed jurisdiction in entering judgment of dismissal (Code Civ. Proc. § 890, subd. 4, as amended in 1905).

Under Code Civ. Proc. § 890, subd. 4, as amended in 1905, where defendant appeared

specially to make motion to dismiss seller's action of claim and delivery, after default in payment of purchase-money installment, on ground that suit was not brought in township of defendant's residence, justice did not exceed jurisdiction in entering judgment of dismissal; action not being within statutory exception to rule of venue nor objection to jurisdiction waived.

Certiorari by E. Firpo to review a judgment of the Superior Court of the City and County of San Francisco; James M. Troutt, Judge, affirming a judgment dismissing petitioner's action of claim and delivery. Writ denied.

Raymond Perry, of San Francisco, for petitioner.

Sans & Hudson, of Watsonville, and Thos. W. Firby, of San Francisco, for respondents.

CASHIN, J. Certiorari to review a judgment of the superior court in and for the city and county of San Francisco.

An action was commenced by petitioner in the justice's court of the city and county of San Francisco to recover possession of an automobile or its value, with damages and attorney's fees. The complaint alleged that the defendant in the action came into its possession in Monterey county; that his right thereto had since terminated, a demand therefor, and prayed as part of the relief sought that it might be taken from his possession by any constable of that county. It was shown by the affidavit of defendant filed in connection with the motion hereinafter considered—and which affidavit was not denied—and by a contract in writing hereinafter referred to and considered by the court on such motion, that defendant at all the times mentioned in the complaint had been a resident of Monterey county; that his possession followed the execution therein by petitioner's predecessor in interest of a contract for the sale of the car to defendant; and that the car remained thereafter in the township and county of defendant's residence, and was there found and taken.

The contract provided for the payment by defendant of installments of the purchase price, with interest thereon, to the seller in San Francisco, and that the title should remain in the latter until such payment should be made in full; that the seller might at his option retake possession upon default in payment, and in that event defendant would pay all expenses thus incurred, including attorney's fees in a sum of not less than \$100. Summons was served upon the defendant in Monterey county, whereupon he served and filed a notice that he would move the court to quash the service of summons and dismiss upon the ground that the action was not brought in the township or county of his residence or in which the property, the sub-

ject of the action, was found or taken; that his residence at all the times mentioned in the complaint had been and the property situated in that county; that the latter was there found and taken; and that the action was not upon an obligation incurred or contracted to be performed in the township where brought. The notice further stated that defendant appeared specially for the purpose of making the motion without consenting to the jurisdiction of the court over his person or the subject of the action.

The motion having been presented, the court found the facts as follows: That defendant was a bona fide resident of Alisal judicial township in Monterey county; that the property mentioned was there situated and was there found and taken, and thereupon entered a judgment of dismissal without prejudice. This judgment having been affirmed upon appeal to respondent superior court, petitioner filed the instant proceeding to review the judgment of the latter court.

[1] Petitioner contends that the defendant mentioned, in moving for a dismissal of the action, thereby submitted to the jurisdiction of the justice's court, and thereby waived his right, if any, to quash the service of summons; that jurisdiction having been acquired of his person, and the action being upon an obligation in writing to be performed in the city and county of San Francisco within the provisions of subdivision 7 of section 832 of the Code of Civil Procedure, the court, in entering a judgment of dismissal, exceeded its jurisdiction.

We do not construe the language of the notice as stating as the grounds of the motion that the court was without jurisdiction over the property which was the subject of the action, but that the action was not brought within the proper township or city. While it is the rule that a motion for dismissal on the ground that the court is without jurisdiction of the subject-matter of the action is in legal effect a demurrer to the complaint on that ground (*Roberts v. Sup. Ct.*, 159 P. 465, 30 Cal. App. 714, and cases therein cited), and in the instant case the notice contained the statement that defendant did not waive objection or consent to jurisdiction in this respect, the grounds of the motion, clearly stated therein, were that the action was not one within any of the exceptions to the general rule that an action in the justice's court must be brought in the township in which the defendant resides. The intention being thus clearly shown, the scope and extent of the motion was not enlarged by the statement mentioned.

[2] It is urged by petitioner that the action was based upon an obligation created by the contract, which, as to the payments provided, was to be performed in the city of San Francisco, and that an action for the recovery of the property therein described was one within the provisions of subdivision

7 of the section mentioned. As stated, this contract provided for the retaking of possession by the seller upon default in payment, and that defendant should pay the expenses thus incurred, including an attorney's fee. The title having been retained by the seller, the effect of the stipulation mentioned above was not to create the right to repossess upon default, as such right existed under well-settled principles of law independent of such provision (*Richardson Drug Co. v. Teasdale*, 72 N. W. 1028, 52 Neb. 698; *Wiggins v. Snow*, 50 N. W. 991, 89 Mich. 476; *Bradshaw v. Warner*, 54 Ind. 58; *Blanchard v. Cooke*, 11 N. E. 83, 144 Mass. 207). The gist of the action was the wrongful detention of property which came rightfully into the possession of defendant. The right to a continuance of such possession was conditioned and dependent upon the payment of the installments of the purchase price, in default of which the seller might at his option terminate the right, but, until the intention to exercise such option was manifested by a demand for possession, an action for its recovery could not be maintained. *Adams v. Wood*, 16 N. W. 788, 51 Mich. 411. Defendant not having by his contract agreed to return the property upon default in payment, no contractual obligation was violated by its retention; the wrong for which relief was sought being its detention after demand. The gravamen of the action being the wrongful detention and not the violation of the terms of the contract, the action, as far as it involved the right to the possession of the property, its value, or damages for its detention, was not one upon an obligation within the meaning of subdivision 7 of section 832 of the Code of Civil Procedure. The action not being for the recovery of expense incurred prior to the wrongful detention alleged, expenditures made or obligations incurred thereafter in the pursuit of the property would constitute elements of damage incidental to such detention, and the stipulation in the contract for payment thereof by defendant would not change the character of the action.

[3] The rule is general that actions in justice's courts must be commenced in the township or city in which the defendant resides; and, where it is not shown that the defendant is within any of the exceptions specified in the statute, his residence in the judicial township in which he is sued is a jurisdictional requirement. 15 Cal. Jur., *Justices of the Peace*, § 18; *Bogmuda v. Young*, 207 P. 915, 58 Cal. App. 19, 21; *Code Civ. Proc.* § 832.

[4] Prior to the amendment to subdivision 4 of section 890, Code of Civil Procedure, adopted in 1905, a defendant, sued in a township other than that of his residence, could raise the objection by answer; and, if unsuccessful, urge the objection on appeal. *Bogmuda v. Young*, *supra*. The section as amended reads:

"Judgment that the action may be dismissed without prejudice to a new action may be entered with costs in the following cases * * * (subd. 4); when the action is brought in the wrong county, township or city."

And it has been held that objections to the jurisdiction of the justice's court must be made by special appearance for that purpose; otherwise, it is waived. *Vance v. Sup. Ct.*, 191 P. 945, 48 Cal. App. 327.

In the instant case, it appearing that the action was not one within any of the exceptions to the rule requiring the suit to be brought in the township in which defendant resided, and that the objection to the jurisdiction was not waived, it is our conclusion that the motion to dismiss was properly granted, and that, in making and entering its order and judgment therefor, the court did not exceed its jurisdiction.

The petition is denied.

We concur: TYLER, P. J.; KNIGHT, J.

198 Cal. 586

DAUBERMAN v. GRANT. (L. A. 7911.)

(Supreme Court of California. May 3, 1926.)

1. Nuisance ⌘34 — Finding that offensive smelling, thick, black smoke is emitted from smokestack held sufficient finding that smoke was saturated with soot, as against contention that mere smoke will not constitute nuisance.

In a suit to enjoin a nuisance, finding that great volumes of offensive smelling, thick, black smoke is emitted from defendant's smokestack and conveyed by wind into plaintiff's dwelling in such quantities as to be of considerable annoyance held in effect finding that smoke was saturated with soot, refuting contention that mere smoke will not constitute a nuisance.

2. Nuisance ⌘3(3).

Smoke and soot may constitute nuisance.

3. Nuisance ⌘7.

Business may be nuisance either by reason of location or by reason of improper or negligent manner in which it is conducted.

4. Nuisance ⌘7—Maintenance of smokestack at height permitting pollution of air and interfering with comfortable enjoyment of property constitutes nuisance, when increasing height of stack would obviate annoyance.

Maintenance of smokestack at such low height as to permit pollution of air of plaintiff's premises and interfere with enjoyment of same constitutes nuisance, when increasing height of stack would obviate annoyance.

5. Nuisance ⌘4—Actual damage to property held not necessary to warrant recovery of damages for smoke and soot causing personal discomfort.

It was not necessary for plaintiff to prove actual damage to her property to recover damages caused by smoke and soot nuisance, but she was entitled to recover for personal discomfort and annoyance.

6. Waters and water courses ⌘121—Failure to use reasonable means to prevent precipitation of rainwater from buildings upon neighbor's property creates situation constituting nuisance.

Owner of land must use reasonable and ordinary means to prevent use of his property from interfering with the use and enjoyment of his neighbor's property, and the absence of effort to prevent precipitation of rainwater from his building upon neighboring property constitutes nuisance.

7. Waters and water courses ⚡126(2)—**Refusal to permit defendant to prove location of boundary line of premises receiving rainwater held error.**

In suit to enjoin defendant from maintaining his building in such a way that rainwater was cast from it to plaintiff's property, refusing to permit defendant to show that a fence separating his property from plaintiff's was not the true boundary line *held error*, where had this evidence been admitted it might have shown that water cast from defendant's premises fell entirely upon his own premises, and would have been a complete defense.

8. Waters and water courses ⚡126(2)—**Excluding evidence on theory of agreed boundary line was error, where record was devoid of evidence of agreement or of uncertainty as to line between premises receiving rainwater.**

In suit to enjoin defendant from keeping his premises in a condition so as to precipitate rainwater on plaintiff's property, refusal to receive evidence as to true location of boundary line on ground that line had been established by mutual agreement was error, where record was devoid of any evidence of uncertainty or of such agreement.

9. Boundaries ⚡48(6).

Where acquiescence in existence and location of fence does not amount to agreement that it is on accepted boundary line.

10. Waters and water courses ⚡126(2) — **Finding that rainwater from defendant's shed fell on plaintiff's land held unsupported by evidence.**

In suit to enjoin nuisance, finding that storm and rainwater falling upon roof of defendant's shed fell and flowed on plaintiff's land was unsupported by evidence.

11. Pleading ⚡19—**Complaint alleging three distinct matters as constituting nuisance held subject to demurrer as ambiguous, in that it could not be determined which portion of damage was attributable to each matter alleged.**

Complaint alleging three distinct matters as constituting a nuisance *held* subject to demurrer as ambiguous in the particular that it could not be determined therefrom which portion of the damage was attributable to each matter alleged.

In Bank.

Appeal from Superior Court, Los Angeles County; R. H. Valentine, Judge.

Suit by Barbara Dauberman against John Grant to enjoin a nuisance. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

Julius V. Patrosso and C. C. Mishler, both of Los Angeles, for appellant.

T. J. K. MacGowen, of Los Angeles, Oscar E. Winburn, of Watts, and Ray Howard, of Los Angeles, for respondent.

LENNON, J. This appeal is from a judgment enjoining defendant from maintaining a chimney or smokestack on the premises ad-

joining those of the plaintiff in such a manner that smoke therefrom shall be conveyed into the plaintiff's dwelling house and also enjoining the defendant from maintaining his building or shop on lands adjoining the property of plaintiff in such a way that the storm or rainwater shall flow upon the premises of the plaintiff, and for damages in the sum of \$500. Plaintiff also sought to have the defendant enjoined from maintaining and operating a steam hammer upon his premises, alleging that the foundation, walls, and ceilings of her dwelling house had been cracked by reason of the vibration attendant upon the use and operation of said steam hammer, and seeking damages for such injury in the sum of \$6,000. The case was tried without a jury. Upon the phase of the case last mentioned, the trial court found in favor of the defendant to the effect that the neighborhood was an industrial neighborhood, and that the operation of the steam hammer was not a nuisance, and that the vibrations caused by the said steam hammer had not damaged the dwelling house of the plaintiff in any amount. The trial court, however, did find that the maintenance and operation of the smokestack and the precipitation of the rainwater upon the lands of the plaintiff constituted a nuisance.

The defendant, as ground for a reversal, insists that the evidence does not support the finding as to the existence of a nuisance in the particulars last stated. In this behalf it is argued that the mere maintenance of a chimney or smokestack in connection with the operation of an industrial plant in an industrial neighborhood cannot be decreed to be a nuisance in the absence of a finding that, in addition to the emanation of smoke from the smokestack, soot and sparks were caused to be conveyed to and deposited upon the property of the plaintiff as the result of the operation of defendant's plant.

Responding to defendant's contention that "mere smoke" will not constitute a nuisance, it will be noted that there is evidence in the record that not only smoke but soot as well issued from defendant's smokestack and permeated the air and penetrated plaintiff's premises, to her annoyance and inconvenience.

[1-4] The finding of the court upon this particular phase of the case was that "great volumes of offensive smelling, thick, black smoke is emitted from a chimney or smokestack in the rear of defendant's said building, the top of which is only a few feet above the roof thereof; and that said smoke, by reason of its denseness and the further fact that it is emitted so close to the ground and at a point so near the plaintiff's dwelling house, has been and is conveyed by the wind into said dwelling house in such quantities as to be of considerable annoyance to plain-

tiff and plaintiff's family." It may be fairly said, we think, that this finding was in effect a finding that the "offensive smelling, thick, black smoke" which emanated from the defendant's smokestack was saturated with soot. Smoke and soot may constitute a nuisance. *Tuebner v. Cal. St. R. R. Co.*, 66 Cal. 171, 4 P. 1162; *Sullivan v. Royer*, 72 Cal. 248, 13 P. 653, 1 Am. St. Rep. 51; *McMenomy v. Baud*, 87 Cal. 134, 26 P. 795; *Judson v. Los Angeles Suburban Gas Co.*, etc., 157 Cal. 168, 106 P. 581, 26 L. R. A. (N. S.) 183, 21 Ann. Cas. 1247. A business may be a nuisance either by reason of its location or by reason of the improper or negligent manner in which it is conducted. *McMenomy v. Baud*, supra. True, the record shows that the neighborhood in the instant case is devoted to some extent to industry, but that fact did not authorize the defendant to conduct his business in such a manner as to interfere with the right of the plaintiff to the clean comfort of her residence. The record shows that the smoke and soot from industries operated by persons other than the defendant in the same neighborhood caused no inconvenience, because the smokestacks of such other industries are of such a height that the smoke is carried over the roofs of the houses. The smokestack of the defendant, however, is so low that the smoke is carried into the adjacent dwelling house of the plaintiff. The maintenance of a smokestack at such a low height as to permit the pollution of the air of the plaintiff's premises and thereby interfere with the comfortable enjoyment of the same, when such pollution and interference could be avoided and obviated by the simple expedient of increasing the height of the smokestack, was sufficient to constitute a nuisance, and the trial court was correct in so finding.

[5] It was not necessary to the recovery of damages caused by the nuisance of smoke and soot to prove actual damage to plaintiff's property. She was entitled to recover for the personal discomfort and annoyance to which she had been subjected, and it was a question for the trial court to determine the amount of the compensation which she should receive. *Judson v. Los Angeles Suburban Gas Co.*, supra.

[6] Defendant does not deny, as the evidence shows and as the trial court found, that rainwater from the roof of his shed was precipitated upon the land beneath, thereby rendering the same excessively soggy and muddy during the rainy season of the year, but insists that the discharge of water from the roof is a mere incident to urban life, and he cannot, therefore be held responsible for the maintenance of a nuisance in this particular. Although the owner of a building may not be charged with the duty of keeping, at all events and under all circumstances, the rainwater falling upon and flowing from his building from flowing on to adjacent land, he is under a duty to use at least ordinary and

reasonable means to prevent the use of his property from interfering with the use and enjoyment of his neighbor's property; and the absence of any effort on his part to obviate the annoyance and discomfort caused by the precipitation of rainwater from his building upon the neighboring property creates a situation which constitutes a nuisance. 1 *Wood on Nuisance* (3d Ed.) § 110; *Harms et al. v. Kuchta et ux.*, 141 Md. 610, 119 A. 454; *Dallas Land & Loan Co. v. Garrett* (Tex. Civ. App.) 276 S. W. 471; *Melin v. Richman*, 96 Conn. 686, 115 A. 426.

[7-9] Defendant, however, complains that the trial court committed error in refusing to permit him to introduce evidence to prove that the fence to which the rear wall of his shed was attached was not located upon the true boundary line separating his property from the plaintiff's property, but was located entirely upon his premises and that, as a matter of fact, the water precipitated from his shed fell upon his own ground. This complaint is, we think, justified. Had the evidence been admitted it might have shown that no part of the water cast from the roof of the defendant's building found its way to the plaintiff's premises but fell entirely upon the premises of the defendant. This would have been a complete defense. The trial court evidently proceeded upon the theory, as expressed in its finding, "that said fence has been mutually accepted and regarded by the owners of said respective pieces of real estate as the dividing line between said properties at all times since its erection." The lower court was in error in attempting to apply the principle governing the cases of agreed boundary line to the case at bar. The record is devoid of any evidence that any uncertainty existed as to the boundary line, or that they ever reached any agreement that the location of the fence should mark and measure the boundary line between their properties. Mere acquiescence in the existence of the fence and the occupancy of the land on either side of it would not amount to an agreement that it was on the accepted boundary line. *Staniford v. Trombly*, 181 Cal. 372, 186 P. 599; *Hill v. Schumacher*, 45 Cal. App. 362, 187 P. 437; *Janke v. McMahon*, 21 Cal. App. 781, 133 P. 21.

[10] Not only was it error on the part of the lower court to refuse to permit the defendant to show the true boundary line between the plaintiff's and defendant's property, but the finding that the storm and rainwater falling upon the roof of the defendant's shed fell and flowed upon the plaintiff's land was unsupported by the evidence. This will necessitate a reversal of the judgment.

[11] The defendant demurred to the plaintiff's complaint upon the ground that it was ambiguous, among other things, in the particular that it could not be determined therefrom what portion of the damage alleged to have suffered by the plaintiff was attrib-

utable to each of the three things which the plaintiff's complaint alleged constituted a nuisance. The demurrer was apparently well taken. The evidence adduced at the trial did not tend to clear up the ambiguity. Doubtless, upon the going back of the case, the ambiguity in the pleadings will be corrected by a proper amendment.

Judgment is reversed, and the cause remanded for a new trial.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; CURTIS, J.; LAWLOR, J.; SEAWELL, J.

198 Cal. 560

KEARNEY INV. CO. v. GOLDEN GATE FERRY CO. (S. F. 11000.)

(Supreme Court of California. April 29, 1926.
Rehearing Denied May 27, 1926.)

1. Records ☞18(10)—Attempt by lessee of land under navigable water to show that title to leased premises was in state in proof of lessor's breach of warranty held not collateral attack on "McEnerney" decree, which did not adjudicate question of state's interest.

Attempt by lessee of land under navigable water to show that title to leased premises was in state in proof of lessor's breach of warranty held not collateral attack on "McEnerney" decree, which was part of lessor's chain of title, but which did not adjudicate question of state's interest.

2. Landlord and tenant ☞48(1)—Lessee may show title to leased property to be in state subsequent to a decree which was part of lessor's chain of title, as proof of lessor's breach of warranty (McEnerney Act, § 11 [St. Ex. Sess. 1906, p. 81]).

McEnerney Act, § 11, providing that judgments thereunder are conclusive as to every person claiming interest in property at time of action and as to persons claiming under them, held not to preclude lessee from showing that title to leased property was in state subsequent to McEnerney decree, which was part of lessor's chain of title as proof of lessor's breach of warranty.

3. Landlord and tenant ☞62(1).

Tenant, induced by false and fraudulent representations to enter lease, held not estopped to deny landlord's title.

4. Judgment ☞702—McEnerney decree, in suit in which city and county were defendants, held not binding on state (Pol. Code, § 2524).

McEnerney decree held not binding on state, though city and county were defendants in the suit, in absence of showing that city and county had interest in property as trustees for state or public, since Pol. Code, § 2524, is inapplicable.

5. Evidence ☞358—Official maps offered as supplemental to red line map, which was required by statute to show property leased by state, held admissible to show that property in controversy in lessor's action for rent was excluded from state's lease (St. 1851, p. 307; St. 1851, p. 311).

Where lessor, in action for rent in which lessee attempted to show title in state, denied state's title to leased property on ground that by St. 1851, p. 311, state relinquished reversionary interest therein after having leased it to city by St. 1851, p. 307, which provided for red line map showing property leased thereby, and such map did not include property in controversy, later official maps, offered as supplemental to red line map to show that property in controversy was not included, held admissible.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by the Kearney Investment Company against the Golden Gate Ferry Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Joseph E. Bien and Werner Olds, both of San Francisco, for appellant.

Dudley D. Sales, of San Francisco, for respondent.

LENNON, J. On January 14, 1921, the Kearney Investment Company, as lessor, entered into a written lease with the Golden Gate Ferry Company, as lessee, which written lease covered certain properties fronting on the bay of San Francisco, and which admittedly is submerged land.

On August 3, 1921, the Golden Gate Ferry Company served notice in writing on the Kearney Investment Company that the lease entered into on January 14, 1921, was rescinded.

On October 5, 1921, the Kearney Investment Company commenced this action to enforce the payment of rent due under the lease for September and October, 1921, and for attorney's fees as in the lease provided. The Golden Gate Ferry Company filed an answer and cross-complaint, denying that it ever took possession of the premises let, and claiming that the Kearney Investment Company had no right, title, or interest in the property leased, and alleging that certain covenants in the lease were false, and had been fraudulently made for the purpose of inducing the Golden Gate Ferry Company to enter into the lease. The cross-complaint prayed that the lease be adjudged canceled and rescinded.

The covenants alleged to be false are as follows:

"The lessor covenants with the lessee that it is now seized in fee simple of the real property herein described and designated as parcels

1 and 3, and that it holds the real estate here-in described as parcel 2 under a valid lease, which said lease does not expire until the 25th day of March, 1950."

The court below found that the Golden Gate Ferry Company had never taken possession of the premises; that no sum of money had ever become due under the lease; that the Kearney Investment Company did not at any time own the parcels described as 1 and 3 in fee, and that it did not ever have a valid 99-year lease to the parcel known as parcel 2; that the Golden Gate Ferry Company had entered into the lease believing that the Kearney Investment Company had the title it represented itself to have in the property, and that the lease had been rescinded.

Judgment was rendered for the Golden Gate Ferry Company for costs, and the lease was declared rescinded, null, and void. This appeal by the Kearney Investment Company is from that judgment.

The findings and judgment of the lower court are based, apparently, upon the theory that a McEnerney decree, dated September 5, 1915, introduced in evidence in the court below as part of appellant's chain of title, did not establish title in the appellant. It was respondent's contention in the court below, and it is its contention here, that title to the property in question is "in the state of California, the property being submerged land under the flow and ebb of the tide" and that the McEnerney decree did not adjudicate this title.

Over the objection of the appellant, the court below admitted evidence offered by the respondent to prove that the title to the land in controversy was in the state of California.

The grounds of reversal urged by appellant are two. The first is that the setting up of title in the state by the respondent is a collateral attack upon the McEnerney decree. The second is that the court below committed error in admitting evidence that despite the McEnerney decree title to the land in controversy was in the state of California.

Respondent takes the position that the attempt to prove that the title to the property in question was in the state of California was not a collateral attack upon the McEnerney decree; that the McEnerney decree was not binding upon the respondent to the extent that it precluded the respondent from proving the title to be in the state of California; that the McEnerney decree was not binding upon the state of California, although the city and county of San Francisco had been made a defendant in the McEnerney suit.

[1] It does not appear to us that the attempt of the respondent to prove in the lower court that the title to the property in question was in the state of California was a collateral attack on the McEnerney decree. Giving the McEnerney decree its full force and effect, it cannot be said to extend to any interest which the state of California might

have in the property. *Berton v. All Persons*, 176 Cal. 610, 170 P. 151. The purpose of a collateral attack upon a judgment is generally to avoid the legal effect of the judgment by overthrowing it. In the instant case the McEnerney decree did not adjudicate the question of the state's interest in the property, and a claim that title to the property is in the state is not, therefore, an attempt to avoid the legal effect of the decree. No claim is made that title to the property was in a particular person. The McEnerney decree, in the instant case, is totally irrelevant as to the state's title, and the claim that title is in the state is not, therefore, an attack upon the McEnerney decree.

[2] Section 11 of the McEnerney Act provides:

That the judgments thereunder are binding and conclusive upon "every person who, at the time of the commencement of the action, had or claimed any estate, right, title, or interest in or to said property, or any part thereof, and upon every person claiming under him by title subsequent to the commencement of the action." Stats. 1906 (Ex. Sess.) p. 78; Stats. 1909, p. 163; Stats. 1911, p. 6; Stats. 1913, p. 135.

[3] Although the respondent under this section would be precluded from claiming any right, title, or interest in the property, it is not precluded by said section from showing that title to the property is in the state of California. Neither is the defendant precluded from setting up such title by the general rule that a tenant is estopped to deny his landlord's title. There is a well-recognized exception to the general rule, namely, where the lessee was induced by the false and fraudulent representations of the lessor to enter into the lease such fraud and misrepresentations relieve the lessee of the estoppel to dispute the lessor's title. This is so because the relation of landlord and tenant arises out of contract, and this, like other contracts, may be avoided by fraud. *Tewksbury v. Magraff*, 33 Cal. 237, 245. See, also, *Gray v. Whitla*, 70 Okl. 288, 174 P. 239, 2 A. L. R. 356, and note.

[4] The fact that the city and county of San Francisco was a defendant in the McEnerney suit does not make the decree therein binding upon the state of California, in the absence of any evidence showing or attempting to show that the city and county of San Francisco ever had any interest in the property in question as trustee for the state or the public. There is no act of the Legislature of this state by which any interest in the property in question is conveyed by the state to the city and county of San Francisco as trustee. Section 2524 of the Political Code transfers the possession and control of certain state property, of which the property in question is a part, to the board of harbor commissioners.

[5] From this conclusion it must be concluded further that the lower court did not commit error in admitting evidence as against

the McEnerney decree that title was in the state of California. Appellant, in addition to objecting to all evidence as tending to impeach the McEnerney decree, objected to the introduction of certain official maps upon the ground that they were incompetent, irrelevant, and immaterial. These official maps, offered in evidence by the respondent, were not inadmissible upon the grounds stated. It was appellant's contention that a lease for 99 years to certain water front lots, which include the lots in controversy, had been granted by the state of California to the city of San Francisco by an act of the Legislature passed March 26, 1851 (St. 1851, p. 307); that, by a subsequent act of the Legislature of May 1, 1851 (St. 1851, p. 311), the reversionary interest in these same lots had been relinquished to the city of San Francisco; and that, therefore, title to the lots in controversy was not in the state of California. Appellant claims title to the land in controversy by virtue of an execution sale arising out of an action against the city of San Francisco. The act of 1851, which granted the leasehold interest to the city of San Francisco, required the city to deposit with the secretary of state and the surveyor general a map of the correct boundary line as set forth in said act, distinctly and properly delineated by a red line. Apparently it is conceded that the "Eddy Red Line Map," a copy of which was offered in evidence, was the official map so required. This map was introduced in evidence by the respondent to prove that the lots in controversy were not included in this grant by the state to the city of San Francisco. The Eddy red line map does not show the blocks and lots west of Larkin street in the city of San Francisco, although the red line indicating the boundary of the grant to the city is delineated thereon. When the Eddy red line map is considered in conjunction with other and later official maps offered and received in evidence, the land in controversy is shown to be excluded from the land granted by the state by the act of 1851 to the city of San Francisco. The property in controversy is described in the lease to be property bounded by certain streets which appear in the later maps above referred to and, as previously indicated, do not appear in the Eddy red line map. The later maps were offered in evidence as supplemental to and in aid of the Eddy red line map and for that purpose, we think, they were admissible.

We are of the opinion, therefore, that (1) the McEnerney decree introduced into evidence in this case does not affect any title which the state of California may have had in the property in question; (2) proof of a breach of the warranty of the lease did not involve a collateral attack upon the McEnerney decree because the McEnerney decree did not adjudicate the state's title; and (3)

there was no error committed by the lower court in admitting evidence showing title to the property in question to be in the state of California.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; CURTIS, J.; SEAWELL, J.; LAWLOR, J.

193 Cal. 490

In re BAIRD'S ESTATE. (S. F. 11585.)

(Supreme Court of California. April 23, 1926.)

1. New trial ⇨105.

Newly discovered evidence, which merely impeaches witness, is not sufficient to justify granting motion for new trial.

2. Appeal and error ⇨1099(7), 1195(1)—Determination of Supreme Court as to legal effect of evidence established law of case, and was binding on it and on trial court.

Determination by Supreme Court on former appeal as to legal effect of evidence before court established law of case, and was binding on trial court and Supreme Court.

3. New trial ⇨150(3)—Alleged newly discovered evidence and evidence at trial held insufficient to establish father's adoption of illegitimate child (Civ. Code, § 230).

Alleged newly discovered evidence and evidence developed at trial held insufficient to show that father received illegitimate child into his family and treated it as his legitimate child, so as to establish his adoption of child, under Civ. Code, § 230.

4. Appeal and error ⇨1202—Trial court's granting of new trial for insufficiency of evidence held abuse of discretion, where judgment for defendants was entered pursuant to order of Supreme Court directing judgment of nonsuit (Code Civ. Proc. § 581, subd. 5).

Where Supreme Court, in reversing judgment for petitioner, determined that trial court erred in denying defendant's motion for nonsuit, held that trial court's judgment, entered pursuant to order of Supreme Court, was judgment of nonsuit, and since, under Code Civ. Proc. § 581, subd. 5, such a motion is granted because of failure to prove sufficient case for jury, trial court abused its discretion in granting petitioner's motion for new trial for insufficiency of evidence.

5. Appeal and error ⇨1176(2)—Supreme Court has power to direct trial court to enter judgment of nonsuit (Code Civ. Proc. §§ 53, 629).

Under Code Civ. Proc. § 53, where Supreme Court decides that trial court erred in denying defendant's motion for nonsuit, it has power to direct judgment of nonsuit under its general appellate powers, irrespective of validity of section 629.

6. Appeal and error **1122(2).**

Supreme Court cannot make findings of fact and base judgment thereon.

7. Trial **388(3).**

No findings of fact are necessary, nor have they any place where judgment of nonsuit is rendered.

8. Jury **34(2)—Granting nonsuit when evidence is insufficient to support judgment for plaintiff is not violation of constitutional right to jury trial.**

Granting of nonsuit, whether by trial court itself or pursuant to direction of Supreme Court, when plaintiff's evidence is insufficient to support judgment in his favor, does not violate constitutional right to jury trial.

9. Appeal and error **927(2)—Error in granting motion for nonsuit will be corrected on appeal just as readily as if motion had been overruled.**

Though trial court has broad discretionary powers respecting determination of motions for nonsuit, such powers are not unlimited, and error in granting such a motion will be corrected on appeal, just as readily as if motion had been overruled.

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

In the matter of the estate of David Jennings Baird, deceased. Petition by David Jennings Baird for a partial distribution of the estate. From an order granting petitioner a new trial after entry of adverse judgment pursuant to direction of the Supreme Court (193 Cal. 225, 290, 223 P. 974, 1001), Veronica C. Baird and others appeal. Reversed.

See, also, 231 P. 744.

K. C. Partridge, of San Francisco, for appellants.

C. M. Fickert, E. A. Cunha, and R. P. Henshall, all of San Francisco (Robert R. Moody, of San Francisco, of counsel), for respondent.

CURTIS, J. This appeal was taken from an order of the court granting two motions for a new trial. The original petition herein was filed by David J. Baird, a minor, by his guardian, Lydia M. Valencia. Thereafter an amended petition was filed by said minor through his said guardian, praying for partial distribution of the estate of David J. Baird, deceased, to said petitioner as the adopted son and heir of said deceased. There have been three trials of the issues involved in this proceeding, from the judgment in each of which an appeal was taken to this court. The opinions rendered therein are reported in 173 Cal. 617, 160 P. 1078, 182 Cal. 338, 188 P. 43, and 193 Cal. 225, 223 P. 974, respectively. The facts out of which this contro-

versy arose are in the main set forth in the former opinions of this court, and accordingly it will not be necessary to repeat them here.

The judgment rendered at the first trial of the issues involved herein was reversed on the ground that the trial court erred in refusing the demand of petitioner, the respondent herein, for a jury trial. On the second trial, the verdict of the jury was in favor of petitioner. This court reversed the judgment therein on the ground that the evidence was insufficient to show that the decedent had adopted petitioner as his child within the meaning of section 230 of the Civil Code. The case in due time came on for trial for the third time. It was tried before a jury, and, like the second trial, resulted in special verdicts in favor of petitioner. The court adopted the special verdicts, made findings of fact and conclusions of law, and entered its decree of partial distribution in petitioner's favor. From this decree or judgment the executors of the last will and testament of said deceased and those claiming interest in said estate adverse to petitioner appealed. On this appeal this court again reversed the judgment of the trial court, and, in doing so, it held that the former decision of this court had established the law of the case, but further held:

"That, apart from the doctrine of the law of the case, the evidence received on the last trial is insufficient to sustain the special verdicts, or to support the findings, and that a case of adoption has not been established." Estate of Baird, 193 Cal. 225, 290, 223 P. 974, 1001.

The court further held:

"That the court erred in denying the motion for nonsuit, in denying the motion for an instructed verdict, and in failing to enter judgment for appellants."

It further made the following order:

"The decree of partial distribution is reversed, and the trial court is ordered and directed to set aside the special verdicts and findings and to enter judgment for appellants, denying the petition for partial distribution upon the ground that respondent is not the adopted son or heir of the deceased."

After the filing of the remittitur in the lower court, petitioner, on the 15th day of April, 1924, filed his notice of intention to move for a new trial and "that the former verdict and the purported decision and judgment herein rendered against him upon his petition and amended petition for partial distribution be vacated, and that a new trial be granted." The grounds set forth in said notice upon which said motion would be based were all those designated in section 657 of the Code of Civil Procedure. Thereafter, and on the 22d day of April, 1924, the trial court, pursuant to said remittitur, "and not

otherwise," made its order vacating and setting aside said special verdicts and findings and denying said petitioner's petition for distribution. Thereafter, and on the 2d day of May, 1924, petitioner served and filed a second notice of intention to move for a new trial, "and that the former verdict and purported decision and judgment, dated April 22, 1924, herein rendered on and filed on April 23, 1924, and entered in Judgment Book 606, at page 463, against him, upon his petition and amended petition for partial distribution, be vacated, and that a new trial be granted." The grounds upon which this second motion was based, as stated therein, were the same as those set forth in petitioner's first notice of intention to move for a new trial, and were all the grounds designated in section 657 of the Code of Civil Procedure. The motions for a new trial were argued on the 4th day of June, 1924, at which time six affidavits in support of the ground of newly discovered evidence were presented by petitioner. He also, probably as a matter of extra precaution, offered at this time, and there was received in evidence, the entire testimony taken at the former or third trial of said cause, together with all depositions and exhibits in the case and also the charge of the court upon the trial of said cause, "together with certain instructions requested by appellants herein." Counter affidavits were also presented and filed by and on behalf of the said Veronica C. Baird and others contesting respondent's petition, as was also the deposition of Miles T. Baird, taken previously and filed in said court on the 26th day of February, 1921. Thereupon, and in addition to the foregoing, the respondent herein offered, and there was received in evidence, a document denominated and called "demurrer, objections, and resistance." Said document was assigned by the attorneys for petitioner, and had been theretofore filed in said cause on the 16th day of April, 1924. Upon these affidavits, testimony, the former deposition of Miles T. Baird, and the document last referred to, the two motions of petitioner were submitted, and thereafter by the court granted. The order granting the said motions, following certain formal recitals, was as follows:

"And the court being fully advised in the premises, it is now here ordered that the said motions for a new trial be, and each of said motions for a new trial is hereby, granted upon all the grounds specified in said notices of intention, and as argued and presented upon said motions, except upon the grounds specified in subdivisions 1, 2, 3, and 5 of section 657, C. C. P. And in this regard the court, in accordance with said section 657, C. C. P., doth further grant said motion for a new trial in addition upon the ground of the insufficiency of the evidence to justify and sustain the verdict and the decision, and in this regard the court doth specify that in its opinion and decision herein certain testimony of certain witnesses who tes-

tified on behalf of the respondent to the petition herein is not true, and that said testimony is not believed by the court to be credible and true, and therefore that the decision herein is not sustained by the evidence."

From this order the said Veronica C. Baird, Benjamin H. Baird, and Thomas R. Baird have appealed. The appeal is brought before this court upon a bill of exceptions.

It will be noted that the order granting a new trial was granted on all the grounds enumerated in section 657 of the Code of Civil Procedure except those specified in subdivisions 1, 2, 3, and 5. The motions were therefore granted upon the grounds set forth in subdivisions 4, 6, and 7, which are as follows:

"4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial; * * *

"6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law;

"7. Error in law, occurring at the trial and excepted to by the party making the application."

We might mention at this time that the respondent thereafter moved to dismiss said appeal, but said motion was denied by this court. Estate of Baird, 231 P. 744. It is the contention of appellants that the trial court was not justified in granting said motions for a new trial, or either of them, on any of the grounds set forth in said order or upon any grounds whatever. We will discuss the several grounds upon which said motions were granted in the order in which they are above enumerated.

[1] 1. Newly discovered evidence. Of the affidavits presented by respondent in support of his motions for a new trial are those of Lydia M. Valencia and Mary Westerfeld. In these affidavits the affiants therein refer to certain statements made to them by Miles T. Baird since the last trial of this cause. A counter affidavit was filed by the said Miles T. Baird, in which he stated that he had not seen either said Lydia M. Valencia nor the said Mary Westerfeld since the year 1914, and that the statements made by them respectively in their affidavits were false and untrue. The only argument advanced by respondent to sustain the order of the trial court granting the motions for a new trial on the ground of newly discovered evidence is that, as the conclusion of the trial court upon conflicting affidavits is conclusive, it evidently believed Miss Valencia and Miss Westerfeld, and therefore believed that Miles T. Baird had committed perjury, and, "if Miles T. Baird had committed perjury on so important a matter as detailed in the affidavit of Miss Valencia, the propriety of a new trial hardly seems to be an open question." In other words, it is claimed that the newly discovered evidence on the part of respondent would impeach the witness Miles

T. Baird, who testified to material and important matters involved in this controversy. It has been repeatedly held that evidence, impeaching in its character, is not sufficient to justify the granting of a motion for a new trial. *Waer v. Waer*, 189 Cal. 178, 207 P. 891. In this case the court said (page 180, 207 P. 892):

"In so far as the affidavit immediately under consideration purported to narrate a statement of the plaintiff which in effect was contradictory of something he had testified to at the trial it was impeaching in its character and, therefore, insufficient on appeal as the basis of review of a motion for a new trial, for it is the rule in this state that 'newly discovered evidence which is merely * * * designed to contradict a witness is not of a character to warrant a new trial'"—citing authorities.

Notwithstanding our opinion that the purported newly discovered evidence on behalf of petitioner would be inadmissible upon a subsequent trial of this cause, if one were granted, for the reason just stated, we will nevertheless discuss it in its relation to the issue involved herein, even though this can only be done at considerable length. The four affidavits of Lydia M. Valencia, Mary E. Westerfeld, Mary A. Reed, and Robert Jackson we understand contain all the newly discovered evidence upon which the respondent relies to sustain the order of the court granting his motions on that ground. The other two affidavits presented by respondent and used at said hearing were by his attorneys. They did not purport to set forth any newly discovered evidence, but simply set forth facts showing due diligence on their part in the procurement of the newly discovered evidence. The document before referred to as a "demurrer, objection, and resistance" was not sworn to, and we do not understand that respondent in any way claims that it contained any statement of facts which could be legally used on said hearing. We will therefore confine our discussion to respondent's four affidavits above referred to.

The affidavit of Lydia M. Valencia is as follows:

"That on two separate occasions since the last trial of the above-entitled cause, and while the same was pending on appeal, Benjamin H. Baird, a half-brother of the deceased, and one of the parties to the above-entitled matter, called upon affiant and the petitioner at his own request. He stated that the object of his visit was for the purpose of settling the case out of court, and he wanted to know just what amount affiant would take to settle the claim of her son, David Jennings Baird, to the estate of his father. Said Benjamin H. Baird further stated that he was going to see to it that affiant would take good care of his brother's child, and that he would force affiant to accept his terms of settlement, as he had the power and the influence. He further stated, on one of these occasions, that he and his mother knew all about the existence of the child prior to the death of his brother, David Jennings

Baird; that the deceased had told his mother, Veronica C. Baird, that petitioner was his son, and that they had many conversations and arguments concerning the petitioner; that, notwithstanding the objections of his mother, the deceased insisted upon keeping in his room, at the Fairmont Hotel, pictures of the petitioner; that in doing so the deceased had caused his mother a good deal of grief. Said Benjamin H. Baird further stated that both he and his mother believed that affiant was married to his brother David until affiant informed him to the contrary at the time he called at 230 I street, San Francisco, immediately after the death of his brother.

"Affiant further deposes and says that on numerous occasions since the last trial of said cause, Miles T. Baird, a full brother of the deceased, called upon affiant and the petitioner. On one of these occasions, he said: 'I was extremely sorry for my mother's hostile attitude toward David, but my mother believed she was justified in doing anything, whether it was right or wrong, to defeat the child's rights and, in doing so, I guess she is no different from most women under such circumstances.' He further stated that both he and his sister, Marie Sproule, had endeavored to get their mother to do what was right by the child, but so far they had failed, as his mother was being influenced against the child by his half-brother, Benjamin H. Baird. Said Miles T. Baird further stated that he and his half-brother, Benjamin H. Baird, had actually come to blows over the fact that said Benjamin H. Baird had induced his mother to give false testimony in her deposition concerning her knowledge of the petitioner. Said Miles T. Baird further stated to affiant that both he and his mother had full knowledge of the existence of the petitioner long prior to the death of David Jennings Baird, and he stated that his mother, the deceased, and himself had many arguments concerning the petitioner, and that the deceased had informed his mother that he was the father of the petitioner, and that he was going to do what he thought was right, regardless of her objections; that said Miles T. Baird further stated that he and his mother were in Europe at the time they received news of the death of his brother David; that before coming to America they had talked over the possibilities of a contest over his brother's estate, and whether or not deceased had left a will providing for the child, and whether the deceased was married to affiant. Said Miles T. Baird further stated that, if the case were again tried, he would gladly appear as a witness for the petitioner and tell the whole truth. On some of his visits, he took the petitioner out riding in his automobile."

The affidavit of Mary E. Westerfeld refers to certain conversations had with Miles T. Baird subsequent to the former trial, in which she relates that he made statements to her similar to many of the statements set out in the above affidavit of Lydia M. Valencia. The principal matters contained in her affidavit and not found in that of Lydia M. Valencia were that Miles T. Baird had a number of small snapshots of respondent taken when he was a child, and that Miles told her that these were sent to him by the deceased

while he and his mother were in Europe, and that he had kept them ever since, and had exhibited them to his mother before the death of David J. Baird, and furthermore that he had seen the child, and that the resemblance between him and the deceased was very striking. She further stated in her affidavit that on this occasion Miles T. Baird had told her that he had received letters from the deceased during his absence in Europe in which he mentioned the child as his own.

The affidavit of Mary A. Reed sets forth that she was not acquainted with the petitioner or his mother, Lydia M. Valencia, but that she had been acquainted with John Rush Baird during his lifetime, and that he had stated to her that his brother David had told him that he had been secretly married to Miss Valencia, and that said David Jennings Baird was apparently embittered towards his two stepbrothers, who were then quite young. She further set forth in her affidavit that she was well acquainted with Veronica C. Baird, met her in Paris, and had frequent conversations with her concerning the relationship that existed between her son David and Miss Valencia and concerning the existence and paternity of respondent, in which conversations Mrs. Baird said that under no circumstances would she recognize or acknowledge the child, and that Mrs. Baird was very embittered towards Miss Valencia, and that she had left San Francisco and gone to Paris to live on account of the notoriety her son had brought upon her through his association with Miss Valencia.

The affidavit of Robert Jackson set forth that he was in the employ of David Jennings Baird during the year 1907, and that in the year 1908, while Mrs. Baird was staying at the Fairmont, she and her son David had an argument concerning this child, and that David told him that his mother took him to task about his association with the child and its mother, and tried to persuade him not to go near them, but that he told his mother that he knew his own business and was his own boss, and that, no matter what she said, he was going to look after the child, meaning the respondent; that on this occasion, after the altercation, he took David from the Fairmont Hotel to 230 I street, where respondent and his mother were then living. He further referred to Mrs. Baird having detectives employed to follow her son David. He also stated that he had frequently met Miles T. Baird during the lifetime of his brother David, and had several conversations with him concerning the child, in which Miles told him the child looked exactly like his brother Dave, and that he felt extremely sorry for the child and would like to help him, but was unable to do so on account of the opposition of his sister and mother to the child. He further related a conversation that he had had with John Floyd, who for a number of years was in the employ of the Baird family.

These conversations related to Mrs. Baird's knowledge of the child, and that she wanted that fact kept quiet, and that Mrs. Baird had purchased from him the house in which he was then living on Eighth avenue.

In order to properly consider these affidavits and their bearing upon the issues involved in this proceeding, it will be necessary to ascertain the prior determinations of this court as to the issues before the court and the evidence produced in support thereof on the former hearings. Upon the second appeal of this matter this court held that four things are essential to the adoption of an illegitimate child by its father: (1) He shall be its natural father; (2) he shall have publicly acknowledged himself to be its father; (3) he shall have received the child into his family; (4) he shall have otherwise treated it as his legitimate child. Estate of Baird, 182 Cal. 338, 347, 188 P. 43. It was assumed, for the purpose of the decision rendered upon the second appeal, that the first two of these essential elements of adoption had been proven, but the court held that there was an absence of evidence to prove either that the deceased, David Jennings Baird, had received respondent into his family, or that he had treated respondent as his legitimate child. The court accordingly reversed the judgment rendered on the second trial of this cause upon the ground that there was not sufficient evidence to support the verdict and findings that respondent had been adopted by said deceased. Following this reversal, the matter came on for trial the third time, and the issues of adoption were again tried by a jury, with the result that the jury again found in respondent's favor. The evidence produced on the third trial was, in a large measure, a repetition of that before the court and jury on the second trial. In some respects, however, it differed from the former testimony, and respondent contended both at said trial and on appeal from the judgment that the evidence was sufficient to sustain the verdict and the finding rendered on the third trial. This court, however, held that there was no substantial or material difference in the testimony taken at the two trials, and accordingly that respondent had failed to prove his adoption by legal and competent evidence. The conclusion of this court was expressed as follows:

"It may finally be declared that the evidence as to public acknowledgment of paternity, receipt into family, and otherwise treating the child as legitimate, does not, in any true sense, conform to the conception of adoption under section 230. The father of a legitimate child would not allow it to live in a clandestine family or to be known by an assumed name, or to be the object of concealment and dissimulation. The father of an illegitimate child would not hold himself out to the world as having a residence into which he did not receive it. He would especially provide for the future of the child. Decedent's will, already referred to, was

dated July 30, 1903. He gave half of his property to his mother and the other half to his half-brothers. In 1907 executor Brown called his attention to the will, but he made no change therein."

[2] The determination by this court as to the legal effect of the evidence then before the court has established the law of the case, and was binding upon the trial court as well as upon this court. Estate of Baird, 193 Cal. 225, 289, 223 P. 974.

[3] Taking up now the affidavits on behalf of respondent in support of his motions for a new trial, the question for decision is, Would the matters set forth therein, if proven at a subsequent trial, be sufficient to establish those facts which this court has held were necessary for the respondent to establish in order to prove his adoption and which he failed to establish at the former trial? In other words, would the purported newly discovered evidence, together with the evidence before the court upon the third trial, establish the three essential elements of adoption which this court held on the last appeal were not proven at the former trial of this matter? For, unless the newly discovered evidence, with the evidence then in the record and already before the court, would at least tend to establish all three of said essentials, it would be insufficient to warrant the court in granting a new trial on said ground. We will discuss said newly discovered evidence only as it relates to two of said elements of adoption—receipt into the family, and treatment as the legitimate child of said deceased. This court on the former hearing (Estate of Baird, 193 Cal. 225, 279, 223 P. 974, 998), held that:

"The father, in order to comply with section 230, must have a home or habitation into which he shall receive his illegitimate child as his own, and that the place where he lives must be his settled or fixed habitation of which he is the head."

The decision then goes on at some length (pages 278-288) to discuss the character of the home or habitation in which petitioner was maintained by the deceased during the lifetime of the latter as shown by the evidence then before the court, and, after a most exhaustive review of this evidence, this court held that it was not such a home or habitation as was contemplated by section 230 of the Civil Code, and that the receipt by the deceased of the petitioner in such a home was not receiving the child into his family. There is nothing in any of the affidavits submitted by respondent in support of his motion for a new trial that would tend in the least to show that the place or habitation where respondent lived during the lifetime of the deceased and where he and his mother were maintained and supported by the deceased was of any different character from that shown by the evidence in the former trial. There was nothing, therefore, in these

affidavits that would show that the deceased received respondent into his family within the meaning of said section 230, Civil Code. The same may be said regarding the showing made in said affidavits as to the treatment of respondent by deceased as his legitimate child. We find nothing in said affidavits which would in any way tend to show a different character of treatment accorded respondent by the deceased than that shown by the evidence before the court at the former trial. At the previous hearing it was held (page 289), after reviewing the evidence upon this phase of the case, that:

"Such treatment is contrary to the sense in which section 230 of the Civil Code uses the phrase 'otherwise treating it as if it were a legitimate child.'"

It is apparent, therefore, that the showing made by respondent in support of his motions for a new trial on the ground of newly discovered evidence was insufficient, and that the trial court was not justified in granting said motions for a new trial on said ground.

[4] 2. Insufficiency of the evidence. The order granting respondent's motions for a new trial, as we have already seen, in addition to specifying in effect that it was granted upon the ground of the insufficiency of the evidence to justify the verdict, contained the following:

"And in this regard the court in accordance with said section 657, C. C. P., doth further grant said motion for a new trial in addition upon the ground of the insufficiency of the evidence to justify and sustain the verdict and the decision, and in this regard the court doth specify that in its opinion and decision herein certain testimony of certain witnesses who testified on behalf of the respondent to the petition herein is not true, and that said testimony is not believed by the court to be credible and true, and therefore that the decision herein is not sustained by the evidence."

While this order is not entirely free from ambiguity, we understand its purport to be that the trial court specified, as one of the grounds for granting the motion for a new trial, the insufficiency of the evidence to support the decision or judgment entered by said court in pursuance of the order of this court, and further specified that the court did not believe the testimony of certain witnesses who had testified on behalf of the appellants herein (in the order they are designated as "certain witnesses who testified on behalf of the respondent to the petition herein"), and, for the reason that the court did not believe said witnesses, that the said decision and judgment was not sustained by the evidence. The order of this court directing the entry by the trial court of said judgment was made after consideration of all the evidence in respondent's behalf produced before the court at the third trial of this cause. After such consideration, this court not only held that "the evidence received on the last trial

is insufficient to sustain the special verdicts, or to support the findings, and that a case of adoption has not been established," but the opinion also declared that:

"We further hold that the court erred in denying the motion for nonsuit, in denying the motion for an instructed verdict, and in failing to enter judgment for appellants." *Estate of Baird*, 193 Cal. 290, 223 P. 1001.

It follows, therefore, that the judgment which was entered by the trial court in pursuance of the order of this court was in reality a judgment of nonsuit, and therefore it did not rest for its validity or depend for its support upon any evidence produced on behalf of the appellants herein. Being a judgment of nonsuit, it was made imperative by reason of the lack of evidence introduced by the respondent herein to prove the allegations of his petition and not as a consequence of any evidence on behalf of appellants. It was manifestly improper, therefore, for the trial court to set aside such a judgment on account of the insufficiency of the evidence of the appellants, or for the reason that appellants' witnesses were unworthy of belief, for the simple reason that it was not based upon and did not depend for its validity upon any evidence offered by appellants. This is made more apparent, and in our opinion absolutely conclusive, when we examine the record in this case and find that at the time the appellants herein made their motion for a nonsuit they had not introduced any evidence whatever. When a motion for a nonsuit is granted by the court upon the motion of the defendant, it is because of the failure of the plaintiff to prove a sufficient cause for the jury. Subdivision 5, § 581, Code Civ. Proc. It would certainly be illogical, and absolutely illegal, for the court to thereafter grant a new trial to plaintiff on the ground of the insufficiency of the evidence to support said judgment of nonsuit. It is obvious, therefore, that it was an abuse of discretion on the part of the trial court for it to grant a new trial herein on the ground of insufficiency of the evidence.

[5] 3. The decision is against law. Under this heading the respondent contends that the Supreme Court upon the last appeal of this case (193 Cal. 225, 223 P. 974) was without power to direct the trial court to enter judgment in favor of appellants and denying respondent's petition for partial distribution. From what we have already said it appears that this court, after a thorough consideration of the question, decided that it had such power, and made its order accordingly. A petition for a rehearing was filed by the respondent, and the question was again presented to this court. The court denied such petition, and its action thereon must be taken as a ruling adverse to the contention now being made by respondent. On this appeal being taken, the respondent moved for a dismissal thereof, and one of the grounds upon

which respondent based his said motion of dismissal was that the Supreme Court exceeded its authority in directing the trial court to enter said judgment. This motion to dismiss was denied. *Estate of Baird*, 231 P. 744. It will thus be seen that this court on three separate and distinct occasions has ruled upon this very identical question, and that its rulings have been consistently against respondent's contention. By these decisions this court has established the law of the case, and it is bound by the same. But, independent of the law of the case as established by the foregoing rulings of this court, the contention of respondent is in our opinion without merit. On the second appeal of this case, as we have before indicated, it was held that the evidence was insufficient to support the findings of adoption, and the case was reversed and a new trial was had. At that trial practically the same evidence was introduced upon the issue of adoption as was before the court on the former trial. At the close of petitioner's evidence the appellants, evidently relying upon the former decision of this court, moved the trial court for a nonsuit, which was denied. On appeal, this court held that there was no material difference between the evidence before the court upon the second and third trials and again held that such evidence was insufficient to prove that petitioner had been adopted, that the trial court erred in denying appellants' motion for a nonsuit, and reversed the judgment, and directed the trial court to enter judgment in favor of appellants. This order was based upon the conclusion of this court that there was no evidence to show adoption, and a nonsuit should have been granted. It was in effect an order to enter judgment of nonsuit in appellants' favor. Undoubtedly the court had the power to direct such a judgment under its general appellate powers as defined by section 53 of the Code of Civil Procedure. Without such power this court might go on reversing judgments of the trial court ad infinitum, with the latter court making findings contrary thereto. The result would be a contest of endurance between the two tribunals, which would not be conducive to the proper administration of the law, nor to any substantial benefit to the litigants concerned. As to the power of the appellate court to make such an order, the Supreme Court of Montana, under a Code provision in all respects similar to section 53 of the Code of Civil Procedure of this state, has held:

"We conclude, therefore, that no general rule may be laid down to determine when this court will, upon deciding that a plaintiff should have been nonsuited, order his action to be dismissed. This court undoubtedly has the power, in all proper cases, to make such an order." *State v. Second Judicial District*, 40 Mont. 206, 105 P. 721.

The section of the New York Code upon the powers of appellate courts upon appeal

is very similar to our own, and it has been repeatedly held by the courts of this state that the appellate courts have under the provisions of said section authority to direct the trial court to enter a judgment of nonsuit. *Meginn v. Ramsdell*, 163 App. Div. 232, 148 N. Y. S. 415; *Peterson v. Ocean Electric R. Co.*, 161 App. Div. 720, 146 N. Y. S. 604; *Norton v. Erie R. Co.*, 163 App. Div. 466, 148 N. Y. S. 769. This rule appears to be adopted practically without any dissent in substantially all jurisdictions. 4 Cor. Jur. p. 1190.

[6, 7] It is further contended by the respondent that the Supreme Court cannot make findings of fact and base a judgment thereon. With this proposition of law we agree. We think it quite evident, however, that the Supreme Court in this case did not attempt to make any findings of fact. What it did do was to hold that the trial court erred in denying the motion of appellants for a nonsuit, and reversed the case for that reason, and made its order directing said court to grant said motion and to enter judgment accordingly. It made no finding of fact whatever, but it found as a matter of law that respondent had not produced evidence sufficient to establish the allegations of his petition, and therefore that he had not made out a case for the jury. No findings of fact are necessary, nor have they any place, in an action where a judgment of nonsuit is rendered.

Respondent has presented an argument at some length upon the validity of section 629, Code of Civil Procedure, passed by the Legislature between the last trial of this matter and the date of the decision of this court reversing the judgment therein. Respondent claims that, if said order reversing said judgment was made pursuant to the authority of this section of the Code, it was erroneous and illegal, for the reason that the provisions of this Code section have no retroactive effect, and, even if they have such effect, the section itself is unconstitutional. We deem it unnecessary to consider the argument presented by respondent as to the validity of this section of the Code for the reason that in our opinion the court had power to make said order of reversal independent of and aside from any authority which said section attempts to confer upon appellate courts. It nowhere appears that this court on the former appeal assumed to act under the provisions of this section, and we do not understand that the respondent directly asserts that the action of this court taken therein was made by it by virtue of any authority conferred by said section. The validity of this section, therefore, is not material in this present proceeding.

[8] Neither are we impressed with the argument of respondent that by the order of this court directing the trial court to enter a judgment of nonsuit he was deprived of a jury trial. He was no more deprived of a jury trial by the action of this court ordering such a judgment than he would have been had the trial court itself granted the motion for a nonsuit at the trial of said action. The granting of a nonsuit when the evidence of plaintiff is insufficient to support a judgment in his favor is not a violation of the constitutional right to a jury trial. *Bohn v. Pacific Electric Ry. Co.*, 5 Cal. App. 622, 91 P. 115.

4. Errors of law. The only error of law relied upon by respondent to justify the trial court in granting his motions for a new trial is based upon the action of the trial court in admitting testimony over the objection of the respondent covering the past history of respondent's mother prior to the time when her relations with the deceased, David J. Baird, commenced. This same question was before the court upon the last appeal, and it was there held (on page 280) that such evidence should not have been excluded.

[9] For the foregoing reasons there was not in our opinion any legal showing made by respondent to justify the trial court in granting his motions for a new trial. In arriving at this conclusion we are not unmindful of the well-established and salutary rule, which clothes the trial court with broad discretionary powers in the consideration and determination of motions of this character. While these powers are broad and extensive, they are not unlimited, and their exercise is controlled by other rules of procedure, equally well settled and beneficial in their application. One of these last-mentioned rules is that, where the trial court errs in the application of the legal principles applicable to a cause in granting a motion for a new trial thereof, such action will be corrected on appeal just as readily as if the motion had been overruled. *Schramm v. Southern Pacific Co.*, 87 Cal. 425, 25 P. 481; *Flood v. Petry*, 165 Cal. 309, 132 P. 256, 46 L. R. A. (N. S.) 861; *Mercantile Trust Co. v. Sunset, etc., Co.*, 176 Cal. 461, 168 P. 1037.

In our opinion the trial court, in granting the respondent's motions for a new trial, misapplied the legal principles applicable to this cause, and for that reason we think said order should be reversed, and it is so ordered.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; LENNON, J.; CASHIN, Justice pro tem.

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MAY HOSIERY MILLS v. G. C. HALL & SON
et al. (Civ. 5040.)

(District Court of Appeal, First District, Division 1, California. March 30, 1926. Rehearing Denied April 29, 1926. Hearing Denied by Supreme Court May 27, 1926.)

1. Sales ⇨23(4)—Hosiery buyers, who signed and returned seller's "confirmation" copy of order, terms of which differed from their proposal, held bound thereby (Civ. Code §§ 1585, 1586).

Hosiery buyers, by signing and returning seller's "confirmation" copy of order, terms of which differed from buyers' proposal, accepted it, and were bound by its terms, since it constituted new proposal, in view of Civ. Code, §§ 1585, 1586.

2. Sales ⇨58—Bracketed printed conditions in corner of hosiery seller's order sheet, which were not specifically referred to or called to attention of buyers, held no part of order written thereon and signed by buyers.

Bracketed printed conditions in upper left corner of hosiery seller's order sheet, on which confirmation copy of certain order was written, limiting time within which complaint as to quality could be made, which were not specially referred to or called to attention of buyers, held no part of contract, though such confirmation copy was signed by buyers, where accepted instrument had all elements of completed contract.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the May Hosiery Mills against G. C. Hall and another, doing business under the firm name and style of G. C. Hall & Son, and another. Judgment for plaintiff, and defendants appeal. Modified.

Joseph G. De Forest, of San Francisco, for appellants.

Lucius L. Solomons, of San Francisco, and Fred C. Peterson, of Oakland, for respondent.

TYLER, P. J. Action for goods sold and delivered. Plaintiff recovered judgment for the sum of \$2,167.93 and costs, and defendant appeals.

The facts relating to the transaction show that about November, 1919, defendants purchased from plaintiff, through an agent, a certain quantity of hosiery. This particular purchase was made by sample, and no written order for the goods was signed by the defendants. On February 10, 1920, before delivery was made, defendants wrote directly to plaintiff at its mills in Nashville, Tenn., inclosing an additional order for 1,500 dozen hose. This order designated the number, kind, size, etc., of the hosiery desired. Plaintiff in a written communication acknowledged receipt of the same and inclosed two copies of what is designated in its letter "confirmation

copies" to cover the proposed purchase. The letter requested that one of them be signed and returned. The confirmation order, so called, contained a recital of the defendants' order as to kind, number, and size of the hosiery ordered. These recitals were type-written upon an order sheet bearing the name and insignia of plaintiff's mills. The letter and confirmation orders differed somewhat from defendants' proposal as to terms. The letter contained a postscript reading, "our terms are net 30 days." The confirmation copies likewise differed in this respect, for they expressly provided, "Terms, net 30 days, f. o. b. mills." In addition thereto, and as part of the body thereof, they provided: "No expressage allowed on sample. This order is not subject to cancellation except per terms mentioned. * * *" In the upper left-hand corner, inclosed in brackets, there was printed, among other conditions, a statement to the effect that any claim that the quality of the goods was not in accordance with the terms of the contract would not constitute cause for cancellation, and that the complaint as to quality should be made within 15 days from the time of the delivery of the goods. This instrument was signed by defendants, and plaintiff made deliveries in accordance with its terms. The first installment was received by defendants on July 13, 1920, and the remainder between that date and August 19, 1920.

Defendants are commission merchants, and the goods as received by them when sold were supplied to the trade in the original boxes. On September 15, 1920, defendants advised plaintiff that certain of the merchandise delivered did not comply with the sample and that portions of the goods sold had been returned to them by their customers as being inferior in quality. Considerable correspondence was had between the parties concerning the matter. Finally plaintiff advised defendants that the hosiery delivered measured up to the sample in every particular, and it referred defendants to the printed clause in the contract existing between them, which provided that complaints, to be valid, must have been made 15 days after shipments were received. It also called attention to a further printed condition giving plaintiff the right to replace any defective merchandise, and it advised them that the company was ready to abide by the contract and replace any quantity of the merchandise that was not right. Certain samples were forwarded by defendants to plaintiff for its inspection, but plaintiff informed defendants that these measured up to the sample. The parties being unable to reach a settlement concerning their differences, defendants on the 12th day of October, 1920, inclosed plaintiff a check for the sum of \$350.06 in payment of the portion of the merchandise they had kept or disposed of, and they also reshipped to it the balance

of the hosiery which they claimed to be defective. The goods so returned were, after notice to defendants, sold by plaintiff at public auction and the proceeds credited to defendants' account, and this action was brought for the balance of the purchase price claimed to be due. After trial, the court found, among other facts, that the hose shipped did not conform in quality, texture, or fineness to the sample, but that the articles were what was known as "seconds." It further found, however, that notice was not made within 15 days after the receipt of shipments as provided for under the printed conditions contained on the face of the contract, and that in consequence plaintiff was under no legal obligation to make any offer to replace such portions of the merchandise as did not comply with the sample, and judgment was accordingly rendered in favor of plaintiff for the amount hereinabove mentioned. It is appellants' claim that the order given by them was accepted by plaintiff, and that the printing contained on the order blank formed no part of the contract, and that defendants were therefore not limited to the time therein provided in which they might make objection to the quality of the goods.

[1, 2] There can be no question but that the real contract between the parties is found in plaintiff's letter and the instrument designated by it as the "confirmation" copy. The offer of defendants was made on February 10, 1920. This offer was not accepted by plaintiff, but, on the contrary, it made a counter offer by its letter and the confirmation order, which contained terms, aside from the printed matter, quite different, as above indicated, to those proposed. The act of plaintiff in proposing terms at variance with defendants' offer amounted to a rejection by it of defendants' proposal and constituted a new proposal. Civ. Code, § 1585.

A proposal imposes no obligation unless accepted as made, and may be revoked at any time before its acceptance is communicated to the proposer. Civ. Code, § 1586.

Defendants having signed and returned the qualified offer based upon terms varying from those proposed, accepted it, and were bound by the terms thereof. *Wristen v. Bowles*, 22 P. 1136, 82 Cal. 84. This being so, it only remains to be considered whether the printed conditions appearing in the upper left-hand corner of the order, one of which refers to the time within which objection is to be made to the quality of the goods, formed a part of the contract. If they were, the judgment should be affirmed, notwithstanding the finding that the goods did not conform to the sample. If not, the judgment must be reversed. The rule seems to be firmly established that printed conditions on letter or billheads, or order blanks of the proposer not specially referred to or called to the attention of the other party to the contract, will not be re-

garded as a part thereof. 35 Cyc. 97; 13 Corp. Jur. p. 278, § 78.

In accordance with this principle it has been held, where an order was placed with the seller and the acceptance was by letter wherein the letter head contained the printed words, to wit, "All sales subject to strikes and accidents," that these words were not part of the contract, even though they were in the very letter of acceptance. *Summers v. Hibbard*, 50 Ill. App. 381; 38 N. E. 899, 153 Ill. 102, 46 Am. St. Rep. 872. To the same effect is *Rosenbaum Hardware Co. v. Paxton Lumber Co.*, 97 S. E. 784, 124 Va. 346. In this case a letter head accepting an order contained the following printed matter:

"All agreements are contingent upon car supply, strikes, and accidents, or other delay from causes beyond our control. No allowance from invoices will be made without certificate of National Hardware Lumber Association—Quotations subject to change without notice. Acceptance of order subject to prior sale."

It was held that the effect of such printed matter did not qualify the absolute contract of purchase arising from the offer and the acceptance thereof in the absence of some specific reference thereto.

Again, in *Menz Lumber Co. v. McNeeley*, 108 P. 621, 58 Wash. 223, 28 L. R. A. (N. S.) 1007, it appeared that the parties entered into a contract of purchase and sale as evidenced by an order upon the stationery of one of the parties upon which was printed, "Quotations subject to change without notice. Contracts made at home office only and contingent upon exigencies of transportation and accidents beyond our control," and it was held that, as the printed matter was not specially referred to in the proposal or acceptance, it formed no part of the contract. See, also, *Sturm v. Boker*, 14 S. Ct. 99, 150 U. S. 312, 37 L. Ed. 1093.

The same doctrine was applied in *Cohen v. Walworth*, 158 N. Y. S. 1081, 95 Misc. Rep. 479. In this case a sale of goods was made under a statement or order containing the buyer's name and address, the terms of credit and the salesman's name, all in typewriting. It was received and confirmed by the seller. Conditions, as here, were printed in small letters at the top of the order and above the description of the merchandise, to the effect that, if the goods were not in accordance with the conditions agreed upon, they should be returned within ten days, and it was held that the printed matter formed no part of the contract, there being no showing that it was called to the attention of the party by the correspondence. Again, in *Weeks v. Johnson Co.*, 92 N. W. 794, 116 Wis. 105, an order appeared upon a blank filled up with writing containing certain terms of the contract. At the top and above the dates appeared in printing, "Terms net 30 days; goods shipped at buyer's risk," and on the side, "All claims for deficiency must be made with-

in 15 days after receipt of the goods." It was held that the printed matter did not destroy, alter, or change the terms and conditions written in the order. See, also, *Doddato v. Gatti-McQuade Co.* (Sup.) 97 N. Y. S. 972.

In *Patch v. Smith*, 94 N. Y. S. 692, 105 App. Div. 208, the memoranda of an order was written upon the face of a printed blank, used by the seller when his customers purchased lumber from him. The order was complete in itself, but contained at the bottom, over the purchaser's name, printed matter reading, "This order is subject to acceptance at the main office." It was held that the printed condition constituted no part of the contract evidenced by such memoranda. We do not deem a further review of the authorities necessary. The offer as accepted contained all the elements and terms of a completed contract and lacked only the assent thereto of the defendants to whom it was addressed to make it such a contract. The mere presence of the printed conditions upon the order, without special reference thereto, became no part of the offer, and they cannot be read into the consummated agreement. The contention of respondent in support of the judgment that it was the duty of defendants to have read their contract, and, having read and signed it, they were bound thereby, is answered by what we have already said.

This conclusion makes it unnecessary to discuss other points raised by appellant. It is admitted that plaintiff is entitled to recover the sum of \$350.06, the amount of the check returned to defendants which had been forwarded to it to cover the cost of goods retained by them.

It is therefore ordered that the judgment rendered herein be modified by substituting this amount for the judgment rendered.

We concur: KNIGHT, J.; CASHIN, J.

77 Cal. App. 321

PARKMAN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.
(Civ. 5233.)

(District Court of Appeal, Second District, Division 1, California. April 2, 1926.)

1. Courts ⚡472(4)—Petition to require testamentary trustee to file account presents new proceeding not incident to settlement of estate, and hence within probate court's jurisdiction only under statute (Code Civ. Proc. § 1699).

Proceeding by petition to require testamentary trustee to file account of property distributed under will is not incident to settlement of estate, but a new proceeding, of which probate court has jurisdiction only under Code Civ. Proc. § 1699, in absence of which relief

could be obtained only by suit in equity in another forum.

2. Trusts ⚡329—Appeal lies from final order of superior court sitting in probate, dismissing citation to testamentary trustee to show cause for not filing account, and hence certiorari will not lie (Code Civ. Proc. §§ 20-23, 963, 1068, 1699).

Under Code Civ. Proc. § 963, appeal lies from final order by judge of superior court sitting in probate dismissing citation to testamentary trustee under section 1699 to show cause for not filing account, and hence certiorari will not lie under section 1068, order constituting basis of final determination, if petition be considered as special proceeding within sections 20-23.

Petition by William W. Parkman for citation to the W. B. Scarborough Company, as trustee, to show cause why it should not be required to file an account. Citation dismissed by order of the Superior Court of Los Angeles County, Frank R. Willis, Judge, and petitioner applies for certiorari. Writ discharged, and proceeding dismissed.

J. W. Hocker, of Los Angeles, for petitioner.

Scarborough & Bowen, of Los Angeles, for respondents.

HOUSER, J. Certiorari. The record herein shows in substance that the respondent superior court had jurisdiction in a certain probate proceeding before it wherein final distribution of an estate was ordered, which, in accordance with the terms of the will therein involved, included distribution to W. B. Scarborough Company, a corporation, as trustee in possession of certain real and personal property; that said W. B. Scarborough Company was not legally qualified to act as such trustee; that, although since such distribution a period of more than six months had elapsed, in violation of the provisions of the statute, said trustee had failed to file in said superior court an inventory of the properties received by it under such order of distribution, and had likewise failed to file any report or account as such trustee; that thereupon petitioner herein had filed a petition in said superior court by virtue of which a "citation" was caused to issue to said trustee, commanding it to show cause why it should not be required to file an account, and "why said corporation accepted such trust, to receive, manage and control the property of said estate"; that said corporation duly filed its answer to the said petition; that thereafter said matter came on regularly for hearing before said superior court, and, over the objections of petitioner, the following final order was entered, to wit: "Respondent having appeared and answered citation, the same is dismissed." The oral reason given for such order by the judge of the superior court at the time the order of dismissal was made was that—

"This court, sitting in probate, has no jurisdiction in the premises; the remedy of the petitioner, if any, is by bill in equity for an accounting brought in another department of this court."

On the part of the respondent herein it is urged, among other things, that, if, as contended by petitioner, the order of dismissal be construed as one finally dismissing and disposing of the proceedings, it is appealable, and consequently that certiorari will not lie.

[1] There would seem to be no question but that a probate court, as originally constituted, and as separated and distinguished from the now existing superior court, had no jurisdiction in a matter of the nature of that involved in the controversy which is the foundation for the present proceeding before this court. The real business of the probate court is the settlement of estates of deceased persons. When the order of final distribution and discharge of the executor under the will or the administrator of the estate has been entered, the work of the probate court with reference to the estate is ordinarily ended. As distinguished from the settlement of the estate, whatever additional legal business connected with the administration of the affairs of the estate may require judicial attention must ordinarily be administered in another forum. It is only when authorized by some express statute that the probate court, sitting as such, and disassociated from the superior court, may entertain matters of a nature distinct from the settlement of estates of deceased persons. In the proceeding presented to the probate court by the petition to require the filing of an account by the trustee acting under the trust created by the will, the probate court derived its authority from the provisions of section 1699 of the Code of Civil Procedure, which conferred complete jurisdiction in such matters. Were it not for such special statute, the probate court, as such, would be lacking in power to determine the question thus presented to it, and the petitioner would be relegated to the equity arm of the superior court for the relief, if any, to which he might be entitled.

In the case of *Estate of Davis*, 136 Cal. 590, 597, 69 P. 412, 414, in treating the subject of jurisdiction of probate courts, the following language is used:

"It may be said that at the present time in this state there is no probate court in the sense that the term has been used in the earlier volumes of the California reports. Under the fundamental law there is a probate jurisdiction vested in the superior court. It may be said that the probate court is gone, but that the probate jurisdiction remains. And that jurisdiction is now vested in the same court that exercises jurisdiction in cases of law and equity. Yet the probate jurisdiction of the superior court is different from its law and equity jurisdiction in this—it is essentially a jurisdiction under the control of the state Legislature.

That law-making power may enlarge it or may restrict it. The character and extent of the jurisdiction is not only a matter under legislative control alone, but the procedure by which that jurisdiction may be invoked and rights thereunder adjudicated is expressly laid down by statute; and that procedure must be followed, or relief under that jurisdiction cannot be secured. While the superior court in this state exercises both equity and probate jurisdiction, still the procedure to be followed in seeking relief within those two jurisdictions is widely varied. And if the probate procedure laid down by the Code is followed, then only relief under probate jurisdiction can be granted. In such a case general equity relief cannot be secured."

In the case of *More v. More*, 133 Cal. 489, 65 P. 1044, 66 P. 76, which was a suit to establish the fact that certain deeds to real property had been procured by fraud and undue influence, and, as a consequence, to compel a reconveyance of such property, or for general relief, one of the defenses was that the plaintiffs were estopped by a judgment rendered in the matter of an estate under the provisions of section 1664 of the Code of Civil Procedure, which authorized the institution of a proceeding in the course of administration of an estate for the purpose of determining heirship. In ruling against the contention of defendants therein, the court took occasion to lay down certain principles affecting the jurisdiction of probate courts, and reached a conclusion similar to that expressed in the case heretofore cited herein.

The case of *Morffew v. San Francisco & San Rafael R. R. Co.*, 107 Cal. 587, 40 P. 810, was one in which a testator devised all his property to his wife in trust for his children. In the course of the administration, the lands belonging to the estate having been distributed in accordance with the provisions of the will, it was held (107 Cal. p. 594, 40 P. 810) that, in the absence of sections 1699 to 1703 of the Code of Civil Procedure, the probate court thereupon had no further control of the trust.

A case which in its declaration of the law goes somewhat beyond that which is stated in either of the foregoing cases is that entitled *King v. Chase*, 159 Cal. 420, 115 P. 207. It is there held that, since the enactment of section 1639 of the Code of Civil Procedure, which empowers the probate court to compel a personal representative of a deceased executor or administrator to render an account of the distribution of the estate of his testator or intestate, an action in equity will not lie for the same purpose, for the reason that the jurisdiction formerly existing in courts of equity "was based solely on the lack of any statutory method of accomplishing the same end by proceeding in probate."

From a consideration of the foregoing authorities it becomes clear that the proceeding initiated by petitioner in the probate court was entirely independent of any administra-

tion upon the estate in which the proceeding was entitled; that, in the absence of the statute (section 1699, Code Civ. Proc.), the only way by which petitioner successfully could have hoped for the relief which he sought was by bringing a suit in equity wholly disconnected from the administration of the estate in the probate court. It follows that, except in its entitlement, which was "In the Matter of the Estate of Calvin E. Parker, Deceased," the petition presented to the probate court a new proceeding, as distinguished from the proceedings necessarily incident to the settlement of the estate.

[2] According to the statutory provisions, judicial remedies are such as are administered by courts of justice, and are divided into two classes: (1) Actions; and (2) special proceedings. Sections 20, 21, Code Civ. Proc. An action is defined as "an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense," and "every other remedy is a special proceeding." Sections 22, 23, Code Civ. Proc.

It is apparent that, if the petition be considered as a special proceeding, the order by the judge sitting in probate dismissing the citation constituted the basis of the final determination thereof. In order to dispose of the question presented for decision, we shall assume, further, that the order is in effect a final order, though not formally entered as such. Section 963 of the Code of Civil Procedure provides that an appeal may be taken from the superior court "(1) from a final judgment entered in an action, or special proceeding. * * *"

The case of *McAdoo v. Sayre*, 145 Cal. 344, 78 P. 874, would seem conclusive as to the ultimate question here presented, in that it is there ruled that an appeal lies from any order made by the probate court in a proceeding of the nature of that involved herein. In that case, as in the instant case, a proceeding was brought under section 1699, Code of Civil Procedure, but therein for the purpose of terminating a trust and directing the trustees "to pay over, convey, and deliver the property" of the trust estate to the person who claimed to be entitled thereto. According to the statement contained in the opinion rendered by the Supreme Court, there was "thus presented the question whether or not section 1699 of the Code of Civil Procedure confers upon the superior court, in the set-

tlement of a trustee's account in the proceeding there established for that purpose, jurisdiction to ascertain and determine who are the persons entitled to the trust property, and, upon the final account, to direct the trustee to deliver the property to such persons in settlement of the trust, or to approve and confirm such delivery if already made by the trustee, * * *" and whether "the court has a general power, upon final settlement at the termination of the trust, to dispose of the entire matter of the trust by determining who, by the terms of the trust, is entitled to the property, and directing the trustees to turn over the same to such person. The decision of this question depends on the effect to be given to the language of section 1699 of the Code of Civil Procedure." After deciding that under said section 1699, Code of Civil Procedure, the superior court had jurisdiction of the question which was thus presented to it, the court denied the application for the writ of prohibition. In dealing with the appealability of a final order rendered in pursuance of the provisions of section 1699, Code of Civil Procedure, the court said:

"It is further provided in section 1699 of the Code of Civil Procedure that the report accompanying the account must give the names and post office addresses, if known, of the cestui que trust. This the report in question failed to give, and it is claimed that for that reason the proceeding is void, and that prohibition will lie to prevent further action therein. This, however, would not be sufficient cause for a writ of prohibition. An appeal lies from any order that may be made in the proceeding and it will furnish a sufficient remedy to any person aggrieved by the action of the court in attempting to proceed without jurisdiction."

Section 1068 of the Code of Civil Procedure lays down the conditions under which a writ of certiorari may be granted. Among them is the provision that the writ will lie only where it appears that "there is no appeal" from the action of the court which is sought to be reviewed.

From the case of *McAdoo v. Sayre*, supra, it clearly appearing that the order to which the consideration of the court is herein directed is appealable, it follows that, irrespective of the other questions which are submitted by the parties to this controversy, the writ should be discharged and the proceeding dismissed. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

77 Cal. App. 279

PEOPLE v. EGAN. (Cr. 1269.)

(District Court of Appeal, First District, Division 1, California. March 26, 1928.)

4. Courts ⇨90(1)—Where state's evidence was same on trials of two defendants, decision as to sufficiency of evidence on appeal by one held controlling as to that question on appeal by the other.

Where state's evidence was same on trials of two defendants, who were charged jointly with robbery but tried separately, decision as to sufficiency of evidence on appeal by one held controlling as to that question on appeal by the other, though such other attempted to establish an alibi.

2. Criminal law ⇨739(2).

Question of weight that should be attached to testimony given in support of defense of alibi held for jury.

3. Criminal law ⇨681(2)—Admission of accusatory statement, with instruction that jury should disregard it unless they found that defendant stood mute when it was read to him, held proper.

Where evidence was conflicting as to whether defendant denied guilt or said he had nothing to say when another's accusatory statement was read to him, admission of such statement, with instruction that jury should disregard it unless they found beyond reasonable doubt that he stood mute at such time, held proper.

4. Criminal law ⇨407(2)—Silence of defendant, when accusatory statement is read to him and he is given opportunity to reply, held proper evidence indicating admission of guilt.

Silence of defendant, when accusatory statement is read to him and he is given opportunity to reply, held proper evidence indicating admission of guilt.

5. Criminal law ⇨304(2).

It is matter of common knowledge that, in committing robbery, pistols are frequently used as bludgeons.

6. Robbery ⇨24(1)—Possession of unloaded pistol by one committing robbery held enough to justify conclusion that such pistol is "dangerous weapon," within statute defining robbery of first degree (Pen. Code, §§ 211a, 245).

Possession of unloaded pistol by one committing robbery held enough to justify conclusion that such pistol is "dangerous weapon" within Pen. Code, § 211a, defining robbery of first degree; wording of such section being different than section 245, defining assault with "deadly" weapon.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dangerous Weapon.]

7. Robbery ⇨17(1).

Information charging robbery need not allege facts showing degree of robbery charged.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Edward Egan was convicted of robbery, and he appeals. Affirmed.

Harry McKenzie, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

KNIGHT, J. About midnight on October 28, 1924, P. I. Jacoby and wife, upon entering their home on Jackson street in San Francisco, were confronted by two masked men armed with a black automatic revolver, and robbed of jewelry valued at \$12,000. The defendant, Edward Egan, was accused and convicted as being one of those committing the robbery. He has appealed from the judgment of conviction and from the order denying his motion for a new trial.

[1, 2] The first point urged for reversal is that the evidence is legally insufficient to sustain the verdict. The appellant Egan was charged jointly with one John H. Smith with the commission of the crime. They were tried separately, and each was convicted of robbery in the first degree. The evidence adduced by the prosecution in both cases was the same. Owing to the fact that the men perpetrating the crime were masked, the Jacobys were unable to recognize Smith or appellant as being either of the robbers, but their guilt was established by circumstantial evidence. Smith was tried and convicted first. He appealed, and one of the questions raised was the sufficiency of the evidence. The judgment of conviction was affirmed by Division Two, District One, of this court (People v. Smith, 241 P. 267), and afterwards a petition for a hearing before the Supreme Court was denied. All of the important circumstances connecting Smith and appellant with the commission of the crime and upon which their convictions were based are set forth in the opinion rendered on that appeal. The correctness of the statement of those circumstances is not challenged by appellant herein except as to one or two matters which we deem immaterial. We are of the opinion, therefore, that the decision in the Smith Case is controlling here upon the question of the sufficiency of the evidence. True, in the instant case, appellant endeavored to establish an alibi, but the question of the weight that should be attached to the testimony given in support of that defense was one for the jury to determine, and the fact that appellant was found guilty would seem to prove that the jury was not impressed with its truth.

[3] Appellant further contends that the trial court erred in receiving in evidence, over appellant's objection, a written accusatory statement made and signed by one Har-

ry Wright, referred to also in the opinion in the Smith Case. The circumstances leading up to the making of said statement and its subsequent use by the prosecution were as follows: Three days after the robbery was committed, Wright, Smith, and appellant, the latter being known to Wright as Brown, were arrested in front of Wright's clothes-cleaning establishment on Gough street, San Francisco, while seated in a Ford sedan talking to a woman named Mamie Manning. They were taken into Wright's place of business, and, after a search was made, the stolen jewelry was found in Wright's pocket, and a black automatic revolver resembling the one used in the robbery was discovered in the pocket of a garment hanging in the room. Wright thereupon stated in the presence of Smith and appellant that he had obtained the jewelry from them; also that he had seen the revolver in appellant's possession that morning. To these accusatory statements Smith and appellant made no reply. Later, on the same day, Wright made and signed a written statement in which he related all of his dealings with appellant and Smith subsequent to the robbery, including the manner in which the latter two had brought the jewelry to his place of business and tried to dispose of it to other persons; also the fact that appellant had possession of the revolver. He likewise detailed a number of conversations had with them, which were accusatory in their nature, and directly connected them with the commission of the crime. On that same evening two police detectives read Wright's statement to appellant and Smith in Wright's presence, and they were asked if they had anything to say. There is a conflict in the evidence as to the nature of appellant's reply. The two officers testified that appellant's only reply was that he "had nothing to say." Mamie Manning and appellant testified that his reply was that he "had nothing to do with it"; that he was innocent. The trial court allowed the written statement to be received in evidence, stating at the time that at the request of appellant or upon the court's own motion the jury would be instructed as to how the statement should be regarded. The court afterwards gave to the jury the following instructions regarding it:

"It has become a well-settled rule that when a defendant, under conditions which fairly afford him an opportunity to reply, stands mute in the face of an accusation of crime, the circumstances of his silence may be taken against him as evidence indicating an admission of guilt. The reason for admitting the accusation in such cases is to explain the conduct of the accused. And in that connection, and with particular reference to the statement which has been read to you, I instruct you that you must first find that the defendant did stand mute, and, if there is a conflict of evidence on that point, you must find the fact beyond all reasonable doubt. If you have any reasonable doubt as to whether or not the defendant stood mute

upon being confronted with this accusation, you must entirely disregard the statement. And the statement, by itself, means absolutely nothing, is proof of nothing, until such time as you connect up with it the conduct of the defendant upon this accusatory statement, if you find it to be an accusatory statement confronting him. Your theory and the manner in which you will proceed on that is: You will ignore the statement entirely; first take the defendant, then the statement being read to him; if you do not find beyond a reasonable doubt that he did stand mute, then disregard the statement entirely. If, however, you find beyond a reasonable doubt, that this defendant, under conditions which afforded him an opportunity to reply, stood mute in the face of accusation of crime, the circumstances of his silence may be taken against him as evidence indicating an admission of the facts in the statement contained."

[4] The rule is well settled that the acts and conduct of an accused person, when a statement of his guilty participation in the crime is made in his presence, may be presented to the jury as circumstances tending to show an implied admission of the truth of such statements. *People v. Ong Mon Foo*, 189 P. 690, 182 Cal. 697; *People v. Shelest*, 216 P. 389, 62 Cal. App. 213; *People v. Bishop*, 54 Cal. 129; *People v. Amaya*, 66 P. 794, 134 Cal. 531. The accusatory statement in the instant case was read to appellant in the presence of Wright, and appellant, being asked if he had anything to say, was fairly afforded an opportunity to make a reply. If, under those conditions, he made no reply to the accusatory statements, the circumstance of his silence was proper evidence to be considered by the jury as indicating an admission of guilt. *People v. Ayhens*, 117 P. 789, 16 Cal. App. 618. The court made it clear to the jury that the only purpose for which the statement was received in evidence was to show acquiescence or admission on the part of appellant in the face of the accusatory charges, and the jury was furthermore instructed that, unless they were convinced beyond a reasonable doubt that appellant did stand mute when the accusatory statements were made, the matter should be entirely disregarded. We are of the opinion that in this state of the record no error has been shown.

[5, 6] Appellant urges also that the evidence is insufficient to sustain a conviction of first degree robbery because it did not appear that the revolver used in the perpetration of the crime was loaded. In support of this point appellant cites the case of *People v. Sylva*, 76 P. 814, 143 Cal. 62. That case is not in point, however, because it involved the construction of the term "deadly weapon" as used in the Code section defining the crime of assault with a deadly weapon (Pen. Code, § 245), which is a different term from the one employed in the Code section defining first degree robbery. The latter section declares that:

"All robbery * * * perpetrated * * * by a person being armed with a *dangerous* or deadly weapon is robbery in the first degree." Pen. Code, § 211a. (Italics ours.)

It is a matter of common knowledge that in committing robbery pistols are frequently used as bludgeons rather than as firearms. The fact, therefore, that a person perpetrating such crime is armed with a pistol is enough to justify the conclusion that the pistol used by him is a "dangerous" weapon within the meaning of said section 211a of the Penal Code, even though it be not loaded.

[7] The remaining point made by appellant is that the information was defective, in that it failed to allege facts showing the degree of the robbery charged. In cases of murder, arson, and burglary it has been held that allegations for such purpose are not essential (People v. Nichol, 34 Cal. 211; People v. Russell, 23 P. 418, 81 Cal. 616; People v. Smith, 68 P. 702, 136 Cal. 207; People v. Jefferson, 52 Cal. 452), and no valid reason appears why a different rule of pleading should be required in charging the crime of robbery. The point is therefore without merit.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

77 Cal. App. 310

DOODY v. DAVIE et al. (Civ. 5351.)

(District Court of Appeal, First District, Division 2, California. April 1, 1926. Hearing Denied by Supreme Court May 27, 1926.)

Municipal corporations — 200—Injury to foot while off duty, though resulting in no infection or general bodily illness, held "sickness" for which fireman might receive compensation under charter (Charter of Oakland, §§ 100, 100½).

Injury to city fireman's foot when stepping on nail while off duty, though resulting in no infection or general bodily illness, held to be "sickness" within Charter of Oakland, § 100, entitling him to payment of full salary during disability for first 60 days, in view of section 100½; "sickness" being any affection of body depriving it temporarily of power to fulfill usual functions, and including injury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sickness.]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Arthur H. Doody against John L. Davie and others to compel payment of salary. Judgment for plaintiff, and defendants appeal. Affirmed.

Leon E. Gray, City Atty., and Markell C. Baer, Asst. City Atty., both of Oakland, for appellants.

Irving Magnes and Breed & Burpee, all of Oakland, for appellee.

LANGDON, P. J. Petitioner is a member of the Oakland fire department, and the defendants are members of the city council which passed a resolution refusing to pay petitioner's claim for salary during a period when he was incapacitated from performing his duties as a member of the fire department by reason of a sore foot, which condition was brought about by stepping on a nail while in the yard of his home on July 12, 1922, which was his "day off."

A demurrer to the complaint was overruled, and defendants answered. Upon motion of petitioner, judgment was entered upon the pleadings, from which judgment defendants appeal. It appears from the pleadings that petitioner's foot was dressed by a physician every other day, and that for a period of nine days petitioner was unable to walk or put his weight upon the sore foot. Petitioner promptly reported to the fire department that he was "sick," and furnished the necessary doctor's certificate required by the department. The said department never asked for any other certificate, and on July 22, 1922, petitioner returned to his work, and furnished what is known in the department as a "well" certificate.

Thereafter petitioner endeavored to collect his monthly salary from the city of Oakland for the month of July, and received in lieu of his salary of \$150, the sum of \$106.45, being informed that the difference, or the amount of \$43.55, was deducted from his salary by reason of his nine days' absence from his regular occupation. Thereafter petitioner duly demanded of the said city of Oakland the balance of \$43.55, and the defendants, acting as the city council of the city of Oakland, by a resolution, regularly adopted, rejected the claim of petitioner, setting forth in the resolution of rejection the following:

"For the reason that the charter authorizes no compensation to firemen during periods of incapacity from duty arising solely from injuries not received in the performance of any duty."

The only question presented is one of construction of section 100 of the charter of the city of Oakland, the pertinent portion of which reads as follows:

"Section 100. * * * A member (of the fire department) becoming incapacitated for duty by reason of sickness shall be entitled to sixty days' sick leave without loss of pay. If such sickness shall continue, he shall be entitled to half-pay for an additional period of sixty days, and if such sickness shall continue further, he shall receive such pay, if any, as the council shall direct. A member on sick leave shall present such certificate of a reputable physician as the chief of the fire department may direct."

Was the petitioner "incapacitated for duty by reason of sickness" within the meaning of the charter provision just quoted? Appellants' position is based upon the fact that petitioner developed no infection in his foot and no nausea or general bodily illness, and it is argued that a distinction should be drawn between an injury received while "off duty" and an illness which had no traumatic cause. It is argued that this view is re-enforced by the provisions of section 100½ of said city charter, which provides that in cases of injury sustained while in the performance of duty, firemen shall receive medical aid, etc., in addition to the sick leave provided for, and that such injured firemen shall receive full pay during the continuance of such disability. Appellants maintain that, as payment of salary during disability caused by injuries received in the course of employment is treated in a section separate and apart from the one relating to "sickness," it is evident that there was no intention to provide for the payment of salary during disability caused by injuries received out of the course of the employment or it would have been included and not excluded by implication in section 100½.

We have given this argument due consideration, but it seems to us more logical to conclude that since, in the case of injuries occurring during the course of the employment, a fireman, in addition to his "sick leave" or payment of salary during disability, was allowed, by section 100½ of the charter, medical, surgical, and hospital treatment, including medicines, medical and surgical supplies, crutches and apparatus, including artificial members, this section created a difference between injuries in the course of performance of duty and those sustained at another time and that in the latter case, the fireman was merely entitled to the usual sick leave provided for in section 100 of the charter.

Appellants assert that the word "sickness" in section 100 does not include "injury." It certainly does in its popular significance and in the definitions found in such a standard work as Bouvier's Law Dictionary, wherein it is said:

"Sickness. By sickness is understood any affection of the body which deprives it temporarily of the power to fulfill its usual functions. It has been held to include insanity. L. R. 8 Q. B. 295. Sickness is either such as affects body generally, or only some part of it."

Appellants admit that if as a result of his injury the petitioner had developed a fever or nausea he would have been entitled to sick leave. The differentiation between such a case and the instant one is a very fine one, and one which seems to us incapable of practical application. If a fireman broke his leg or his wrist while off duty, the continuance of his salary would depend upon whether or not

his constitution was strong enough to stand the shock and pain without some bodily reactions, such as fever, nausea, nervousness, etc. The inquiry into this question of fact would certainly be most unsatisfactory; its determination could not depend upon the degree of temperature developed, or the amount of nausea, faintness, dizziness or nervousness which would result. It is almost impossible to conceive of any injury severe enough to incapacitate a man which would not cause some general variation from normal in the functions of the body.

Appellants argue at some length the improvident and unusual result of paying men for services which they are unable to perform because of injuries suffered while about their own concerns on a day when they are relieved from duty. We can only suggest that, if this was not the intention of those responsible for the charter, it would be well to have it amended so as to remove the question from the realm of doubt. This court cannot do this, indirectly.

There are no authorities directly in point upon this question, but this court agrees with the trial court that the injury suffered by petitioner constitutes a "sickness" within the meaning of section 100 of the Oakland city charter.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

77 Cal. App. 254

CUNIAL v. JUSTICE'S COURT OF CITY OF BERKELEY, ALAMEDA COUNTY, et al.
(Civ. 5010.)

(District Court of Appeal, First District, Division 1, California. March 23, 1926.)

1. Appearance ⇨20.

Appearance and contest of motion held to waive objection to sufficiency of notice thereof, notwithstanding attempt to preserve such objection.

2. Justices of the peace ⇨122(5)—Justice is not deprived of jurisdiction to set aside default because defendant, after contesting reversal of judgment in his favor, on remand stipulated amount of damages; the question whether defendant was estopped from seeking such relief being for the justice, and his determination, even if erroneous, not being void (Code Civ. Proc. §§ 859, 1010).

Where justice's court judgment for defendant was rendered after his default and he opposed reversal thereof, and on remand his attorney stipulated amount of damages to which plaintiff was entitled if any, justice was not deprived of jurisdiction to set aside default on motion under Code Civ. Proc. §§ 859 and 1010, the question whether defendant was estopped to seek such relief being for justice, and his

action, though it might be erroneous, was not void.

Appeal from Superior Court, Alameda County; Joseph M. Koford, Judge.

Application by Antonio Cunial for writ of certiorari against the Justice's Court of the City of Berkeley, County of Alameda, and another, Justice of the Peace in and for City of Berkeley. From a judgment of the superior court dismissing the application and affirming an order of the justice court, vacating the judgment rendered therein, plaintiff appeals. Affirmed.

Charles A. Cogswell, of Berkeley, for appellant.

Wm. M. Abbott, K. W. Cannon, and W. Lindley Abbott, all of San Francisco, for respondents.

CASHIN, J. An appeal from a judgment of the superior court in and for the county of Alameda made on certiorari dismissing the petition and affirming an order of the justice's court of the city of Berkeley vacating a judgment therein rendered.

An action was brought by appellant in the latter court. Summons was served upon the defendant, on whose failure to appear default was entered. On the day of the entry of the default, but after its entry, defendant filed therein a demurrer to the complaint. Following the entry of the default mentioned, evidence was taken in support of the allegations of the complaint, whereupon the court entered judgment for defendant. Appellant appealed therefrom to the superior court upon questions of law. Following a hearing in that court, in which the attorney for the defendant participated, the judgment was reversed and the cause remanded. After the remand, but before further proceedings were had in the cause, defendant moved in the justice's court for an order setting aside his default, which motion was denied. Subsequently the cause was again heard in the latter court, the attorney for defendant being present; evidence was offered by appellant and a stipulation entered into between the attorneys for the parties as to the amount of damages suffered by appellant, whereupon judgment was entered against the defendant.

[1] On the fourth day thereafter defendant filed a written notice of motion and application for an order setting aside the default, vacating the judgment and permitting him to answer the complaint; the notice being accompanied by the affidavit of his attorney stating grounds for relief under the provisions of section 859 of the Code of Civil Procedure, which motion was presented and granted within the time limited by the section named. It was alleged in the petition mentioned "that five days' notice for the time of hearing of said motion to set aside the de-

fault in the justice's court heard on the 13th day of December was never given," and "that the time of the hearing of said motion to set aside the default judgment heard on the 13th of December, 1923, was not given in the notice of motion." The notice mentioned, which was supported by an affidavit, was dated December 8, 1923, addressed to appellant and his attorney, and in all respects as to form complied with the requirements of section 1010 of the Code of Civil Procedure; it being therein stated that the motion would be made on November 13, 1923. The insertion of the latter date was evidently a clerical error, but one which did not mislead appellant, who appeared at the hearing on December 13, 1923. It was not alleged that the notice and affidavit were not served upon the latter, or that notice in fact of the hearing was not given; and while appellant appeared specially for the purpose of objecting to the placing of the motion on the calendar it appears from the petition that he thereafter presented argument in opposition to the granting of the motion. In the latter connection the petition states that counsel "did not waive the special appearance of himself on behalf of said plaintiff"; but the rule is well settled that having received notice in fact, he, by appearing and contesting the motion, waived objection to the sufficiency of the notice. *Naylor v. Adams*, 114 P. 997, 15 Cal. App. 353; *Brown v. Sup. Ct.*, 223 P. 426, 65 Cal. App. 147, 151.

[2] It is contended by appellant that the defendant having opposed the reversal of the original judgment, and his attorney having stipulated to the amount of damages, following which the subsequent judgment was entered, and the motion to set aside the default made before the entry of the latter judgment having been denied, the court was without jurisdiction to grant relief under the provisions of section 859 of the Code of Civil Procedure. None of the facts mentioned, whatever their effect in rendering erroneous the subsequent acts of the court, deprived it of jurisdiction. The question whether they were sufficient to estop the defendant from seeking relief under that section was one which the justice's court was empowered to determine; and such determination, if erroneous, was nevertheless made in the exercise of its jurisdiction. *Granger v. Sup. Ct.*, 112 P. 854, 159 Cal. 1; *Muir v. Sup. Ct.*, 58 Cal. 361; In the Matter of Hughes, 113 P. 684, 159 Cal. 360.

It appearing that the application for relief was filed, heard, and acted on within the time limited by the provisions of the section, and that appellant had notice of and appeared at the hearing, the order of the court was one made in the exercise of its jurisdiction and was not void. *People v. Elkins*, 40 Cal. 642, 647.

The judgment appealed from is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

77 Cal. App. 285

PEOPLE v. FATRIOUS. (Cr. 1297.)

(District Court of Appeal, Second District, Division 1, California. March 26, 1926.)

Embezzlement ⚡44(1).Evidence *held* to support conviction of embezzlement.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Gilbert Fatrious was convicted of embezzlement and other offenses, and he appeals. Affirmed.

Milton G. Gill, of Red Bluffs, for appellant.
U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

HOUSER, J. Defendant was found guilty of having committed offenses, as briefly charged in the information filed against him, as follows: Count 1, embezzlement; count 2, falsifying corporate records; count 3, embezzlement; count 4, alteration of corporate records; count 5, embezzlement; count 6, falsifying corporate records; counts 7, 8, 9, and 10, false entry by agent of bank; count 11, forgery. Sentence was passed on defendant as to counts 1, 3, and 11, and the passing of sentence was suspended as to all other counts of which defendant was found guilty. He has appealed from the judgment and from an order of court denying his motion for a new trial.

The only complaint made by appellant is that the evidence was insufficient to justify the verdict as to embezzlement. Other than a general statement by appellant that "there is wholly a lack of evidence showing any receipt of any item of money by this defendant or any money received by him, nor is there any evidence of the defendant's fraudulent appropriation of any of the money or property of the bank to his own use," only the most incomplete and inadequate attempt is made to lead the way or in any manner to point out in what respect the evidence failed to support the verdict.

Defendant was employed in the exchange department of a bank. Without quoting the testimony given by the several witnesses introduced by the prosecution, or attempting to summarize the evidence adduced on the trial, it may be said that it clearly appears from such evidence that by a manipulation of accounts, drafts, and money of which defendant had charge, he was able to and did commit the crime of embezzlement as charged in each of counts 1 and 3 of the information, as well as the crime of forgery as charged in count 11 of the information. In view of the voluminous character of the evidence, it would seem a waste of time and energy for this court to demonstrate the correctness of the verdict. The claim of appellant that no cash came in-

to his hands, and that there is no evidence of a shortage existing at any time in the cash delivered by him to the vault teller (as compared with the amount which should have been delivered), ignores evidence definitely supplying those facts. It suffices to say that the evidence is entirely satisfactory and convincing as to defendant's guilt.

The judgment and the order denying defendant's motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

77 Cal. App. 297

SIMPSON et al. v. NIELSON et al.
(Civ. 5550.)

(District Court of Appeal, First District, Division 2, California. March 30, 1926. Rehearing Denied April 27, 1926. Hearing Denied by Supreme Court May 27, 1926.)

1. Corporations ⚡283(3)—Statute denying injunction to prevent exercise of office does not apply to action under statute expressly providing mode of determining validity of elections to corporate offices (Code Civ. Proc. § 526; Civ. Code, § 315).

Code Civ. Proc. § 526, denying right to injunction to prevent exercise of a public or private office by the person in possession, does not apply to an action brought under Civ. Code, § 315, which expressly provides a mode of determining the validity of elections to corporate offices.

2. Injunction ⚡136(2)—In action to determine validity of corporate election, court may issue temporary restraining order as auxiliary relief, as proceeding is in equity (Civ. Code, § 315).

In action under Civ. Code, § 315, to determine validity of election of directors of corporation, court may issue temporary restraining order as auxiliary relief pending final determination of action as proceeding is in equity.

3. Corporations ⚡283(3)—In action to determine validity of corporate election, that complaint does not plead all circumstances required by statute does not affect court's jurisdiction to issue temporary restraining order (Civ. Code, § 315).

In action under Civ. Code, § 315, to determine the validity of election of directors of corporation, that complaint does not plead all circumstances required by this statute, does not affect jurisdiction of court to issue temporary restraining order pending final determination of controversy.

4. Corporations ⚡573(2)—Stockholder may revoke at pleasure voting agreement with other stockholders to continue for 12 years (Civ. Code, § 321b).

Stockholder might revoke at pleasure agreement with other stockholders that third person might vote their stock according to wishes of majority of parties to agreement for period of 12 years, as under Civ. Code, § 321b, proxy

for over 7 years is invalid, and one for any term is revocable at pleasure of stockholder.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action to determine validity of election of directors of corporation and to restrain defendants from acting as such by Thomas Simpson and others against William Nielson and others. From an order granting a temporary restraining order, defendants appeal. Affirmed.

J. F. Riley, H. S. Young, and Bert F. Rabnowitz, all of San Francisco, for appellants.

John H. Riordan, of San Francisco, for respondents.

NOURSE, J. The plaintiffs, who constitute the majority in number and in ownership of stock of the stockholders of the Diamond Laundry Company, a corporation, commenced this action under the provisions of section 315, Civil Code, to determine the validity of an election of directors of the corporation held on March 5, 1924. The plaintiffs alleged in their complaint that three of their number were elected directors at said meeting, but that defendant Collopy, claiming to act under a written proxy from one of the plaintiffs, voted his stock at said meeting, and that three of the defendants thereby claimed to have been elected directors; that these three defendants had taken possession of all the property of the corporation to the injury of the plaintiffs. The complaint closed with a prayer that the defendants be restrained from acting as officers of the corporation and from possessing its books and properties, and that the election of the three plaintiffs—Simpson, Neibel and Mehegan—be declared valid, that the voting agreement, or proxy, be declared void, and for other equitable relief.

The trial court found all the allegations of the first cause of action to be true, and issued its temporary restraining order preventing the interference by defendants with the three plaintiffs named in their exercise of the functions of the offices to which they claimed to have been elected. From this order the defendants have appealed on typewritten transcripts.

[1-3] The first point raised is that the trial court was without jurisdiction to issue the order because of the code provisions denying the right to an injunction to prevent the exercise of a public or private office by the person in possession. Section 526, Code Civ. Proc. The section has no application to a case of this kind. This action is brought un-

der section 315, Civil Code, which expressly provides a mode of procedure to determine the validity of elections to corporate offices. The proceeding is one in equity. *Dulin v. Pacific Wood & Coal Co.*, 35 P. 1045, 37 P. 207, 103 Cal. 357, 364. Thus the court had the power to issue a temporary restraining order as auxiliary relief pending final determination of the controversy. See *Foster v. Superior Court*, 47 P. 58, 115 Cal. 279, 284; *Title Ins., etc., Co. v. Cal. Development Co.*, 152 P. 542, 171 Cal. 173, 208. The fact that the complaint may not have pleaded all the circumstances required by the section of the Code authorizing the action does not affect the question of jurisdiction to issue the order. *Brown v. Anderson-Cottonwood Irr. Dist.*, 190 P. 797, 183 Cal. 186, 187.

[4] The appellants rely upon a voting agreement executed June 16, 1922, wherein Neibel, one of the plaintiffs, agreed with certain of the defendants that the defendant Collopy should vote their stock at all meetings of the corporation in accordance with the wishes of the majority of the signers of the agreement. The term of the agreement was fixed at 12 years, and Collopy was named as proxy for a period of 5 years. The appellants rely upon *Smith v. San Francisco & N. P. Ry. Co.*, 47 P. 582, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, wherein a similar agreement, except as to the time of its duration, was held valid. After that decision, the Legislature enacted section 321b, Civil Code, which provides that no proxy for the voting of stock shall be valid unless it shall specify the length of its duration, which shall not exceed 7 years, and that all proxies for such purposes shall be revocable.

It is useless to discuss cases from other jurisdictions, when the question is plainly covered by our statutory law. There is no uncertainty or ambiguity in the section of the Code cited. A proxy given for a term in excess of 7 years is invalid, and one for any term is revocable at the pleasure of the stockholder. Cases involving voting trust agreements likewise have no application here. The parties entered into an agreement in violation of the express terms of the statute, and in July, 1923, nearly a year prior to the date of the stockholders' meeting, Neibel gave written notice of revocation of this agreement. The trial court merely followed the express terms of the statute in holding that he had a right to do this, and we see no need of citation of authority in support of his order.

Order affirmed.

We concur: **LANGDON, P. J.; STURTEVANT, J.**

77 Cal. App. 265

SHAPIRO v. R. G. WHITLOCK CO.
(Civ. 4427.)(District Court of Appeal, Second District,
Division 1, California. March 25, 1926.)**Judgment** $\S$ 683, 729—**Judgment in action wherein trade acceptance was mentioned in counterclaim as having been offered in place of money held not bar to action on acceptance brought by assignee for value before maturity, who stated he intended suing on acceptance.**

Where, in another action brought by present defendant, counterclaim was interposed for claim of damages due under contract, stating that trade acceptance was offered instead of actual money, judgment therein *held* not bar to present action on trade acceptance by assignee for value before maturity, who was attorney for defendant of former action, and who stated to court at that time that he intended to prosecute action on acceptance.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by A. Shapiro against the R. G. Whitlock Company on a trade acceptance. Judgment for plaintiff, and defendant appeals. **Affirmed.**

Frank G. Tyrrell and McComb & Hall, all of Los Angeles, for appellant.

Shapiro & Shapiro, of Los Angeles, for respondent.

CONREY, P. J. The defendant in its answer averred that the trade acceptance for \$398.50 herein sued upon was "pleaded in the answer" of plaintiff's assignor, Harvey, in an action of R. G. Whitlock Company against Harvey, the said Harvey (under the fictitious name Harvey Machine Company) being the payee named in the trade acceptance; "that the issues in this action were in said former action fully determined and adjudicated."

At the trial of the present action appellant offered in evidence the judgment roll in the former action, together with a paragraph of the instructions of the court to the jury in that action, and a part of the evidence received at the trial. To these offers the respondent objected. There does not appear to have been an immediate ruling on the objections. The matters thus offered are set out in the transcript. Immediately following this record of the evidence the court made a general ruling covering said preceding matters, giving its reasons therefor, and sustained the objections. The court held that the plea of *res adjudicata* failed because the subject-matter of the former action was not the same as the present action, and because the parties are not the same, and because the trade acceptance was not the property of either of the parties to the former action. By the evidence it was shown that the trade acceptance was transferred to respondent, Shapiro, for an actual and valuable considera-

tion prior to maturity. It further appeared from said evidence that Shapiro was the attorney for Harvey in the former action, and that at the trial of said former action Shapiro informed the court that this present action was then pending, and that he still expected to try to obtain judgment thereon.

The principal ground of appeal by the defendant herein is that the court erred in refusing to admit the offered evidence to which we have referred. We are of the opinion that said evidence was properly excluded. In the former action the counterclaim of defendant Harvey set out certain demands for damages on account of alleged nonperformance by plaintiff of a contract for the purchase by plaintiff of certain materials which were to be manufactured and delivered by Harvey to the plaintiff. The only reference in the counterclaim to any trade acceptance consisted of a statement that, when defendant demanded a payment, which he claimed to be due on the contract, he "was offered a trade acceptance instead of actual money."

The evidence herein was clearly sufficient to sustain the court's finding that the trade acceptance was assigned before maturity and for value to Shapiro, and that he is the owner thereof. There is no evidence that he was not such purchaser, or that he had notice of any defenses thereto when he accepted the assignment of the acceptance to himself. The fact that he was the attorney for Harvey in the said action of R. G. Whitlock Company against Harvey (an action which was commenced after Shapiro had filed his complaint in the present action) has no tendency to prove that Shapiro was a party to that action, or that he had any personal interest therein.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

77 Cal. App. 263

PEOPLE v. DUGAT. (Cr. 1313.)(District Court of Appeal, Second District,
Division 1, California. March 25, 1926.)

Criminal law $\S$ 1169(1)—In prosecution for manslaughter, erroneous admission of evidence tending to show threats, malice, and previous motive, which if true showed defendant despicable, and evidence that his wife was engaged in immoral business at time of trial, held prejudicial.

In manslaughter trial, where evidence was circumstantial only, erroneous admission of evidence of threats, malice, and previous motive, which, if true, showed defendant to be lowest and most despicable kind of man, who would be hated by all mankind, and was followed by evidence that his wife was engaged in immoral business at time of trial, though she was not called as witness, *held* so highly prejudicial as to require reversal of conviction.

Appeal from Superior Court, San Diego County; L. D. Jennings, Judge.

Louis Dugat was convicted of manslaughter, and he appeals. Reversed, and new trial ordered.

Cooper, Collings & Shreve, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

YORK, J. The defendant was charged with the crime of manslaughter, and with no other offense. He was found guilty of this offense, and from that judgment, and the order denying his motion for a new trial, this appeal was taken.

During the course of the trial the district attorney insisted upon calling the charge against the defendant murder, and introduced as part of the state's main case, certain evidence which might tend to show threats, malice, and previous motive. The people attempt to excuse this order of proof on the theory that certain evidence was given by the defendant at a coroner's inquest, and the people claim they had a right to anticipate a possible defense in accordance with such testimony there given.

The trial court in its instructions correctly laid down the law as to manslaughter, and in clear and concise language instructed the jury as to what evidence they could consider, and laid down in such instructions a strict rule to the jury, directly instructing them at length that evidence tending to prove other offenses must not lead them to convict on that evidence, nor on less evidence than sufficient to warrant a conviction under the law of the offense charged, to wit, manslaughter and nothing else; and that he could only be convicted of the offense charged, and then only if proved to the satisfaction of the jury beyond a reasonable doubt that he was guilty thereof; and that he could not be convicted unless, under all of the instructions of the court, they believed beyond a reasonable doubt that he was guilty of the crime charged. One of the instructions also was that they should not be influenced by passion or prejudice.

This is not a mere matter of order of proof, nor is it a mere technical objection that is raised on behalf of the defendant, but is a matter which strikes at the very right of defense itself. The evidence so introduced, if true, showed the defendant to be one of the very lowest and most despicable kind of men, to be in fact such a man as would make him hated by all mankind, and was followed by evidence that the wife of the defendant was engaged, at the time of the trial, in an immoral business in a negro dive at Tia Juana, although the wife herself was not called as a witness by either party

to the action. The erroneous admission of this evidence was very seriously prejudicial to the right of the defendant. *People v. Clark*, 203 P. 781, 55 Cal. App. 46, 47 and 48, and cases therein cited.

The case against the defendant was a circumstantial case only. If there had been any direct evidence, our ruling might be different than what it is, but after an examination of the entire case we hold that the erroneous admission of the evidence referred to caused a miscarriage of justice, and that the substantial rights of the defendant were thereby violated, because, by reason of the prejudice that such evidence may have caused in the minds of the jury, the defendant might have thereby been compelled to take the stand. If this evidence had been introduced as proper rebuttal evidence after the defendant had voluntarily taken the stand and testified, and after the defense had closed, we might have to pass upon several other questions, a consideration of which is made unnecessary by the foregoing ruling.

Said judgment is therefore reversed, and a new trial is ordered.

We concur: CONREY, P. J.; HOUSER, J.

77 Cal. App. 287

BENSON v. OLENDER et al. (Civ. 5373.)

(District Court of Appeal, First District, Division 2, California. March 29, 1926. Hearing Denied by Supreme Court May 27, 1926.)

1. Appeal and error $\hookrightarrow$ 934(2)—Where verdict in replevin is in alternative, it may not be presumed in favor of judgment, merely for value, that evidence demonstrated return was impossible.

In face of verdict in the alternative—for return of replevied goods, or, if return could not be had, for their value—it may not be presumed in favor of judgment for value, merely, that evidence demonstrated that property could not be returned.

2. Judgment $\hookrightarrow$ 256(1).

Judgment in replevin, for value of goods only though verdict was in alternative, contravenes Code Civ. Proc. § 664, declaring judgment ineffectual unless in conformity to verdict.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by B. M. Benson against Julius Olender and another. Judgment for plaintiff, and defendants appeal. Reversed.

See, also, 240 P. 61.

Lewis H. Smith and Claude L. Rowe, both of Fresno, for appellants.

Glenn M. De Vore and B. M. Benson, both of Fresno, for respondent.

LANGDON, P. J. The defendants appeal from a judgment against them as sureties on a replevin bond. The following facts appear from the findings of the court:

On December 12, 1922, Sam Caplan and I. H. Caplan commenced an action in the superior court of the state of California, in and for the county of Fresno, against one S. S. Smith. Said action was in replevin, the plaintiffs therein claiming to be entitled to the possession of certain personal property then in the possession of defendant. A writ of replevin issued and the goods were seized by the sheriff and delivered to the plaintiffs. The defendant Smith filed an answer in said action, demanding the return of the property or its value, alleged to be \$4,000. The plaintiffs in said action filed a replevin bond signed by Olender and Samuels, defendants herein, which bond contained the following clause:

"Now therefore, we, the undersigned, residents of the said county, in consideration of the premises and of the delivery of the said property to the said plaintiffs do hereby undertake and acknowledge to the effect that we are jointly and severally bound in the sum of eight thousand dollars, being double the value of said property as stated in said affidavit, for the prosecution of the said action, for the return of the said property to the said defendant, if return thereof be adjudged, and for the payment to the said defendant of such sums as may from any cause be recovered against the said plaintiffs."

Thereafter, said replevin action came regularly on for trial on April 28, 1924, and judgment was entered in favor of the defendant Smith and against the plaintiffs Sam Caplan and I. H. Caplan in the sum of \$1,750, together with costs. Said judgment became final and a writ of execution issued thereon was returned unsatisfied. Demand was made upon the defendants herein as sureties on the bond to pay the amount of the judgment, and they refused to do so. Smith assigned the judgment in the replevin action to plaintiff, and the defendants, on November 6, 1924, paid \$721.95 upon the same, leaving a balance due thereon of over \$1,200.

Incidentally, in June, 1924, a certain action was filed in the superior court of the state of California, in and for the county of Fresno, by the Caplan Finance Corporation against S. S. Smith, the defendant in the original replevin action, and his wife. In said action brought by the Caplan Finance Corporation a writ of attachment was issued and served upon Sam Caplan and I. H. Caplan, which attached all the money, goods, debts, etc., or other personal property belonging to said S. S. Smith in the possession or under the control of said Sam and I. H. Caplan. Prior to the trial of the present action, said writ of attachment in the case of Caplan, Finance Corporation v. Smith was dissolved by order of court.

[1,2] The first objection made upon the present appeal is that the defendants herein are not bound to pay the amount of the judgment rendered in the prior action of Cap-

lan v. Smith for the reason that said judgment was not entered in the alternative for a return of the property, or if return could not be had, then for the value thereof. The verdict of the jury was in the alternative, but, as recited in the findings herein, the judgment entered was merely for the value of the property. The sureties claim to have been deprived of a substantial right, in that their principal may not satisfy the judgment by returning the property.

Respondent claims the instant case falls within the exception to the general rule, namely, that where it is established that the property cannot be returned, the judgment need not be in the alternative. We might indulge in the presumption of the regularity of the judgment and conclude that the evidence in the replevin suit indicated that the property could not be returned were it not for the fact that the verdict of the jury was in the alternative, and as the jury is the trier of the facts, we may not presume in the face of its verdict in the alternative that the evidence demonstrated the property could not be returned. And this brings us to another objection to this judgment in the replevin action, which is that it is in violation of section 664, Code of Civil Procedure, which provides that a "judgment must be entered in conformity to the verdict." Said section declares that "in no case is a judgment effectual for any purpose until so entered."

In Nickerson v. Cal. Stage Co., 10 Cal. 520, it was said:

"The defendant objects that under our statute there should have been a finding of the value in the replevin suit, and an alternative judgment for the return of the property or the payment of its value. This would have been necessary to enable the plaintiff to recover against the sureties on the replevin bond but the failure to do so cannot affect his rights as to the defendants."

The case of Field v. Lumbard, 73 N. W. 703, 53 Neb. 397, considers the question involved upon this appeal, saying:

"* * * The sureties contract with a view to an alternative judgment if the plaintiff should be unsuccessful. They are discharged, pro tanto at least, by a return of the property if the judgment be regular. But, if the judgment be absolute, a return of the property would not satisfy it, and their liability would be thereby increased. Nor do we think that it is their duty to appear in the replevin suit, and see that the judgment is proper. It is rather the duty of the defendant therein to see that the judgment is such that it will protect him than for the sureties, who are not parties, to appear and see that it is of such a character that it will bind them."

In Gallarati v. Orser, 27 N. Y. 324, it was said:

"In this case there was a judgment for damages only, and not for a delivery to the plaintiff of the property of which replevin was sought. This was a departure from section 277 of the

Code, which prescribes the terms of a judgment. It is required to be for the possession, or for the recovery of the possession, or for the value thereof in case a recovery cannot be had, and of damages for the detention. The plaintiff is not entitled to waive the claim to the possession, and to have an absolute judgment, in damages, to the value of the property. * * * But we are not to assume that the court would not, if the plaintiff had required it, have rendered a legal judgment which would have concluded not only the defendant, but his sureties and the sheriff. The consent of the plaintiff to take a judgment not appropriate to the action, or warranted by law, would, if the sureties and the sheriff were concluded, be changing their contract in a most material point. We cannot say but, if a proper judgment and an execution in conformity with it had been issued, the bail or the sheriff would have found the property and have caused it to be taken and delivered to the plaintiff, on the writ of retorno habendo. One of the most common principles in the law of principal and surety is that the latter cannot be charged beyond the fair import of his undertaking, nor where there has been any substantial change of the contract of the party for whose performance he has become responsible. To hold the defendant liable in this case would be a palpable denial of that principle."

The case of *Thomas v. Irwin*, 90 Ind. 557, is also in favor of the appellants upon the question raised, as are various other cases cited in their briefs which we shall not discuss herein.

There is also another objection made by appellants to the judgment in the instant case, which grows out of the contention that the action was prematurely brought because at the time it was commenced Sam and I. H. Caplan, the principals on the replevin bond, were restrained by a court order from paying the amount of the judgment in the replevin suit. This contention is based upon the facts with relation to the attachment in the suit of *Caplan Finance Corporation v. Smith*, mentioned heretofore. However, we need not discuss the legal situation created by this incident, because the matter previously considered is decisive of the appeal.

The judgment is reversed.

We concur: STURTEVANT, J.;
NOURSE, J.

77 Cal. App. 308

**SAN FRANCISCO CREDIT CLEARING
HOUSE v. MACGOWAN. (Civ. 5397.)**

(District Court of Appeal, First District, Division 2, California. March 31, 1926.)

Judgment ¶256(6)—In action for services and materials, where there was no counterclaim or cross-complaint, finding that defendant promised to pay sum claimed held to require judgment in that amount.

In action for services rendered and materials furnished, where there was no counter-

claim or cross-complaint questioning value of materials or whether all materials furnished were actually used, finding that defendant promised to pay sum claimed held to require judgment in that amount without reduction based on finding that all materials had not been used.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by the San Francisco Credit Clearing House against R. H. MacGowan for services rendered and materials furnished. From a judgment for only a portion of the sum claimed, plaintiff appeals. Reversed with directions.

Cross & Brandt, of San Francisco, for appellant.

Joseph J. Bullock, of Redwood City, for respondent.

NOURSE, J. Plaintiff sued in assumpsit for \$307.20 for services rendered and materials furnished in the repair of a pump at the special instance and request of the defendant. The complaint stated two causes of action—one, an express promise to pay the amount sued for; and the other, that the said sum was the reasonable value of the services and materials. The answer denied both the promise to pay and that said sum was the reasonable value. An amendment to the answer set up the special defense that the plaintiff's assignor had been called on to repair the same pump on two previous occasions, but that the work had been done in an improper manner, necessitating the work for which the account in suit was rendered.

The trial court found that these allegations of the answer were untrue; that the defendant ordered from plaintiff's assignor the services and materials and promised to pay therefor the sum of \$307.20; that, in pursuance of said order, the services were rendered and the materials were furnished as alleged in the complaint; and that the reasonable value thereof was the sum of \$307.20. The Court found further that some of said materials were not used in the repair of the pump, but were left on defendant's premises, and that the reasonable value of such materials was \$190. Judgment was then rendered for plaintiff in the sum of \$117.20; the value of the unused materials having been deducted from the sum sued for. The plaintiff appeals on typewritten transcripts.

The single ground of appeal is that the appellant is entitled to judgment in the amount prayed, on the finding that the respondent promised to pay that sum. Of this there cannot be any doubt. The respondent did not plead a counterclaim or a cross-complaint for damages. He did not question the account which was rendered him long prior to the commencement of the action, and he did not return, or offer to return, the materials which

he claimed had not been used. No issue was raised as to these materials, and this finding is wholly outside of the case.

The judgment is reversed, with directions to the trial court to enter judgment for the appellant as prayed.

We concur: LANGDON, P. J.; STURTEVANT, J.

77 Cal. App. 780

PEOPLE v. CORDOSCO. (Cr. 1352.)

(District Court of Appeal, Second District, Division 1, California. May 6, 1926.)

1. Criminal law **1024(4).**

People cannot appeal under Pen. Code, § 1238, from order sustaining objection to pronouncing judgment and granting motion to dismiss following verdict not in compliance with section 1158; such order not being one in arrest of judgment, in view of section 1185.

2. Criminal law **1202(5).**

Verdict, silent on question of former conviction, which was charged in information, held in effect a finding for defendant thereon.

3. Criminal law **972—Motion in “arrest of judgment” challenges sufficiency of information, and can be based only on defects appearing on its face.**

Motion in “arrest of judgment” which is practically demurrer interposed to accusatory pleading after conviction, challenges sufficiency of information, and can be based only on defects appearing on its face.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Arrest of Judgment.]

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

P. Cordosco was charged with violation of the Wright Act. From an order sustaining defendant's objection to pronouncing judgment and dismissing proceedings and discharging defendant, the People appeal. On motion to dismiss. Appeal dismissed.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

Richardson & Scherrer, of Riverside, for respondent.

CONREY, P. J. In this action the information charged the defendant with the crime of violation of the Wright Act (St. 1921, p. 79), a misdemeanor, by willfully and unlawfully having in his possession intoxicating liquor. The information further charged prior commission of a like offense, for which it was alleged that he had been prosecuted, and had been convicted and sentenced. After a general plea of not guilty, this case was tried before a jury, which found the defendant guilty as charged. The verdict did not comply with the requirement of section 1158 of the Penal Code that in a case so presented the jury must find specifically upon the charge of previous conviction.

Thereafter, at the time fixed by the court for pronouncing judgment, the defendant objected as follows:

“Defendant, by his counsel, objects to any judgment being pronounced on the grounds that the court has no jurisdiction to pronounce

judgment and moves the court to discharge the defendant on the grounds that the verdict is insufficient and that the court has no jurisdiction to pronounce judgment.”

After argument of the question thus presented, the court made the following order:

“Objection to pronouncing judgment sustained, motion to dismiss granted, information and all proceedings dismissed, defendant discharged and bail bond exonerated.”

Thereupon the district attorney gave notice of appeal, and in due course the transcript on appeal was filed.

[1] The defendant now moves to dismiss this appeal, upon the ground “that the order and judgment made by the court sustaining the defendant's and respondent's objections to the pronouncement of judgment, and dismissing the proceedings and discharging the defendant, on December 19, 1925, is not such an order and judgment coming within the provisions of section 1238 of the Penal Code, granting to the plaintiff and appellant the right of an appeal therefrom.”

The cases in which an appeal may be taken by the people are those set forth in section 1238 of the Penal Code. The appeal herein is not one of those in which the right of appeal by the people is allowed by said section, unless the order above mentioned was in effect “an order arresting judgment.” Section 1185 of the Penal Code, relating to motions in arrest of judgment, reads in part as follows:

“A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant, on a plea of a former conviction. It may be founded on any of the defects in the indictment or information mentioned in section ten hundred and four, unless the objection has been waived by a failure to demur, and must be made and determined before the judgment is pronounced.”

[2] The objection of defendant as made in the court below was not directed against the pronouncing of judgment “on a verdict against the defendant on a plea of a former conviction,” nor on a charge of former conviction. For since the verdict was silent on the subject of former conviction, it was in effect a finding in favor of defendant upon the question of prior conviction. *People v. Dueber*, 34 Cal. App. 686, 690, 163 P. 578, citing and quoting from *People v. Eppinger*, 109 Cal. 294, 41 P. 1037.

[3] Nevertheless, the objection of defendant in the court below was directed against the rendition of any judgment on the “verdict of guilty” referred to in section 1185 of the Penal Code, concerning motions in arrest of judgment. But it was not an objection or

motion based upon any defect in the information. Being thus outside the scope of a motion in arrest of judgment as defined by the Penal Code, the objection was not a motion of that description, and the order sustaining the objection was not an order arresting judgment.

"A motion in arrest of judgment challenges the sufficiency of the indictment or information to state a public offense. The office of such a motion is neither more nor less than that of a demurrer. It is practically a demurrer interposed to an accusatory pleading after conviction." *People v. Wilbur*, 33 Cal. App. 511, 165 P. 729.

"As to the motion in arrest of judgment, that can be based only upon defects appearing upon the face of the indictment or information." *People v. Cole*, 127 Cal. 545, 549, 59 P. 984, 985.

The order in question here was, in legal effect, merely an order dismissing the action from which order there is no appeal.

The appeal is dismissed.

We concur: HOUSER, J.; YORK, J.

in provisions of section 1, subds. 1-13, providing that act applies to vagrant children, etc., and this regardless of actual effect on minor or whether penal under other statutes.

2. Intoxicating liquors ⚡215—Information charging that accused sold wine to minor, but not alleging that sale tended to cause minor to habitually visit place where intoxicating liquor was sold, not in company with parent, or otherwise violate law, held insufficient (Juvenile Court Law [St. 1925, pp. 1225, 1246] § 1, subds. 6, 7, 8, 11, 13, and section 21; Pen. Code, §§ 397b, 950-952, 954).

Information charging violation of Juvenile Court Law, § 21, by selling wine to a minor, tending to cause him to visit place where intoxicating liquor was sold and to possess intoxicating liquor, was insufficient under Pen. Code, §§ 950-952, 954, as, in view of section 397b, it did not charge that sale tended to cause minor to habitually visit place not in company with parent or guardian, or otherwise violate Juvenile Court Law, § 1, subds. 6, 7, 8, 11, 13, especially as minor's possession might be lawful.

3. Indictment and information ⚡71—Where facts necessary to complete description of offense are omitted from information, and do not follow as necessary conclusion from allegations, demurrer is properly sustained.

Where ultimate facts necessary to complete description of offense are omitted from information, and do not follow as a necessary conclusion from its allegations, demurrer is properly sustained, as defendant is entitled to a clear statement of offense with which he is charged.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Criminal prosecution under Juvenile Court Law, § 21, against Victor Lamanuzzi. From an order sustaining a demurrer to the information, the People appeal. Affirmed.

U. S. Webb, Atty. Gen., Wm. F. Cleary, Deputy Atty. Gen., Geo. R. Lovejoy, Dist. Atty., and William A. White and C. M. Ozias, Deputy Dist. Attys., all of Fresno, for the People.

Lindsay & Gearhart, of Fresno, for respondent.

CASHIN, J. An information was filed against respondent in the superior court in and for the county of Fresno, the pleading consisting of three counts identical in form, with the exception of the date on which the act charged was alleged to have been committed and the names of certain minors connected therewith. The minors mentioned were two boys both aged 17 years, and a girl of the age of 15 years. The charge in each count, as shown by the language of the first, which we quote, was as follows:

"Victor Lamanuzzi is accused * * * of the crime of misdemeanor, to wit, violation of section 21 of the Juvenile Court Laws committed as follows: The said Victor Lamanuzzi on

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PEOPLE v. LAMANUZZI. (Cr. 1273.)

(District Court of Appeal, First District, Division 1, California. March 31, 1926.)

1. Infants ⚡16—Penal provisions apply to acts tending to bring minors within act, and without regard to effect on minor, or whether penal under other statutes (Juvenile Court Law [St. 1925, pp. 1225, 1246] § 1, subds. 1-13, and section 21).

Penal provisions of Juvenile Court Law, § 21, apply to acts tending to bring minors with-

or about the 1st day of November, 1924, at and in the said county of Fresno and state of California, and prior to the filing of this information, did willfully, unlawfully, and knowingly commit certain acts, to wit, sell and furnish wine, said wine being then and there fit for use for beverage purposes, and then and there containing more than one-half of 1 per cent. of alcohol by volume, to Bud Stoffers, which caused and tended to cause the said Bud Stoffers, a minor child of the age of 17 years, to visit a place where intoxicating liquor was sold, bartered, exchanged, and given away, to have intoxicating liquor in his possession, which said intoxicating liquor was then and there fit for use for beverage purposes and then and there contained more than one-half of 1 per cent. of alcohol by volume. All of which is contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California."

Respondent demurred generally and specially to each count, alleging that the facts stated therein did not constitute a public offense, that the pleading did not substantially conform to the requirements of sections 950, 951, and 952 of the Penal Code, and that more than one offense was charged therein and not charged in the manner provided in section 954 of the Penal Code, in that defendant was therein charged with causing and tending to cause the minor named to visit a place where intoxicating liquor was sold, bartered, exchanged, and given away, and also charged with having caused and tended to cause the minor to have intoxicating liquor in his possession; the offenses not being separately stated. The demurrer to each count was sustained upon all the grounds, and the people, having declined to amend, appeal from the order.

[1] The purpose of section 21 of the Juvenile Court Law (St. 1915, p. 1246) is to prevent minors from being brought within any of the provisions of subdivisions 1 to 13, inclusive, of section 1 of the act; and the penal provisions thereof apply to acts or omissions which in a given case tend to that result without regard to their actual effect upon the minor. *People v. DeLeon*, 170 P. 173, 35 Cal. App. 467. These acts or omissions may or may not be penal offenses under the provisions of other statutes; their character for the purposes of the act being determined by their effect or tendency. *People v. Baker*, 175 P. 88, 38 Cal. App. 28. Where the gravamen of the offense under the section mentioned is the tendency of an act or omission, it is, according to the general rule applicable to criminal pleadings, essential to a complete description of the crime that it be alleged that the act or omission charged tended to have the effect designed to be prevented. *People v. Salisbury*, 175 P. 88, 59 Cal. App. 299, 300; *Joyce on Indictments*, § 375; *People v. Dunlap*, 45 P. 183, 113 Cal. 72, 73; *People v. Robles*, 49 P. 1042, 117 Cal. 681.

[2] In the instant case the information charged respondent with acts which were in violation of certain provisions of section 397b of the Penal Code, reading as follows: "Every person who sells, gives or delivers to any minor child, male or female, * * * intoxicating drink in any quantity whatsoever * * * shall be guilty of a misdemeanor"—it not being directly alleged therein that the acts tended to bring the minor within any of the provisions of the Juvenile Court Law, unless the allegations that the act caused or tended to cause the minor to have intoxicating liquor in his possession and to visit a place where intoxicating liquor was sold, bartered, exchanged, and given away, may be said to be equivalent thereto.

Following the general rule, the court, in *People v. Robles*, supra, held that, although, as a matter of evidence, inferences may be drawn by a jury from circumstances indicating the guilt of a defendant, yet no inferences of facts not alleged can be invoked to aid an indictment, which must charge the crime in words, and is demurrable if it fails to charge it in express terms. In conformity with this rule it was held, in *People v. Salisbury*, supra, that an information charging acts of sexual intercourse with a female under the age of twenty-one years not the wife of defendant was, in the absence of allegations that the acts charged tended to encourage the minor to become a person within the provisions of the Juvenile Court Law is insufficient. The one exception to the rule stated is the case wherein ultimate facts are alleged in an indictment or information from which but one conclusion can follow, and such conclusion necessarily follows from the facts alleged, in which case the pleading is sufficient, though the conclusion is not directly alleged. *People v. Tinnen*, 192 P. 557, 49 Cal. App. 18, 23. In the instant case it was not alleged that the possession by the minor following the sale and delivery was unlawful, or that the liquor was consumed by him. The language of section 397b of the Penal Code is sufficiently broad to include a sale or delivery of intoxicating liquor to a minor under the age of 18 years upon a physician's prescription, whether issued directly to the minor or to one not its parent or guardian, irrespective of the innocent character of the purpose for which the sale or delivery was made, or whether the minor was aware of the intoxicating nature of the liquor. Such possession, however, would not in every case be unlawful or inconsistent with an innocent and proper purpose; nor would the fact of an illegal sale or delivery followed by possession under all circumstances necessarily or manifestly tend to bring the minor within any of the provisions of the Juvenile Court Law. Whether such was the tendency of the act charged would be dependent upon the nature of the transaction (*People v. Baker*, supra); and, where, as here, such tendency as

an ultimate fact does not follow as a necessary conclusion from the allegations, the information is not brought within the exception mentioned. The charge that the act caused the minor to visit a place where intoxicating liquor was sold, bartered, exchanged, and given away was not an allegation which, if proved, would bring the minor within the provisions of subdivision 7 of section 1 of the law, which requires the habitual visiting of such places not in company with the parent or guardian of the minor; nor would the visit alleged or the possession of liquor which, so far as alleged, was not unlawful, as a necessary conclusion, cause or tend to cause the minor to frequent the company of criminals or persons so reputed, to habitually use intoxicating liquor, to lead or be in danger of leading an idle dissolute, lewd, or immoral life, or to violate the law within the provisions of subdivisions 6, 8, 11, or 13 of the section last mentioned.

[3] A defendant is entitled under any statute to a clear statement of the offense with which he is charged (*People v. Bergotini*, 158 P. 198, 172 Cal. 717); and, where the ultimate facts necessary to a complete description of the offense have been omitted from the pleading, and such facts do not follow as a necessary conclusion from the allegations contained therein, a demurrer to the information is properly sustained.

The order is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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ANDERSON v. SOUTHERN CALIFORNIA EDISON CO. (Civ. 5333.)

(District Court of Appeal, First District, Division 1, California. April 2, 1926. Hearing Denied by Supreme Court May 27, 1926.)

1. Easements ⚡1, 42—"Easement" is restriction on servient tenement owner's property rights, and grant may entirely exclude him from any enjoyment thereof.

"Easement" is restriction on servient tenement owner's property rights, and in case of grant may altogether exclude him from any rights in enjoyment thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Easement.]

2. Easements ⚡41, 42—Extent of servitude is determined by terms of grant or nature of enjoyment by which easement is acquired, and, where acquired by prescription or operation of law, character and extent are fixed by user under which gained (Civ. Code, § 806).

Extent of servitude is determined by terms of grant or nature of enjoyment by which easement was acquired, but where acquired by prescription or operation of law, character and extent are fixed by user under which gained (Civ.

Code, § 806); right so acquired being stricti juris.

3. Easements ⚡38—Easement includes "secondary easements," consisting of right to do things necessary for full enjoyment of easement, but right must be exercised so as not to increase injuriously burden on servient tenement.

Every easement includes "secondary easements," consisting of right to do things necessary for full enjoyment of easement, but such right is limited and must be exercised in such reasonable manner as not to increase injuriously the burden on servient tenement.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Secondary Easement.]

4. Electricity ⚡9(1)—Electric power company's easement of right of way did not abridge landowner's right to use of land not conflicting with company's rights.

Interest of electric power company in land under asserted easement of right of way for its lines did not abridge owner's right to such use of land for any purpose as did not conflict with or defeat company's rights in use of its lines, its interest not being exclusive.

5. Electricity ⚡9(1)—Right to maintain power line supported by poles does not affect landowner's right to use surface.

Right to maintain aerial power line, supported by poles resting in ground, does not affect landowner's right to surface use of land, except so far as surface is reasonably necessary for ingress, egress, maintenance, and repair.

6. Electricity ⚡15(1)—Landowner building on power company's right of way held not trespasser or mere licensee.

Where building did not restrict or limit power company's alleged easement of right of way for its lines, and it never objected to erection or maintenance of building, but arranged to use higher poles to remove danger from proximity of wires to roof, it could not complain of building's existence, so long as it did not interfere with company's alleged interest in land, and landowner and those deraining interest through him had right to enjoy full benefit of improvement and were not trespassers or mere licensees as to company in so doing.

7. Electricity ⚡13—Power company enjoying easement of right of way held under duty to so erect line as not to interfere with landowner's reasonable use of surface.

In enjoyment of power company's asserted interest in land under alleged easement of right of way for its lines, it was its duty to keep within limited interest, and so erect aerial right of way as not to interfere with reasonable use of surface, failing in which it became trespasser on rights of owner and those claiming under him.

8. Electricity ⚡14(1)—Power company must exercise high degree of care for safety of persons lawfully using property over which wires are strung.

It is duty of power company using dangerous force of electricity to exercise high degree of

care for safety of persons lawfully using property over which wires are strung, such as painter's apprentice working on copper roof, by insulating or otherwise protecting wires at places where such persons may reasonably be expected to go in pursuit of their calling, or by placing wires beyond danger of contact with them.

9. Electricity ⇨14(2)—Failure to raise electric wires high enough above roof to prevent contact with persons is sufficient proof of negligence.

Failure of electric company to raise wires so high above roof that those having occasion to go there will not come in contact with them is sufficient proof of negligence.

10. Negligence ⇨68.

Person *sui juris* must use ordinary care for his own protection, degree thereof being commensurate with danger.

11. Electricity ⇨19(6, 12)—Negligence in maintaining wires too near roof, and workman's contributory negligence in forgetting about wires, held for jury.

Negligence of electric power company in maintaining wires in dangerous proximity to roof of building, on which injured painter's apprentice was working, and latter's contributory negligence in forgetting about wires which he had seen, held for jury.

12. Negligence ⇨136(26).

To forget about known danger is not negligence, unless it shows want of ordinary care, which is for jury.

13. Damages ⇨131(1)—\$3,000 for second and third degree burns of back and heels, producing severe pains and nervousness for several days and incapacitating painter's apprentice to work for several weeks, held not so excessive as to suggest passion, prejudice, or corruption.

\$3,000 for second degree burns of back and heels, producing severe pains and nervousness for several days and incapacitating painter's apprentice to work for several weeks, and one of which subsequently developed characteristics of third degree burn, held not so excessive as to suggest passion, prejudice, or corruption at first blush.

14. Appeal and error ⇨1004(3)—Appellate court has power over excessive damages only when facts suggest passion, prejudice, or corruption at first blush; question being for trial court in first instance.

Question of excessive damages is first addressed to trial court, which must bear whole responsibility, and appellate court may interfere only when facts at first blush suggest passion, prejudice, or corruption of jury.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Walter Anderson against the Southern California Edison Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Roy V. Reppey, E. W. Cunningham, and G. C. Larkin, all of Los Angeles, for appellant. Swaffield, Swaffield & Pray, C. Douglass Smith, Frank P. Farrell, and Russell H. Pray, all of Long Beach, for respondent.

TYLER, P. J. Action to recover damages for injuries caused by contact with a high-voltage wire maintained by defendant company, a public service corporation, as a part of its electrical distributing system. Plaintiff claimed that the defendant company negligently maintained its wires in dangerous proximity to the roof of a certain building upon which he was working, in consequence of which he received the injuries complained of. The defendant denied any negligence on its part and alleged contributory negligence on the part of the plaintiff. It also set up in its answer by way of separate defense that at the time of the accident plaintiff was a trespasser upon its property. At the conclusion of plaintiff's case, a motion for a nonsuit was made and denied. After trial the jury returned a verdict in favor of plaintiff in the sum of \$3,000. A motion for a new trial was made and denied. This is an appeal from the judgment and order.

As grounds for reversal, appellant claims that the evidence fails to prove negligence on the part of defendant company, or a duty of care owed from it to plaintiff, and the trial court therefore erred in denying a motion for a nonsuit and in refusing to instruct the jury to return a verdict for defendant; that the court likewise erred in refusing to give certain instructions requested by defendant. It is also claimed that the damages are excessive and not justified by the evidence. These alleged errors are relied upon for a reversal of the judgment.

The facts are practically without conflict. Defendant corporation is engaged in the business of distributing electricity to customers in the county of Los Angeles. In the year 1910 it constructed a power line parallel to Cherry street, in the Signal Hill District, Los Angeles, through territory which was then and now is farming and agricultural in character. The wires used were three in number; they were small in diameter, consisting of No. 6 bare copper wire, insulated wires not being used. The poles supporting the line were installed upon private property 5 feet from the road. They were 40 feet high, and the wires at the lower point were about 30 feet from the ground. The line carried 11,000 volts of electricity. At the time of the accident there was a sag in the wires. There is testimony to show that this sag was normal. The place where the accident occurred was known as "farm lot No. 7." Defendant company had attempted to procure an easement of a right of way over this particular parcel of land from the owner, but was never able to acquire this inter-

est. The R. H. Herron Company, affiliated with the Pittsburg Oil Company, had rented this particular property from the owner in the year 1921, and the following year it constructed a corrugated iron building thereon directly under the transmission wires above described. Upon the completion of the building, the wires passed directly over the peak of the roof, $1\frac{1}{2}$ to 5 feet from the front end thereof, with a clearance of about 3 feet. During the construction of the building, two men employed by the contractor had been injured by reason of the close proximity of the wires to the building. The company was notified by the contractor of this fact. Several of the employees of defendant company, including the superintendent, had noticed the dangerous condition of the wires, and they, too, had notified their company of this condition. No claim was ever made by the company that the improvement interfered with any easement claimed by it, but, on the contrary, prior to the happening of the accident in question, an order was placed with it by its officers for longer poles; but the company had none on hand at the time and they were not procured until some time in June, 1922. It was also claimed by defendant that at the time complaint was made the city of Long Beach had refused permission to cut the line because of the interruption of service which would result therefrom, and such permission was not granted until the day of the accident.

Other testimony is to the effect that the power transmitted by the wires was used for pumping water for use by the city. The officer in charge of the water department of the city of Long Beach testified that the current could have been shut off for a period of three or four hours, as the city had another source of supply that could be used. On July 26, 1922, the manager of the owner of the newly constructed building ordered the Harris Sign Company to paint a sign thereon. On this day plaintiff was employed by such company as a painter's apprentice and had been so employed for about a year and a half immediately prior thereto. He was ordered to accompany another employee to assist in the performance of the work. In order to accomplish their task, it was necessary to swing a stage across the front part of the building. The painter and plaintiff proceeded to the roof for the purpose of fastening wooden blocks thereon to properly secure the stage upon which they were to work. Plaintiff took the lead, carrying blocks, a hammer, and some tools. When he had reached the roof, he observed the wires, about 3 feet above the building and some 12 to 20 feet away. The wires were very small, being only one-sixteenth of an inch in diameter, according to the records of the company, and, as above stated, they were not insulated. For these reasons both plaintiff and his fellow servant were under the impression

that they were telephone wires. There was nothing to indicate that they carried a high voltage of electricity. Plaintiff, carrying his tools, approached the wires, straddling the peak of the slanted corrugated iron roof, stooping at times and looking down. When he came to the first wire, he bent down to pass under it; his hands and feet touching the roof. When directly under the wire, he raised up, but, according to the testimony of his companion, no part of his body touched the wire; it being 3 or 4 inches therefrom. There was a flash, plaintiff was thrown in the air and rendered unconscious, and his body started to roll down the roof. His companion went to his assistance and prevented him from falling therefrom. Plaintiff received second degree burns on his back and upon the heels of both of his feet, and in consequence thereof was incapacitated from work for 26 days.

It is claimed by appellant company that the evidence as above recited shows plaintiff to have been a trespasser or mere licensee, to whom the company owed no duty of care except not to be actively or overtly negligent, and that under such circumstances there could be no negligence; there being no duty of care.

The conclusion of appellant that plaintiff was a trespasser is based upon its claim that it had acquired an easement of right of way over the lands in question, and that this being so, defendant owed no duty to plaintiff to keep its premises safe. Under its asserted easement appellant claims that it is not limited to the mere space actually occupied by the wires, but also to that space reasonably necessary for the use of the wires as high-voltage transmission lines. In asserting an easement in the land in question, defendant does not claim that it acquired such interest by express grant, and, indeed, it could not successfully do so, as the evidence shows conclusively that it failed in this attempt. The assertion of its title is based upon two alleged theories. It is first claimed that under the decision in *Gurnsey v. Northern Cal. Power Co.*, 117 P. 906, 160 Cal. 699, 36 L. R. A. (N. S.) 185, the company acquired the asserted interest. In that case it was held that where a public service corporation has entered upon land and erected poles and wires in connection with its business, though the entry was without right, and the owner fails to bring any action until public interest, by reason of the construction of the work, has intervened, the right of such owner to maintain ejectment against such public service corporation will be denied and the owner will be remitted solely to his action for damages as the measure of his compensation. It is there further declared that this exception, which forms the rule as to public service corporations, is not based upon any consideration of the rights pertaining to the public corporation itself, nor solely upon the doc-

trine of estoppel of the owner, but is based mainly upon the great principle of public policy under which the rights of the citizen may be abridged in the interest of the public welfare.

[1-4] The second theory advanced by appellant company for the support of its claimed easement rests upon a claim of title to the asserted right by adverse possession. We do not think we are here seriously concerned with the question of the respective rights of the owner of the land and the company in the easement in question. This is not an action between the parties to determine such rights. Assuming some interest in the land to exist in favor of the company or the public, to the unlimited and unrestricted right to have its wire pass over the lands, the question with which we are concerned is the duty of the company to exercise care in the use of the alleged easement. An "easement" is, of course, a restriction upon the rights of property of the owner of the servient tenement. In the case of a grant it may be of such a character as to altogether exclude the owner of the servient tenement from any rights in the enjoyment of his property. The extent of the servitude is determined by the terms of the grant or the nature of the enjoyment by which it was acquired. Where, however, the easement is acquired, as here, by prescription or operation of law, its character and extent are fixed and determined by the user under which it is gained. Civ. Code, § 806. A right so acquired is stricti juris and cannot extend beyond the user. Every easement, it is true, includes "secondary easements," consisting of the right to do such things as are necessary for the full enjoyment of the easement; but this right is limited, and must be exercised in such reasonable manner as not to increase injuriously the burden upon the servient tenement. *North Fork Water Co. v. Edwards*, 54 P. 69, 121 Cal. 662. Whatever interest defendant company may have in the land in question by reason of the asserted easement, the right of the owner thereof to its use of the land for any purpose was not abridged, provided only that such use did not conflict or defeat the rights of the company in the use of its lines. In other words, the interest of the company was not an exclusive one.

[5-7] Giving the evidence the full force contended for, it shows at most a right for maintenance of an aerial power line supported by poles resting in the ground, and does not affect the right of the owner to the surface use of the land except in so far as such surface is reasonably necessary for the purposes of ingress or egress and for maintenance and repair. There is no evidence in the record to show that the presence of the building in any manner restricted or limited defendant's alleged easement, or that the company ever objected to its erection or maintenance. On

the contrary, they had arranged for the use of higher poles to remove the dangerous condition. So long, therefore, as the structure did not interfere with defendant's alleged interest, it could not complain of its existence, and the owner of the land and those derailing interest through him had the right to enjoy the full benefit of the improvement, and in thus enjoying it they could in no manner be considered trespassers or mere licensees as to the company. In the enjoyment of its asserted interest, it was the duty of the defendant to keep within its limited interest and to so erect its aerial right of way as not to interfere with the reasonable use of the surface of the soil to which the owner had made avail. In failing to do so, it became itself a trespasser on the rights of the owner and those claiming under him. *Citizens' Telephone Co. v. Cincinnati Ry. Co.*, 233 S. W. 901, 192 Ky. 399, 18 A. L. R. 615.

[8] Defendant not having the exclusive and unlimited right to the surface of the soil, it was its duty in using the dangerous force of electricity to exercise great care to prevent injury to persons making lawful use of the property. Plaintiff herein had the right to be where he was. As a general rule, all wires conveying a dangerous current of electricity, attached to any part of a building to which persons may rightfully go, should be insulated or in some manner protected so as to remove, so far as it is possible, all chance of damage to such persons. From the very nature of its business, an electric company using highly charged wires owes a legal duty toward every person who, in the exercise of a lawful occupation in a place where he has a legal right to be and is liable to come in contact with the wires, to see that such wires are properly placed with reference to the safety of such persons. It is only in accord with reason and common sense that persons controlling so dangerous and subtle an agency as electricity should use a high degree of care. Either the wires must be insulated or at least placed beyond the danger line of contact with human beings. While the law does not require the wires to be insulated everywhere, where there is reason to apprehend that persons may come in contact with them in the pursuit of their calling or where they may be reasonably expected to go, they should in some manner be protected. Here no notice or protection of any kind or character was ever given or made.

[9] It has been held in this state that an electric company is required to use very great care to prevent injury to person or property, and it is sufficient proof of negligence for it not to raise its wires so high above a roof on which they are placed that those having occasion to go there will not come in contact with them. *Giraudi v. Electric Imp. Co.*, 40 P. 108, 107 Cal. 120, 28 L. R. A. 596, 48 Am. St. Rep. 114.

We do not deem further discussion upon

this subject necessary. Defendant knew through its officers that the wires as placed presented a very dangerous condition, and it was undertaking to remedy the evil when the accident happened. It made no claim of any unreasonable use on the part of the owner of the premises, or that it would subject the company to expense that it was under no duty to incur. No such question is here involved.

[10] The further point is urged that contributory negligence existed as a matter of law, and that the court should have granted defendant's motion for a nonsuit. An employee of defendant company interviewed plaintiff concerning the accident. He testified that he had admitted to him that he had seen the lines, but that in working he had forgotten about them and had "raised up and come in contact with the wires." It is chiefly upon this testimony that the claim is based that plaintiff was guilty of contributory negligence. It is true that the law imposes upon a person *sui juris* the obligation to use ordinary care for his own protection, the degree of which is commensurate with the danger to be avoided.

[11, 12] The question of the company's negligence and also that of the plaintiff were questions for the jury to determine from all the facts and circumstances of the case. While it has been held in this state that one who is aware of a known danger, which should have put him on his guard, cannot rebut the presumption of contributory negligence by showing that he momentarily forgot it, it has also been held that this rule must have a reasonable construction. To forget is not negligence, unless it shows the want of ordinary care, and that is a question for the jury. *Giraudi v. Electric Imp. Co.*, supra; 19 Cal. Jur., p. 586. There is evidence to show, as above indicated, that plaintiff thought the wires, by reason of their small diameter and the fact that they were not insulated, were telephone wires, and there was no other evidence to show that the existing danger was comprehended by plaintiff. There is therefore no merit in this claim.

[13] It is also contended that the damages are excessive and not justified by the evidence. The testimony upon this subject shows that plaintiff suffered second-degree burns of the back and both heels, which produced severe pains and nervousness which lasted for several days, and incapacitated him from work for several weeks. It further shows that while the burns were at first classified as second degree, it subsequently transpired that one developed the characteristics of a third degree burn as there was an actual charring of tissues which formed a crater.

[14] The question of excessive damages is one that is first addressed to the trial court. Practically that court must bear the whole responsibility in every case.

The power of appellate courts over excessive damages exists only when the facts are

such as to suggest, at first blush, passion, prejudice, or corruption on the part of the jury. *Morris v. Standard Oil Co.*, 205 P. 1073, 188 Cal. 468. No such facts here appear. And finally, complaint is made of the refusal of the trial court to give certain instructions to the jury requested by the defendant, and in giving certain instructions requested by plaintiff. This objection is controlled by the views we have herein expressed.

From what we have said, it follows that the judgment should be and it is hereby affirmed.

We concur: KNIGHT, J.; CASHIN, J.

77 Cal. App. 341

JENKINS et al. v. ZIMMERMAN.
(Civ. 5346.)

(District Court of Appeal, First District, Division 2, California. April 5, 1926.)

1. Appeal and error $\S$ 612(2)—Typewritten record, certified by clerk but not by judge, held insufficient to warrant review by appellate court, where no transcript was filed (Code Civ. Proc. $\S$ 953a).

Typewritten record, certified by clerk but not by judge, held insufficient to warrant review by appellate court, where no transcript was filed, though reporter was ordered to prepare it, in view of Code Civ. Proc. $\S$ 953a.

2. Appeal and error $\S$ 1024(2)—Where two affidavits filed in opposition to motion for injunction would, if considered by court, be sufficient to support order denying it, such order will be affirmed, in absence of any other showing.

Where two affidavits filed in opposition to motion for injunction, would, if considered by court, be sufficient to support order denying it, such order will be affirmed in absence of any other showing.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Suit by Harry G. Jenkins and another, as executors of the will of Anna Jenkins, deceased, and another, against I. Zimmerman. From an order dismissing an order to show cause, plaintiffs appeal. Affirmed.

H. M. Anthony, of San Francisco, for appellants.

James M. Thomas, of San Francisco, for respondent.

NOURSE, J. [1] Plaintiffs sued to restrain the erection of an apartment house by the defendant on the theory that the plans and specifications did not provide sufficient air space as contemplated by the State Housing Act (St. 1923, p. 781). Upon the hearing of plaintiffs' motion for a temporary injunction two affidavits were filed by the defendant. It does not appear whether any oral testimony was taken, but the record discloses an order of the trial judge dismissing the order to show cause after a hearing. From this

order the appeal was taken and has been presented on a typewritten record, certified by the clerk, but not by the trial judge. Though the reporter was ordered to prepare a transcript, none has been filed. The record is plainly insufficient to warrant a review by this court. Code Civ. Proc. § 953a; Jeffords v. Young (Cal. Sup.) 239 P. 1054, and cases there cited.

[2] Furthermore, the notice of appeal states that it is taken from the order refusing to grant appellants an injunction, but the record does not contain a motion for the injunction or any information as to the grounds upon which the motion was made. It does appear that two affidavits were filed "in opposition to motion for injunction." Assuming that these affidavits were before the trial court on the hearing, they were sufficient to support the order denying an injunction, and, in the absence of any other showing, we cannot say on this record that error occurred.

Order affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

78 Cal. App. 728

REZOS v. ZAHM & NAGEL CO. (Civ. 5062.)

(District Court of Appeal, First District, Division 1, California. April 5, 1926. As Modified July 19, 1926.)

1. Brokers ⚡86(7)—Evidence in action against seller of grape juice machine for commission held to show plaintiff was purchaser's agent.

Evidence in action against seller for commission for effecting sale of machine for manufacturing grape juice held to show plaintiff was agent of purchaser.

2. Principal and agent ⚡1.

Whether an agency has been created is determined by relation of parties as they exist under their agreement or acts.

3. Brokers ⚡65(4)—Purchaser's agent could not enter into secret agreement with seller for commission.

Agent of purchaser of machine could not enter into secret agreement with seller for a commission, public policy demanding that agent shall not represent interests adverse to his principal.

4. Principal and agent ⚡69(1).

An agent may not make secret profit out of transaction in which he represents his principal.

5. Principal and agent ⚡48—Gratuitous agent must exercise good faith.

A gratuitous agent must exercise good faith toward his principal, and cannot make the business an object of interest to himself.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Action to recover commission by M. Rezos against the Zahm & Nagel Company. Judgment for plaintiff, and defendant appeals. Reversed.

Willard P. Smith, of San Francisco (Kenneth B. Dawson, of San Francisco, of counsel), for appellant.

Dozier, Kimball & Dozier, of San Francisco, for respondent.

TYLER, P. J. Action to recover a commission amounting to the sum of \$337.50 upon an alleged express agreement for the sale of a certain evaporator or grape juice concentrator.

Defendant was the manufacturer of the machine and plaintiff claimed to be its agent in consummating the sale in question. The trial court so found and judgment was rendered in favor of plaintiff in the sum prayed for, together with costs. The main ground relied upon for a reversal is that the evidence shows conclusively that plaintiff was acting as the agent of the buyer, for which reason he could not also be the agent of the seller.

The facts are substantially as follows: In the year 1922 the National Fruit Products Company of Lodi, Cal., was manufacturing and selling grape juice. Plaintiff was engaged under a written contract with the company to dispose of the product upon a commission basis. The exact nature of the agreement does not appear from the record, as the contract between the parties was not offered in evidence. Plaintiff was permitted, however, over objection, to testify concerning his business arrangement.

The company was desirous of purchasing an apparatus for the manufacture of its concoction and as plaintiff was about to go East to procure orders for the mixture the officers of the company told him to locate and select the necessary machinery. While in New York City he heard that one was made by defendant at Buffalo, N. Y., which he thought might be suitable for the purpose. He visited the latter city and called at the office of defendant company with his son. He presented to certain of its officers a card reading as follows: "M. Rezos, Concentrated Grapes. With National Fruit Products Co. Manufacturers of Grape Products, Lodi, California." Plaintiff stated to them that he had come East to buy an evaporating apparatus for the manufacture of grape juice. There was a general conversation concerning the construction and operation of defendant's machine. Plaintiff was familiar with the manufacture of grape juice. He was taken to defendant's factory and shown the machine, and he expressed his belief that it was just what he wanted and he advised the officers of the company that he would try his best to have the National Fruit Products Company purchase the same. He spoke of being paid a commission of 5 per cent. on the sale if he succeeded in inducing his company to make the purchase, and asked the price of the machine.

The evidence is conflicting as to whether

or not the officers agreed to pay him the commission sought. Plaintiff was the sole witness on his own behalf. His son was present at the conversation, but did not testify. The officers of the corporation, while admitting that plaintiff had asked for a commission, denied that they had agreed to pay one, and they testified by deposition that the price agreed upon was \$6,500, and that plaintiff had been informed that it was impossible to pay any commission, as the machine was being sold practically at cost. A written offer or proposal was thereupon drawn up, dated June 1, 1922, under the terms of which defendant proposed to furnish to the National Fruit Products Company the concentrator apparatus for the sum named *f. o. b.* Buffalo, N. Y. Plaintiff thereafter returned home and presented the proposal of defendant to the National Fruit Products Company and advised its acceptance. The company subsequently accepted the offer and the machine was thereafter, on August 20, 1922, delivered to it at Lodi, Cal. It was installed under plaintiff's supervision and proved satisfactory. The machine was paid for the following September. The same year plaintiff wrote a letter to defendant in which he asked the defendant for a "gift" for making the sale. In explaining what he meant by a "gift" he testified that an officer of defendant company had previously told him to use this word rather than the word "commission," as he would like to have the transaction appear regular between the two companies. In reply to this letter plaintiff was informed by the treasurer of defendant company that he was distinctly told that it would be impossible for the company to pay any commission, as the machine was being practically sold at cost.

[1-4] Plaintiff, according to his own testimony, had never informed the National Fruit Products Company that he had asked for or expected to receive a commission for effecting the sale until after the bill was paid. Assuming, as we must, that the promise of a commission was made, it clearly appears that plaintiff was employed by the National Fruit Products Company under a written agreement to sell its products, and was commissioned by that company to find for it a suitable machine for the manufacture of the same. He represented his employer in the transaction. It is true that he testified he was the agent for defendant company, but his conclusion in this matter amounts to no evidence in the face of his own statements concerning the transaction, which speak for themselves. Whether an agency has been created is to be determined by the relation of the parties as they in fact exist under their agreements or acts. 1 Cal. Jur. 695; 21 R. C. L., p. 819. Being an agent of the purchaser, he was in no position to enter into a secret agreement with defendant company for a commission as a reward for his service in inducing his company to make the purchase. We have

very ancient authority upon the subject. "No man can serve two masters." Matt. vi:24. This principle is universally recognized in the law, and it is one which permits of no exception. An agent may not, as such, make a secret profit out of a transaction wherein he represents his principal; he is not allowed to place himself in antagonism to his principal in the business of his agency. The underlying thought is that the agent should not unite his personal and representative character in the same transaction. 1 Cal. Jur. p. 792. Humanity is so constituted that where conflicting interests arise the temptation is at times too great to be overcome, and duty is sacrificed to interest. *Pacific Vinegar Works v. Smith*, 78 P. 550, 145 Cal. 352, 104 Am. St. Rep. 42. And it matters not that the principal was in no manner injured, or that the agent intended no wrong. *Gordon v. Beck* (Cal. Sup.) 239 P. 311.

Public policy demands that an agent shall not represent interests adverse to his principal in order that all temptation to neglect his principal's interests may be removed from the agent. Such arrangements create a relation so conducive to bad faith and double dealing that they are condemned by the law. It is to the interest of a vendor to obtain the highest possible price for his goods, and for the purchaser to pay the least. Under such circumstances it is manifest that an agent cannot represent both parties. Here plaintiff admitted that he did not inform his principal that he was to receive a commission. The law is inflexible against such acts.

[5] Nor does the fact that the record fails to show that plaintiff was to be paid for his services by his company alter or change the situation. Assuming him to have been a mere gratuitous agent of his company in negotiating the sale, the same principles we have discussed apply. He was bound to exercise good faith toward his principal. One who is intrusted with the interest of others cannot be allowed to make the business an object of interest to himself. Such transactions are against the policy of the law. *Wilson v. Southern Pacific Land Co.*, 46 Cal. App. 738, 189 P. 1040.

We are of the opinion, therefore, that the finding that plaintiff acted as the agent for defendant company finds no support in the evidence. The mere fact that he so testified amounts to no evidence in face of his testimony concerning the true facts. In any event, the relation existing between plaintiff and this company is such as to preclude a recovery on his part of the claimed commission.

This conclusion renders unnecessary a discussion of other points urged for a reversal.

The judgment is reversed.

We concur: KNIGHT, J.; CASHIN, J.

77 Cal. App. 268

DUGAN v. PHILLIPS. (Civ. 3074.)(District Court of Appeal, Third District,
California. March 25, 1926.)

1. Auctions and auctioneers ⚡8—Vendor at auction held bound, on entry of auctioneer's memorandum of sale, by warranty in catalogue of animals sold (Civ. Code, §§ 1793, 1794, 1798).

Under Civ. Code, §§ 1793, 1794, 1798, in absence of agreement to the contrary, vendor of cattle at auction was bound, on entry of auctioneer's memorandum of sale, by warranty that every animal is guaranteed to be a breeder, contained in catalogue, on terms of which all animals were sold.

2. Arbitration and award ⚡3—In action to enforce arbitration award, question before trial court was whether controversy existed between parties relating to matters submitted to arbitration.

In action to enforce arbitration award, based on dispute whether bull purchased by plaintiff was warranted to be breeder, question before trial court was not whether defendant had made such warranty, but whether there existed a controversy between parties relating to matters submitted to arbitration.

3. Contracts ⚡127(2)—Executory provision for arbitration in contract of sale at auction was unenforceable as ousting courts of jurisdiction, but on submission of controversy to arbitration award was binding, in absence of fraud or mistake.

Condition of auction sale as stated in catalogue, subject to which all sales were made, that controversy between buyer and seller should be adjusted by arbitration while executory only was not enforceable because ousting courts of jurisdiction, but, on voluntary submission of controversy to arbitration in accordance with contract, parties were bound by award, in absence of fraud or mistake.

4. Arbitration and award ⚡85(3)—Evidence held sufficient to support finding of agreement by defendant to submit controversy to arbitration.

Evidence that seller knew of buyer's claim of breach of warranty; that bull purchased was a breeder; and that seller appeared before arbitrators willing to be bound by their decision, held sufficient to support finding that defendant agreed to submit controversy to arbitration.

5. Arbitration and award ⚡82(1).

Where defendant agreed to submit controversy to arbitration, he cannot thereafter refuse to be bound by an adverse award.

6. Contracts ⚡254—Written agreement may be abrogated by oral contract; provision relating to alteration of written contract not being applicable (Civ. Code, § 1698).

Written agreement may be abrogated by an oral contract, in which case Civ. Code, § 1698, providing for alteration of written contract only in writing or by executed oral agreement, has no application.

7. Contracts ⚡274.

On mutual rescission of contract, each party must restore whatever he has received under it.

8. Arbitration and award ⚡7.

Agreement to submit to arbitration becomes executed on making of award.

9. Arbitration and award ⚡57—Finding by arbitrators that bull guaranteed to be a breeder was a nonbreeder and ordering rescission of contract held not to go beyond matters in controversy.

Where buyer claimed breach of guaranty that bull purchased at auction was a breeder, award of arbitrators finding bull to be a nonbreeder and ordering rescission of contract held not to go beyond matters in controversy.

10. Arbitration and award ⚡12, 48.

Technical precision is not required either in submission of controversy to arbitration or in the award.

11. Arbitration and award ⚡18, 80.

Submission of controversy to arbitration and the award will be construed with reference to all surrounding facts and circumstances.

12. Arbitration and award ⚡66.

Every reasonable presumption is in favor of award of arbitrators.

13. Arbitration and award ⚡85(3)—Evidence relating to auction sale at which bull purchased was warranted a breeder, and making of lease note containing no warranty, held properly admitted to show that real controversy was submitted to arbitration.

In action to enforce arbitration award, evidence relating to auction sale at which bull warranted to be a breeder was purchased, and making of lease note containing no such warranty, held properly admitted to show that there was a real controversy between parties, submitted to arbitration.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by J. E. Dugan against J. P. Phillips. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Kauke, of Fresno, for appellant.

Lewis H. Smith, Ames Peterson, and Frank H. Marvin, all of Fresno, for respondent.

FINCH, P. J. This action was brought to enforce an award in favor of plaintiff in a common-law arbitration. The plaintiff was given judgment in accordance with the award, and the defendant has appealed.

Prior to the transactions involved in this case the defendant was the owner of a herd of registered cattle and for the last two years of that time the plaintiff was in full charge of the herd. The defendant employed the California Breeders' Sales & Pedigree Company to sell the cattle at public auction. The company printed and distributed a catalogue of

the animals to be sold, giving their description and pedigree, and stating the time and place and terms of the sale. The catalogue contained the following:

"The terms of this sale are cash. Responsible parties may arrange for time with owner, but such arrangements must be made before sale. * * * It is a condition of this sale that the buyer agrees to make any and all complaints in writing to the president of California Breeders' Sales & Pedigree Company, California, within 30 (thirty) days of the sale; that the president will appoint a committee of three to investigate and adjust the complaint; and that the decision and adjustment by this committee shall be final with both buyer and seller. * * * The owners guarantee every animal sold to be exactly as represented. Every animal in this sale is guaranteed to be a breeder. * * * The sale will start promptly at 10 o'clock on Thursday, September 23, 1920."

The sale was held at the time stated. At the opening of the sale the sales manager of the company announced:

"That every animal in this sale was sold according to the terms and conditions printed in the front of the catalogue."

Being desirous of purchasing a certain bull, Sir Pieterje Korndyke Ormsby, described in the catalogue, the plaintiff arranged with defendant, prior to the sale, that if the former became the purchaser of the animal his promissory note was to be accepted in part payment of the purchase price thereof. Plaintiff made the highest bid for the bull and it was declared sold to him, by the auctioneer, for the sum of \$3,200. Thereafter, on the same day, the plaintiff paid the defendant the sum of \$1,500 and signed an instrument, referred to in the findings as a lease note, in form an agreement by the defendant to sell and by the plaintiff to buy the bull for \$3,200, the sum of \$1,500 to be paid in cash and the remainder of the purchase price to be paid in quarterly installments of \$425 each, title to remain in the defendant until final payment. The contract contained the following clause:

"It is hereby agreed that the party of the first part neither makes nor is to make any warranty in regard to said property except to title."

The instrument was not signed by defendant, but was delivered to him by the plaintiff. The instrument contains about 10 folios. The plaintiff testified:

"I saw it in Mr. Phillips' house in Dixon when I signed it, but I didn't have time to read it over. Mr. Phillips was in a hurry to leave and I didn't have time to read it over. He said it was just a matter of form and it wouldn't be necessary."

May 11, 1921, the plaintiff wrote the defendant to the effect that the bull was not a breeder, and stated:

"This looks very much to me like there should be some adjustment made—according to the

clause in your catalog which read, 'Every animal guaranteed to be a breeder.'"

May 25, 1921, plaintiff again wrote defendant, stating, among other things:

"I cannot well afford to have my money tied up in an animal that has proven worthless and shall have to take other steps if necessary."

June 2, 1921, the defendant wrote plaintiff, demanding payment of the installments then due, and stating:

"If there is any truth whatever in the representations which have been made to you, it is by reason of the way in which the animal has been kept and handled since you received him. At the time you took him you were thoroughly acquainted with him, and the fact is that at that time he was a breeder, and I feel certain he would have continued to be such, had he been properly kept and handled, and that he is such now if properly handled. I fail to understand why, under all the circumstances, you should think there should be any adjustment of this matter other than the making of the payments on your contract as called for therein. By the contract itself it is specified that there is no warranty made by me except as to title. * * * I would suggest that you investigate the matter and put the * * * animal in the keeping of parties who will give him proper care and attention."

June 20, 1921, the plaintiff wrote the defendant, saying:

"I am willing to give him (the bull) a chance in another herd and under another man's care to demonstrate whether he is a breeder or not. I surely hope that he does come out all right as it would be to my advantage, but under the present conditions I do not feel justified in continuing the payments until he proves to be a breeder."

The defendant replied:

"I do not concede that you are entitled to defer the payments, or that, under the circumstances, you are to be relieved from same, or any part thereof. I therefore request that you do not let these unpaid amounts accumulate, but that, without further delay, you send me your check for the amounts now due."

February 14, 1922, plaintiff wrote the president of the California Breeders' Sales & Pedigree Company as follows:

"In compliance with the conditions of the terms of sale of the Allana farm herd, dispersed in September, 1920, I wish to make complaint that the sire, Sir Pieterje Korndyke Ormsby, purchased by me from Mr. J. P. Phillips, owner of the Allana Farm herd, has proved to be a nonbreeder. * * * He was used in four different herds, and letters from the owners of these herds show that they were unable to get any cows with calf to the service of this sire. In view of the conditions as stated above and additional evidence I can furnish, I request that you, as president of the California Breeders' Sales & Pedigree Company, appoint a committee to investigate and adjust this matter in accordance with the conditions of sale."

The president of the company appointed "a committee of three to investigate and adjust the complaint" and the parties were duly notified of the time and place at which the committee would meet for that purpose. Both parties appeared at the time and place stated in the notice. The committee investigated and decided a controversy over a sale between other parties immediately before taking up that of the parties hereto. The defendant testified that the committee decided that controversy "adversely to the buyer." The plaintiff testified:

"While they were deciding on the first case I called Mr. Phillips to one side and asked him if he would care to make any proposition as to settlement before this went before the committee, as, if he were to continue in the pure breed business, it would probably be better for us not to have it to come before the committee, and he said he was perfectly willing to stand by the decision of the committee."

The defendant testified that he did not make such statement. Both parties appeared before the committee and presented evidence in support of their respective contentions. The committee then retired for deliberation and prepared and signed the following written award, addressed to the president of the company:

"We, the undersigned committee, appointed by you to decide the complaint of J. E. Dugan against J. P. Phillips that the registered Holstein bull, Sir Pieterje Korndyke Ormsby, 176945, was at time of sale an intermittent breeder and since that time a nonbreeder, report that we met at Tulare, Cal., on March 13, 1922, and after hearing the evidence of both J. E. Dugan, and J. P. Phillips do decide as follows: That the evidence submitted would tend to prove that the bull has been a nonbreeder since purchased by J. E. Dugan, and that J. E. Dugan return the bull, Sir Pieterje Korndyke Ormsby, 176945, H.F.H.B., to J. P. Phillips, who shall return to J. E. Dugan whatever amount of the original purchase price of \$3,200 as said Dugan has already paid and shall also return to said J. E. Dugan the lease note given as balance of settlement. Said bull to be returned to J. P. Phillips by J. E. Dugan within thirty (30) days of this date."

The committee then returned to the room in which the hearing had been conducted and the decision was thereupon read in the presence of the committee and of both parties to the controversy. Within the time provided in the award the plaintiff returned the bull to defendant and the latter received it, with the understanding between the parties that defendant's rights should not be prejudiced by his acceptance of the animal. The defendant refused to comply with the terms of the award and thereafter this action was commenced.

The court found the facts relative to the sale of the animal in accordance with the foregoing statement thereof; "that on or

about the 26th day of March, 1921, and continuously after said date, there existed a controversy between plaintiff and defendant," the former contending that the latter had warranted the bull to be a breeder and that the animal was not such, and the latter contending that he had not so warranted the animal, but that, in fact, it was a breeder at the time of the sale; that on the day the committee met to adjust the controversy "the plaintiff and defendant agreed with each other that the defendant had warranted and guaranteed the bull to be a breeder, and the plaintiff and defendant agreed with each other to submit to a committee of three arbitrators, composed of W. J. Higdon, F. L. Morris, and Alex Whaley, the determination of the question as to whether or not the said animal was a breeder as warranted and guaranteed by the defendant, as aforesaid, and to authorize the said committee to decide what disposition should be made of the said animal, and what disposition should be made of the said lease note, and what disposition should be made of the sum * * * paid by plaintiff to the defendant." The court found the facts relating to the arbitration proceeding and the award and the subsequent acts of the parties as herein stated. Plaintiff was given judgment in accordance with the terms of the award.

[1, 2] The finding that, on the day of the hearing before the arbitration committee, the defendant agreed that he had warranted the bull to be a breeder, is supported only by such inference as may arise from defendant's agreement to submit the controversy between him and the plaintiff to arbitration. Such agreement implies either that the defendant had made the warranty or that he intended to submit to the arbitrators the question of whether he had made it, otherwise there would have been nothing to arbitrate. The finding, however, is not necessary to the validity of the judgment. There was a substantial controversy between the parties, which they submitted to the arbitrators. By the fall of the auctioneer's hammer the sale of the bull to the plaintiff became complete. Civ. Code, §§ 1793 and 1794. The auctioneer's memorandum of the sale bound "both the parties in the same manner as if made by themselves." Civ. Code, § 1798. The terms of payment had been arranged between the parties prior to the sale. Whether in such arrangement any agreement was made as to warranty does not appear. Plaintiff testified that "any understanding" between them prior to the execution of the lease note was "merely verbal." He was asked by his counsel, "What verbal understanding before that was there?" Defendant's objection to the question was sustained. In the absence of any agreement or understanding to the contrary, the defendant became bound, upon the entry of the auctioneer's memorandum of the sale, by the warranty contained in the catalogue that "every animal in this sale is guaranteed to be a

breeder." If the apparent release of defendant from such warranty by the terms of the lease note was given without consideration, it may be seriously doubted whether such terms are binding on plaintiff. *Western Lith. Co. v. Vanomar Producers*, 197 P. 103, 185 Cal. 366, 369. The question before the trial court was not whether the defendant had warranted the animal to be a breeder, but whether there existed a controversy between the parties relating to the matters submitted by them to arbitration. "It is sufficient if there is a bona fide difference of opinion as to the rights of the parties." 5 C. J. 27. The plaintiff testified that he did not read the lease note prior to its execution. He could have maintained an action for its reformation if the clause relating to warranty was inserted through fraud or mistake.

[3] The condition of the sale, as stated in the catalogue, that controversies between the buyer and the seller should be adjusted by a committee to be appointed by the president of the company, was not enforceable while it remained executory only. *Blodgett Co. v. Bebe Co.*, 214 P. 38, 190 Cal. 665, 670, 26 A. L. R. 1070. But, if the parties to such an agreement voluntarily submit a controversy arising thereunder to arbitration in accordance with the provisions of the contract, they will be bound by the award, in the absence of fraud or mistake. In a recent case, the Supreme Court of the United States said:

"An agreement for arbitration is valid, even if it provides for the determination of liability. * * * If executed—that is, if the award has been made—effect will be given to the award in any appropriate proceeding at law, or in equity." *Red Cross Line v. Atlantic Fruit Co.*, 44 S. Ct. 274, 264 U. S. 109, 68 L. Ed. 582.

"It has been held that an agreement in an executory contract to refer all matters of dispute that may arise under the contract to arbitration will not oust the courts of jurisdiction, * * * and, when invoked for that purpose, will be held void; yet, if the parties have, before suit is instituted, proceeded with the arbitration under the contract, and an award, in the absence of fraud or mistake, has been made, suit must be on the award, and not on the contract." *Florida Athletic Club v. Hope Lumber Co.*, 44 S. W. 10, 18 Tex. Civ. App. 161; *Elliott on Contracts*, § 2941.

[4, 5] There is sufficient evidence to support the finding that, on the day of the hearing before the arbitrators, the defendant agreed to submit the controversy to arbitration. The defendant then knew, from the correspondence between the parties, that the plaintiff claimed that the bull had been warranted to be a breeder; that it was not such; and that he was entitled to an adjustment of the matter. The defendant also knew that the plaintiff had made formal complaint to the president of the company; that the latter had appointed a committee of arbitrators to adjust the dispute; and that the members of the committee were there present to take evi-

dence and make an award. Under such circumstances, when the plaintiff sought a compromise, the defendant, according to plaintiff's testimony, "said he was perfectly willing to stand by the decision of the committee." He appeared before the committee and presented his side of the controversy. Had the award been in his favor he doubtless would have insisted that the plaintiff was bound by it. A party cannot be allowed thus to speculate upon the action of the arbitrators and then refuse to be bound by an adverse award. "Participation in the arbitration proceedings is of itself evidence of the party's prior agreement to submit." 5 C. J. 23. "The form of the submission is immaterial. It is sufficient if it appears from the acts of the parties that they intended to arbitrate, and that the decision of the arbitrators should have the effect of an award." 5 C. J. 32. "It is not necessary that there should be an express agreement to abide by an award when made; * * * the law implies such an agreement from the very fact of the submission." 5 C. J. 33; *Robinson v. Templar Lodge, I. O. O. F.*, 31 P. 609, 97 Cal. 62, 65.

Appellant contends that a verbal submission is invalid, citing 5 *Corpus Juris*, p. 34, where it is said:

"A verbal submission is valid at common law in all cases where the subject-matter is such that a verbal agreement directly between the parties, in the terms of the award, would prevail. But where, from the subject-matter of the arbitration, a writing is necessary to pass the right to the thing in demand, or to defeat or destroy the demand, the submission must be in writing."

Appellant also relies upon the provisions of section 1698 of the Civil Code, reading:

"A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

[6-8] An agreement between the parties in the terms of the award involved in this case would amount to an abandonment or rescission of the contract of sale. It has been held many times that a written agreement may be abrogated by an oral contract and that in such a case section 1698 has no application. *McClure v. Alberti*, 212 P. 204, 190 Cal. 348; *Pearsall v. Henry*, 95 P. 154, 159, 153 Cal. 314; *Guidery v. Green*, 30 P. 786, 95 Cal. 630; *Producers' Fruit Co. v. Goddard* (Cal. App.) 243 P. 686; *Haberman v. Sawall* (Cal. App.) 237 P. 776; *Hooke v. Great Western Lumber Co.*, 202 P. 492, 54 Cal. App. 681; *Arsenio v. Smith*, 194 P. 756, 50 Cal. App. 173; *Tompkins v. Davidow*, 149 P. 788, 27 Cal. App. 327; *Credit C. Bureau v. Hochbann*, 144 P. 315, 25 Cal. App. 546; *Sarnighausen v. Scannell*, 106 P. 117, 11 Cal. App. 652; *Proud v. Strain*, 103 P. 949, 11 Cal. App. 74. Upon a mutual rescission of a contract the law requires each party to restore whatever he has received under it. *Green v. Darling* (Cal. App.) 239 P. 70; *Hooke*

v. Great Western Lumber Co., supra. The agreement to submit to arbitration became executed upon the making of the award. Red Cross Line v. Atlantic Fruit Co., supra.

[9-12] It is contended that the award covers matters not embraced in the contract of submission and is insufficient in form. The award does not go beyond the matters in controversy, and well understood by the parties to be in controversy. The defendant was a member of the California Breeders' Sales & Pedigree Company and it may be inferred that he was familiar with the scope of arbitration proceedings conducted under its direction. "Where there is doubt, the presumption is that all matters in dispute were intended to be decided." Elliott on Contracts, § 2949. Technical precision is not required either in the submission or the award. 5 C. J. 36. The submission and the award will be construed "with reference to, and in view of, all the surrounding facts and circumstances." 5 C. J. 124. Every reasonable presumption is in favor of the award. 5 C. J. 123. "Submissions are to be liberally construed so as to give effect to the intentions of the parties." 5 C. J. 40. "The arbitrators were not required to find facts nor to give reasons for their award." In re Connor, 60 P. 862, 128 Cal. 279. "Misrecitals of facts not required to be recited may be disregarded." 5 C. J. 117. Tested by the foregoing rules, appellant's contentions are not sustained.

[13] It is contended that the court erred in admitting evidence relating to the auction sale and the making of the lease note. Such evidence was properly admitted for the purpose of showing that there was a real controversy between the parties, which they submitted to arbitration. Appellant urges that there are many inconsistencies in the findings, but a careful examination and comparison thereof fails to disclose any inconsistency.

It is true that some of the findings are outside the issues, but such findings are unnecessary, because the other findings fully support the judgment.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

77 Cal. App. 314

GENERAL ACCIDENT, FIRE & LIFE ASSUR. CORPORATION, LIMITED, OF PERTH, SCOTLAND, v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 5208.)

(District Court of Appeal, Second District, Division 1, California. April 1, 1926.)

1. Master and servant $\S$ 385(11)—Question of permanency of disability held to involve determination as to whether surgical operation would relieve condition.

Question of permanency of disability, resulting from injury to knee, involves determina-

tion as to whether surgical operation would relieve condition.

2. Master and servant $\S$ 385(18)—Applicant for compensation for permanent disability is under no compulsion to undergo operation, in face of expert testimony that outcome would be problematical.

Where consensus of expert opinion, in proceeding for compensation for permanent disability arising from injury to knee, is that outcome of operation would be problematical, employee is under no compulsion to take risk of an operation.

3. Master and servant $\S$ 405(6)—Evidence held to sustain finding of permanent disability caused by injury to knee.

Evidence held to sustain finding of Industrial Accident Commission that injury to employee's knee resulted in permanent disability.

4. Master and servant $\S$ 419—"Permanent disability" is "new and further disability" within Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 841, § 11 [c]).

Under Workmen's Compensation, Insurance, and Safety Act, § 11 (c), providing that collection of compensation for "new and further disability" is not barred within six months, a "permanent disability" is a "new and further disability."

[Ed. Note.—For other definitions, see Words and Phrases, Permanent Disability.]

5. Master and servant $\S$ 419—Compensation proceeding for permanent disability may be instituted after second injury, if within 245 weeks after first injury, where employer voluntarily paid compensation for first injury (Workmen's Compensation, Insurance, and Safety Act [St. 1917, p. 841], § 11 [a] [c]).

Under Workmen's Compensation, Insurance, and Safety Act, § 11 (c), proceeding for compensation for permanent disability, instituted after second injury to knee and within 245 weeks after first injury thereto, can be maintained, notwithstanding date when permanent disability was first ascertainable, where, after first injury, employer voluntarily paid compensation therefor; subdivision (a) being inapplicable.

Certiorari by General Accident, Fire & Life Assurance Corporation, Limited, of Perth, Scotland, against the Industrial Accident Commission and another, to review an award under the Workmen's Compensation, Insurance, and Safety Act made to M. C. Robinson, claimant. Award affirmed.

Clarence B. Runkle and Joe Crider, Jr., both of Los Angeles, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondent Industrial Accident Commission.

HOUSER, J. This proceeding is brought for the purpose of reviewing an order made by the Industrial Accident Commission in the matter of an application to determine the amount of compensation, if any, payable by petitioner to M. C. Robinson because of an

injury or injuries received by him in the course of his employment.

It appears that Robinson suffered two accidents, each of which having affected his right knee. The first accident occurred on August 25, 1921, and the second some three years and six months later, to wit, on February 26, 1925. No application or other proceeding was filed by Robinson with the Industrial Accident Commission for the purpose of having his rights determined with reference to the first accident until after the second accident had occurred. Compensation for the first accident and medical attention, however, were given to Robinson by his employer to the same extent as might have been awarded through appropriate action by the Industrial Accident Commission. It is further shown that after a period of some weeks following the first accident Robinson was discharged by his employer's physician as cured from the effects of the first injury, and thereupon that Robinson returned to work at a lighter form of employment; that his knee, however, continued weak and unstable, and at times "gave way," causing him considerable trouble and annoyance without necessitating a cessation from his work until the occasion when he suffered the second injury, at which time he was obliged to and did refrain from following his vocation for a period aggregating some three of four weeks.

In presenting his application of the Industrial Accident Commission for adjustment of the compensation due to him on account of his injury or injuries, Robinson joined as defendants each of the employers for whom he was working at the time the first and the second accident, respectively, occurred, together with the insurance carrier of each of them.

The findings by the commission included the following:

"Said employee was a truck driver, 38 years of age, and said injury caused permanent disability consisting of trauma of right knee joint, causing a chronic derangement of the joint and some pain on manipulation in extreme flexion, with a tendency of limb to give way under him at times.

"The percentage of said permanent disability is 14, entitling him to \$20.83 a week for 56 weeks, amounting to \$1,166.48. Payments thereon, \$193.41; balance due, \$973.07. Said benefit is based upon earnings in excess of the maximum allowed by law in computing compensation.

"Said permanent disability as hereinabove determined became permanent and reached a stage at which the extent of permanent disability could first be definitely ascertained within six months and said permanent disability therefore constitutes a new and further disability under the provisions of section 11 (c) of the Workmen's Compensation Act, and this application was therefore filed within the proper time."

An award was made by the commission in favor of Robinson and against the General Accident, Fire & Life Assurance Corporation

in the sum of \$973.07 on account of the permanent disability which had resulted to Robinson from the first accident. The petitioner here being dissatisfied with such award, and having exhausted its remedies with the Industrial Accident Commission, has come to this court for a reviewal of the proceedings before the commission, and urges that that body acted without and in excess of its powers in the premises, and that the evidence adduced at the hearing before the referee of the commission did not justify or support the findings of fact or the award.

The first contention of petitioner is that there was no evidence to indicate that Robinson ever suffered any permanent disability as a result of the injuries of which he made complaint. Turning to the transcript of the evidence, it will be found that the report on the case by one of the physicians included the statement that the patient has "a chronic internal derangement of the right knee joint." The diagnosis of another physician was that a "mechanical derangement of the right knee joint" existed, for the relief of which he recommended a surgical operation, closing with the statement that "we cannot expect any improvement in his present condition by conservative methods." A third physician gave it as his opinion that "undoubtedly there is a chronic derangement of the right knee joint, and the condition has reached a permanent stage unless operative procedure is thought advisable."

[1-3] The question of permanency also involves a determination as to whether a surgical operation would relieve the condition of the right knee joint of the applicant. The consensus of opinion as expressed by the doctors who were called upon to give testimony regarding the advisability of performing an operation, was that it would be exploratory in its nature and consequently problematical as to its outcome. One of them said, "As you are undoubtedly aware, knee-joint surgery should only be done by a surgeon who is competent to do such work;" and another surgeon stated, in effect, that the operating surgeon would not know the condition of the knee to any certainty until after the knee joint was opened, and that, unless such surgeon were very skillful, the disability would probably be increased rather than diminished. In the face of such expert testimony, the patient was under no compulsion to take the risk of the operation with the attending possible, if not probable, result of a worse rather than a better knee. We think, therefore, that the finding by the commission that such injury caused permanent disability was fully justified.

It is also urged that there was no evidence upon which to base the finding that Robinson's permanent disability "reached a stage at which the extent of permanent disability could first be definitely ascertained within

six months" next preceding the date of the award.

The evidence shows that Robinson was not advised by any physician prior to the date of the happening of the second accident that the disabled condition of his right knee joint was permanent. After the first injury, some improvement was noticeable in the condition of the knee for a period of approximately ten months or a year. Just when the permanency of the disability became determinable apparently was not an ascertainable fact. Even at the time the hearing was held some contrariety of opinion prevailed among the doctors as to whether the knee had yet reached that stage. In such circumstances, if the question were vital to the case, in the absence of an opinion by the surgeon as to the date when the permanency of the disabled condition of the knee joint became an established fact, it may be that the date of the hearing before the Industrial Accident Commission when the opinions of the doctors were accepted by the commission as to the permanency of the condition should be taken as the date when the "permanent disability could first be definitely ascertained." However, in view of the language of section 11 (c) of the Workmen's Compensation, Insurance, and Safety Act (Stats. of 1917, p. 831, as variously amended), it would appear that, if the injuries received in the first accident "caused new and further disability," the question of the date when the permanent disability of Robinson was first determined would be immaterial, so long as the proceedings to have his claim adjusted were instituted within 245 weeks after the date when the first injury was sustained.

It being established that the proceedings were commenced within the time limit of 245 weeks from the date of the first accident, the question remaining for consideration is whether "permanent disability" of the right knee joint was within the meaning of the phrase "new and further disability," contained within the provisions of the statute to which reference has just been had.

In the case of *Kauffman v. Industrial Accident Commission*, 174 P. 690, 37 Cal. App. 500, it is held that "further disability" is a disability "in addition to that for which proceedings were commenced * * * or that for which disability indemnity has been paid or agreed to be paid. If there have been no proceedings commenced within six months from the date of the injury, and if there has been no payment of disability indemnity or agreement therefor, the employee is not entitled to institute proceedings grounded upon 'further disability' after the expiration of six months from the date of the injury." That case, however, was directed to the question only of whether a claim might be filed for "new and further disability" in the absence of any award through the Industrial Accident Commission or compensation being voluntarily paid by the employer. It will be re-

membered that in the instant case the employer made full compensation to the employee based upon what was assumed to be his injuries received in the first accident.

[4, 5] The question has received the attention of the Supreme Court of this state on three separate occasions, in each of which it being inferentially determined that a "permanent disability" was a "new and further disability" within the meaning of the statute.

In the case of *Imperial Ice & Development Co. v. Industrial Accident Commission* (L. A. 8334), which was before the Supreme Court on an application for a writ of review of an award by the Industrial Accident Commission, it appears that on February 18, 1922, a man by the name of Putnam sustained an injury to his right hand and thereafter received from the insurance carrier full temporary disability compensation and medical treatment until July 29, 1922, at which time, although there was still some contraction of the muscles in the hand, he returned to his employment. From time to time thereafter, until in the month of April, 1923, Putnam complained to the physician representing his employer that his condition was not improving, but on each occasion was assured by the physician that no permanent injury would result. However, on March 27, 1923, which was about eight months after any compensation had been paid to him, Putnam filed with the Industrial Accident Commission his application for adjustment of his claim for permanent disability, to which application the insurance carrier objected on the ground that the claim was barred by the provisions of the statute. The commission disallowed the plea of the insurance carrier and recognized the permanent disability of Putnam as a "new and further disability" of the applicant, which decision was carried to the Supreme Court by way of an application thereto for a writ of review. The application was denied without written opinion by the Supreme Court.

The next case is entitled *Anaheim Co-operative Orange Ass'n v. Industrial Accident Commission*. The facts of that case were similar to the essential facts in the case last cited herein, in that the employee suffered an injury to his hand for which he was fully compensated by the insurance carrier from the date of the accident by which he sustained the injury to the time when he was pronounced cured, and that thereupon he returned to his employment. More than one year and six months thereafter the employee filed with the Industrial Accident Commission an application for adjustment of his claim for permanent disability resulting from the injury for which he had received compensation. A plea of the statute of limitations was interposed by the insurance carrier, and, as was said by its counsel, the sole question involved in the proceeding was whether a permanent disability constituted a "new and further disability" within the meaning of the provisions of the statute. The

commission ruled in favor of the applicant. A petition to the District Court of Appeal for a writ of review was denied on the ground, as expressed in its opinion (233 P. 1115) that on an identical question presented in the Putnam Case, *supra*, the Supreme Court had denied an application for a similar writ. A petition for hearing in the Supreme Court after decision by the District Court of Appeal was filed and extensively briefed on its merits. The Supreme Court denied the petition.

In the third case (Otis Elevator Co. v. Industrial Accident Commission, S. F. 11819) a writ of review of an award by the Industrial Accident Commission was denied by the Supreme Court. Like each of the other cases, the question involved was whether a permanent disability constituted a "new and further disability" within the meaning of the provisions of section 11 (c) of the Workmen's Compensation Act. From the records, the matter seems to have been ably presented, and, although no opinion was rendered, it must be presumed that careful consideration was given to the question before the court. The application for a writ of review was denied; from which fact it would follow that the Supreme Court was in accord with the conclusion reached by the commission, to wit, that "new and further disability" was established by a permanent disability arising from the original injury.

It is suggested by petitioner that the application made by Robinson to the Industrial Accident Commission to have adjusted the matter of compensation for the injuries received by him was barred by the provisions of section 11, subd. (a), of chapter 586 of the Laws of 1917, and subsequent amendments thereto. But, if the views heretofore expressed herein are correct, the statute upon which petitioner relies has no application to the facts herein.

Being guided entirely by the indicated rulings by the Supreme Court, we are constrained to hold that the award of the Industrial Accident Commission should be affirmed. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

198 Cal. 618

COMMONWEALTH ACCEPTANCE CORPORATION v. JORDAN, Secretary of State.
(S. F. 11809.)

(Supreme Court of California. May 21, 1926.
Rehearing Denied June 17, 1926.)

- 1. Corporations** ⚡631—Foreign corporation derives right of doing business in other states through doctrine of comity between states.

A foreign corporation derives the right of doing business in other states than that of its creation through application of doctrine of comity between states.

- 2. Corporations** ⚡631—Under principles of comity, and except as otherwise provided by Constitution or statute, corporation may enter other states and exercise all legitimate powers conferred on it and carry on any business not prohibited by local laws or against local public policy.

Under principles of comity, and except as otherwise provided by Constitution or statute, a corporation created by any state or nation is permitted to enter other states and to exercise all legitimate powers conferred on it and to carry on any business not prohibited by local laws or against local public policy.

- 3. Courts** ⚡511—Courts must observe and enforce rules of comity until modified by sovereign.

Rules of comity are subject to local modification, but until so modified have controlling force of legal obligation, and courts must observe and enforce them until sovereign otherwise directs.

- 4. Evidence** ⚡35—Courts must take judicial notice that laws of various states regulating organization and powers of private corporations differ widely.

Courts must take judicial notice that laws of various states regulating and prescribing method for organization and measure of powers of private corporation differ widely.

- 5. Corporations** ⚡636—Constitution and statutes of state held to contain no express inhibition against foreign corporations entering state and engaging in business therein, even though such corporations were not entitled to organize as domestic corporations under laws of state (Const. art. 12, § 15).

Constitution and statutes of California held to contain no express inhibition against foreign corporations entering state and engaging in business therein, even though such corporations were not entitled to incorporate as domestic corporations under laws of state, and notwithstanding Const. art. 12, § 15, prohibiting foreign corporations from transacting business under more favorable conditions than local corporations.

- 6. Corporations** ⚡654—Business which foreign corporation transacts or seeks to transact in state which it may desire to enter is business which is contemplated as set forth in its articles of incorporation.

Business which foreign corporation transacts or seeks to transact in state which it may desire to enter is business which is contemplated

ed in expressed purposes of its creation, as set forth in its articles of incorporation.

7. Corporations ⚡648—**Matter of Inequality of voting power of stockholders of Delaware corporation is of concern merely in internal organism of corporation, and is not involved in application for admission to do business within state.**

Matter of inequality of voting power of stockholders of Delaware corporation, seeking admission for purpose of doing business within state, held to concern merely internal organism of corporation, and not involved in question of admission within state.

8. Statutes ⚡1.

Laws of state do not have extraterritorial force.

9. Corporations ⚡648—**Delaware corporation should not be denied admission for purpose of doing business within state because of dual stock structure limiting liability of stockholders to creditors (Civ. Code, § 322; Const. art. 12, § 15).**

Delaware corporation should not be denied admission for purposes of transacting business within state because of dual stock structure limiting liability of stockholders to California creditors, imposed by Civ. Code, § 322, notwithstanding Const. art. 12, § 15, prohibits foreign corporation from doing business under more favorable conditions than local corporations.

10. Corporations ⚡216.

Liability of stockholders of foreign corporations entering state for purpose of prosecuting business therein is governed by state law.

In Bank.

Original mandamus by the Commonwealth Acceptance Corporation against Frank C. Jordan to compel respondent, as Secretary of State, to receive and file a certified copy of petitioner's certificate of incorporation and other documents, and to accept the amount of license fee tendered therewith. Writ granted.

Arnold C. Lackenbach and Dunne, Brobeck, Phleger & Harrison, all of San Francisco (Frank S. Richards, of San Francisco, of counsel), for petitioner.

U. S. Webb, Atty. Gen., Robert W. Harrison, Deputy Atty. Gen., and Lionel B. Browne, of San Francisco, for respondent.

Wm. M. Abbott, K. W. Cannon and Allen G. Wright, all of San Francisco, Charles A. Son, of Los Angeles, and John P. Beale, William H. Orrick, Alfred Sutro, and McCutchen, Olney, Mannon & Greene, all of San Francisco, amici curiæ on behalf of petitioner.

Bauer, Wright & Macdonald, Farrand & Slosson, Flint & MacKay, Gibson, Dunn & Crutcher, Lawler & Degnan, Loeb, Walker & Loeb, Newlin & Ashburn, Overton, Lyman & Plumb, and Page, Nolan, Rohe & Hunt, all of Los Angeles, amici curiæ on behalf of petitioner.

RICHARDS, J. This application is for the issuance of a writ of mandate requiring the respondent, as secretary of state of the state of California, to receive and file in his office a duly certified copy of the certificate of incorporation of the petitioner, a corporation organized in and under the laws of the state of Delaware, together with certain other required documents, and to accept the amount of the license fee tendered therewith, all of which the respondent as such secretary of state is alleged to have refused to do. The said documents and fees were tendered to the respondent for his acceptance and filing as a prerequisite to the qualification of the petitioner herein, a foreign corporation, to transact business as such within the state of California. The respondent's return to the alternative writ issued herein is in the form of a demurrer to the sufficiency of the petitioner's said application. The grounds upon which the respondent bases his refusal to receive and file the petitioner's aforesaid documents, or to accept its tendered fees, appear upon the face of its said application in the form of a letter to the petitioner wherein the reasons for his action are set forth. They are in substance that whereas it appears upon the face of the petitioner's application that it is a foreign corporation organized and existing under the laws of the state of Delaware, and whereas it appears from its articles of incorporation which are appended to its said application that its stock capitalization is represented by shares of different par values, that is to say, of 50,000 shares of preferred stock of the par value of \$10 per share, of 50,000 shares of class A common stock of the par value of \$10 per share, and of 500 shares of class B common stock without nominal or par value, it is not such a foreign corporation as can be permitted to qualify for the transaction of business in this state under the authority of *Del Monte Light & Power Co. v. Jordan* (Cal. Sup.) 238 P. 710. The respondent further states in his said letter that for the above reasons "it is impossible to subject the stockholders thereof to the liability to California creditors which is imposed by section 322 of the Civil Code, and therefore such foreign corporation, if admitted to the state, would be able to transact business therein on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state, in violation of section 15, article 12 of the California Constitution." The foregoing grounds of his aforesaid refusal as thus set forth present the two main questions before us in this proceeding. These relate, first, to the status of foreign corporations in respect to their right or privilege to engage in intrastate business in this state, and, second, to the interpretation to be placed upon section 15 of said article 12 of the state Constitution as affecting such right or privilege.

It is a conceded fact herein that the petitioner, a corporation organized in and under the laws of the state of Delaware, had in all respects in its said organization complied with the laws of Delaware, and hence that under the laws of that state corporations such as this could be legally organized with a capital stock structure having certain shares of stock of a fixed par value and certain other shares of stock of a nominal or no par value. It may also be conceded that such a corporation, if attempted to be organized in this state with a like stock structure, would not be entitled to receive from the secretary of state a certificate of incorporation under the rule laid down by this court in *Film Producers' Co. v. Jordan*, 171 Cal. 664, 154 P. 605, and *Del Monte, etc., Co. v. Jordan* (Cal. Sup.) 238 P. 710. The first question herein presented is as to whether the rule declared in the above-cited cases as applicable to California corporations is also to be given application to foreign corporations duly organized under the laws of the state of their creation.

[1-3] A foreign corporation, that is to say, a corporation organized under the laws of one or other of our American states, derives the right of doing business in other states than that of its creation through the application of the doctrine of comity between states. It is not necessary to go afield for authorities stating the origin of this doctrine or showing that it is deeply rooted in those fundamental principles of our nationality which found expression in our federal Constitution and in the interpretation thereof by the Supreme Court of the United States. See *Bank of Augusta v. Earle*, 38 U. S. (13 Pet.) 519-538, 10 L. Ed. 274. The doctrine has been fully recognized and clearly stated in the decisions in many states and has been well set forth in 14a *Corpus Juris*, p. 1217, as follows:

"Under principles of comity, and except as otherwise provided by constitutional or statutory provisions, a corporation created by any state or nation is permitted to enter other states, and there to exercise all legitimate powers conferred upon it and to carry on as a corporation any business not prohibited by the local laws or against local public policy. The rules of comity are subject to local modification by the lawmaking power. But until so modified they have the controlling force of legal obligation, and it is the duty of the courts to observe and enforce them until the sovereign otherwise directs. The comity involved is the comity of the state, not of the courts, and the judiciary must be guided by the principles and policy adopted by the Legislature.

* * * Statutes authorizing foreign corporations to do business within the state and prescribing the terms and conditions upon which they shall be permitted to do so have been almost universally adopted, and their construction and application forms a large part of the law of foreign corporations. Upon compliance with such statutes the foreign corporation may transact business within the state as if under a franchise from the state, and ordinarily in the

same manner as if it were a domestic corporation."

The decision of the courts of this state have been in harmony with the doctrine of comity as thus applied to foreign corporations, as will be seen from an examination of the following cases: *Anglo-Californian Bank v. Field*, 146 Cal. 644, 80 P. 1080; *American, etc., Wireless Co. v. Superior Court*, 153 Cal. 533, 96 P. 15, 17 L. R. A. (N. S.) 1117, 126 Am. St. Rep. 125; *H. K. Mulford Co. v. Curry*, 163 Cal. 276, 125 P. 236; *People v. Alaska P. S. S. Co.*, 182 Cal. 202, 187 P. 742.

[4] In the case of *American, etc., Wireless Co. v. Superior Court*, supra, the application of the doctrine of comity to foreign corporations seeking to transact business in this state was so far extended as to hold that—

"A statute of this state which purports to curtail the privilege of foreign corporations to maintain or defend actions in this state, and to impose conditions upon compliance with which alone they may be permitted to do so, will not be construed to extend beyond the plain meaning of its terms considered in connection with its object and purposes. The sections above quoted do not purport to forbid a foreign corporation which has failed to comply with its provisions from defending an action brought against it in the courts of this state. They are only forbidden to maintain actions."

In so holding, that decision was in harmony with the statement of the similar rule of construction set forth in *Murfree on Foreign Corporations*, and is also expressed in *Fletcher on Corporations* in the following terms:

"Repugnancy to the public policy of the state will not be implied from the mere silence of the state. It must be expressed in some affirmative way. An intention to exclude a foreign corporation, or to prohibit it from doing business and making contracts in a state, or acquiring or holding real property within its limits, is not to be implied from the mere fact that the laws of the state do not provide for the formation of similar corporations, or from the fact that it permits corporations to be formed only under general laws." 8 *Fletcher, Encyc. Corp.* par. 5740.

It is a fact of which the court must take judicial notice that the laws of the various states which regulate and prescribe the method for the organization and the measure of the powers of private corporations differ widely, and it is because of these differences that so many cases have arisen and been decided involving the application of the doctrine of comity to corporations seeking to enter other states than those of their creation for the purpose of transacting business therein, and out of this very diversity has been evolved a rule which may almost be said to be a rule of necessity, that corporations which may have been organized in one state in accordance with statutory methods which do not obtain in other states, or have been

given powers which corporations organized in other states do not possess, or which have different stock structures, or which have imposed different measures of liability or limitations of liability upon their stockholders, or which have invested such stockholders with divergent voting powers than those allowable in states other than that of their origin, may still be permitted to enter such other states and transact business therein under the doctrine of comity, in the absence of express constitutional or statutory inhibitions on the part of those states which such foreign corporations thus seek to enter.

The following are some of the applications of this rule:

In the case of *Cowell v. Springs Co.*, 100 U. S. 55-59 (25 L. Ed. 547), the question arose over the attempt of a Pennsylvania corporation, organized under a special statute and invested thereby with extensive powers, to enter the territory of Colorado and transact forms of business therein at a time when Congress had provided that corporations could not be organized in territories except under general laws, and that territorial corporations thus created were not authorized to transact the kinds of business which the Pennsylvania corporation was empowered under its special charter to do. It was argued that if a domestic corporation could not be created with such powers, a foreign corporation could not for the like reason be permitted to exercise them in the territory. In passing upon this question, Mr. Justice Field said:

"The answer to this position is found in the general comity which, in the absence of positive direction to the contrary, obtains through the states and territories of the United States, by which corporations created in one state or territory are permitted to carry on any lawful business in another state and territory, and to acquire, hold and transfer property there equally as individuals. If the policy of the state or territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its Legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law."

In the case of *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316, a corporation organized under the laws of the state of New Hampshire had become possessed of certain real property in the state of Massachusetts and undertook by an order of its board of directors to mortgage the property; the board of directors of said corporation having power under the laws of New Hampshire to adopt and carry into effect such order. Under the laws of the state of Massachusetts governing corporations created thereunder, it was provided that a corporation could not convey or mortgage its real estate unless authorized by

a vote of the stockholders thereof at a meeting called for that purpose so to do. It was held, however, that the Massachusetts statute referred only to corporations organized thereunder and had not been made expressly applicable to foreign corporations, and that in the absence of an express inhibition the foreign corporation derived its authority to do the act in question by comity from the state of its creation. In the case of *People ex rel., etc., v. Fidelity, etc., Co. of New York*, 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295, it was held that the foreign corporation in question might do multiform insurance in Illinois under the rule of comity which prevails between states, in the absence of an express prohibition in the statutes of Illinois, although such statutes did not authorize the formation of corporations in that state for that purpose. In so holding, the Supreme Court of Illinois quoted with approval the language of Mr. Justice Field in the case of *Cowell v. Springs*, supra. In the case of *U. S. Fidelity Co. v. Linehan*, 73 N. H. 41-43, 58 A. 956, it was held on the authority of the Illinois case last above cited that, in the absence of an express prohibition in the statute against the business of multiform insurance, the comity that prevails between states permits a foreign corporation to do such insurance, although the statutes of the local state do not authorize the formation of corporations for that purpose. In the case of *Clark v. Memphis Street Ry. Co.*, 123 Tenn. 232, 130 S. W. 751, it was decided that under the rule of comity between states a foreign corporation authorized so to do by the laws of the state of its creation might purchase and hold the stock of other corporations in Tennessee, although local corporations in that state had not been given the power so to do.

Approaching more immediately the question before us, we are referred to the case of *State ex rel., etc., v. Sullivan, etc.*, 282 Mo. 261, 221 S. W. 728. This was a case wherein the relator, a corporation organized under the laws of the state of Delaware for the purpose of engaging, selling, and dealing in railway equipment and appliances, and having a capital structure consisting of 130,000 shares, divided into 30,000 shares of preferred stock, of the par value of \$100 a share, and 100,000 shares of common stock without par value, such stock structure being permissible under the laws of that state, undertook to engage in business in the state of Missouri, and applied to the secretary of state of Missouri for a license so to do. Its said application was refused upon the ground that the Constitution of Missouri contemplated corporations with a capital stock of par value shares only (Const. of Mo. § 21, art. 10); and that the statutes of Missouri provided only for the organization of corporations in that state having capital stock of a fixed par value. The relator sought a writ of mandate to compel the issuance to it of the required

license, and thus the direct question presented to this court in the instant case came before the Supreme Court of that state for decision. That court, after a very exhaustive review of the decisions touching the application of the doctrine of comity between states in its relation to foreign corporations, and also after a very careful consideration of the Constitution and laws of Missouri, decided that while as to the latter they provided for the formation of domestic corporations with a capital stock composed of par value shares, and while there was no law in that state authorizing the formation of such corporations with a capital stock not thus divided, it was nowhere expressly provided therein that corporations organized in another state with a capital stock not in whole or part composed of par value shares should be denied admission into said state for the purpose of transacting business therein or should be refused a license so to do. In the absence of such express inhibition, it was held that the doctrine of comity between states was susceptible of being given full application to the facts of that case, and hence that the relator was entitled to its writ. In the case of *North American Petroleum Co. v. Hopkins*, 105 Kan. 161, 181 P. 625, the petitioner sought a writ of mandate to compel a consideration of the petitioner's application for permission to do business in that state. It appeared from said application that the petitioner was a foreign corporation having a capital stock divided into shares of no fixed or nominal par value, as was permissible in the state of its creation. It further appeared in the record that corporations organized for profit under the laws of the state of Kansas must set forth in their articles or charter the amount of their capital, the number of shares into which that capital was divided, and the number of shares held by each stockholder. The court, while holding that the petitioner as a foreign corporation was not such as to its framework as could be organized as a domestic corporation under the laws of Kansas, it was nevertheless entitled to admission to do business in that state.

[5, 6] When we examine the Constitution and statutes of the state of California in the light of the liberal application which, according to the consensus of the foregoing authorities, should be given to the doctrine of comity in its application to the admission of foreign corporations to transact their lawful business in states other than those of their creation, and when we do so with particular reference to the exhaustive consideration of the similar situation presented in the case of *State ex rel. Standard, etc., Co. v. Sullivan*, supra, we are constrained to hold that as to our statutory law upon the subject there is to be found therein no express inhibition against the admission of foreign corporations entering this state and engaging in business therein, even though it might be that as to

their framework, and especially as to the duality of their stock structure, such corporations would not have been entitled to organize as domestic corporations or to receive certificates of incorporation as such under the laws of this state. Nor are we able to discover any such express inhibition in the provisions of the state Constitution having relation to the admission and functioning of foreign corporations in this state, unless it is to be found in the language, intent, and meaning of section 15 of article 12 of the said state Constitution. Said section reads as follows:

"No corporation organized outside the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state."

It is the main contention of the respondent herein that the foregoing provision of the state Constitution furnishes full and sufficient ground for his refusal to receive the documents and fees tendered to him by the petitioner herein as the basis for the issuance to it of his official permission to engage in business in this state. We are not, however, satisfied that the respondent is justified in making this contention. The business which a foreign corporation transacts or seeks to transact in the state which it may desire to enter is the business which is contemplated in the expressed purposes of its creation as set forth in its articles of incorporation. This was clearly indicated by this court in its decision in the case of *Miles v. Woodward*, 115 Cal. 308-311, 46 P. 1076. That was a case wherein a stockholder of a corporation undertook to recover liquidated damages from a director thereof for an alleged violation of an act of the Legislature (Stats. 1880, p. 134) which imposed a liability upon directors of corporations for a failure on their part to make and post weekly reports in the manner required by the act. It was contended that the act was unconstitutional because it operated only upon domestic corporations and thus enabled foreign corporations to transact business in this state upon more favorable conditions than domestic corporations might under the requirements and penalties of said act; but this court held that the said act related merely to the internal affairs of corporations and not to its outside dealings or the conduct of the business it was organized to engage in. The subject was further clarified by the case of *General Conference, etc., v. Berkey*, 156 Cal. 466, 105 P. 411, wherein it was held that a corporation organized in another state solely for "religious, missionary, educational and charitable purposes," and having acquired a piece of real estate in California, and seeking to sell and dispose of the same, was not required to comply with sections 593 and 598 of the Civil Code applicable to the sale by domestic cor-

porations of property of like character. This court held that the purposes for which said foreign corporations were organized being those above set forth, it was not to be held, by virtue of the doing of the single and incidental act referred to, to be engaged in the transaction of business in this state within the purview of section 15 of article 12 of the Constitution. The business which the petitioner herein was organized to transact, according to the declared purposes of its articles of incorporation, was primarily that of a corporation dealing in securities of all kinds and also of engaging in other lines of business germane to the main purpose of its organization.

[7-10] The respondent herein contends that a foreign corporation organized for the foregoing purposes may not, under the foregoing inhibition of the Constitution, be permitted to enter the state of California and transact business herein, for two reasons: First, that because of its dual stock structure its stockholders have not an equality of voting power; and, second, that for the same cause its stockholders are not subjected to an equality of liability. As to the first of these reasons, it would seem that the matter of the equality or inequality of voting power in its stockholders is one which concerns merely the internal organism of the corporation and has nothing whatever to do with the transaction of the business of the corporation as between itself and the outside world; and that this being so, the language of this court in the case of *Miles v. Woodward*, *supra*, with this section of the Constitution immediately in mind, may be aptly applied:

"The Constitution was not designed to limit the powers of the Legislature when dealing with the organization and government of corporations which are created by its own will and act. Over such corporations it has and may exercise full powers of control. Over the organization and internal government of foreign corporations it has no such powers. The laws of the state do not have extraterritorial force. It would be meaningless for this state to try to legislate upon the internal affairs of such foreign corporations, and it has not attempted to do so."

Applying these principles, we are of the opinion that the question as to whether the stockholders of this foreign corporation have or have not an equality of voting power in the management of its internal affairs is not involved in the present inquiry. With respect to the second proposition urged by

the respondent, to the effect that this petitioner, if granted permission to enter California for the transaction of business therein, with its aforesaid dual stock structure, would be permitted to transact business herein upon more favorable conditions than domestic corporations can under the stock structure required by the present laws of the state, conceding, for the sake of argument, that the regulations which a corporation adopts as to the basis of liability of its stockholders has such a relation to the transaction of its business as declared in its articles of incorporation as to bring it within the terms of the foregoing section of our state Constitution, it does not follow therefrom that the permit of the petitioner should be denied. The authorities to which the respondent has cited us with relation to the liabilities of stockholders of foreign corporations hold that the stockholders of such corporations, regardless of the laws of the state wherein they were organized or of the exemptions or other conditions affecting such stockholders and their liabilities under said laws or under the terms of the charter of such foreign corporations, are subjected to the same liabilities as are the stockholders of domestic corporations when such foreign corporations see fit to enter California for the purpose of transacting business therein. It was so held in the case of *Provident Gold Mining Co. v. Haynes*, 173 Cal. 44, 159 P. 155, and in the earlier decisions of this court cited therein. *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 110 P. 942, 139 Am. St. Rep. 120; *Peck v. Noee*, 154 Cal. 351, 97 P. 865. See, also, *Thomas v. Matthiessen*, 232 U. S. 221, 34 S. Ct. 312, 58 L. Ed. 577; *Pinney v. Nelson*, 183 U. S. 144, 22 S. Ct. 52, 46 L. Ed. 125. The question of how this equalized liability of the stockholders of a foreign corporation is to be established and enforced is one which would be determinable by the courts when it arose in a proper case, but we do not think it is presentable upon the threshold of the proposed entry of such foreign corporation for the purpose of transacting business in this state, nor that it is involved in the present inquiry. We do not deem it necessary to determine whether or not section 15 of article 12 of the Constitution is self-executing, since we find no present reason for its application to the instant proceeding. Let the writ issue as prayed for.

We concur: WASTE, C. J.; SHENK, J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.

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PEOPLE v. SLOPER. (Cr. 2910.)

(Supreme Court of California. May 19, 1926.)

1. Criminal law §1193—When judgment of death is affirmed and remittitur spread on minutes of trial court, trial court must carry judgment into effect (Pen. Code, § 1265).

When judgment of death is affirmed and remittitur spread on minutes of trial court, trial court must make all orders necessary to carry the judgment into effect, under Pen. Code, § 1265.

2. Criminal law §1084.

Appeal to Supreme Court from judgment of death stays execution until determination of appeal, under Pen. Code, § 1243.

3. Criminal law §1023(12)—Order fixing date of execution under previous sentence of death is not appealable, notwithstanding statute allowing appeal from orders after judgment affecting substantial rights (Pen. Code, § 1227, as amended by St. 1905, p. 700, and section 1237, subd. 3).

By terms of Pen. Code, § 1227, as amended by St. 1905, p. 700, an order fixing the date of execution of a defendant under previous sentence of death is not appealable, notwithstanding Pen. Code, § 1237, subd. 3, making appealable any order after judgment affecting the substantial rights of defendant.

4. Criminal law §624—Where counsel argued that accused was insane, but did not ask stay of proceedings for trial of sanity by jury, contentions concerning sanity before judgment are concluded by verdict (Pen. Code, §§ 1367, 1368).

On trial for murder, where counsel argued that accused was insane, but did not ask stay of proceedings before judgment until sanity could be tried by jury, under Pen. Code, §§ 1367, 1368, verdict of guilty was final determination of sanity at time of murder, and contentions concerning sanity before judgment could not thereafter be considered.

5. Criminal law §1003.

Refixing time for executing sentence of death does not constitute pronouncement or rendition of judgment.

6. Constitutional law §272—Criminal law §1193.

Neither statutes nor due process of law require that, on affirmance of judgment of death, defendant be sentenced anew.

7. Criminal law §1084.

Judgment of death is not vacated by appeal from judgment, but its execution is stayed pending the appeal.

8. Criminal law §995(1)—Fixing of time of execution is no part of judgment of death, but is merely appointment of day for executing judgment and may be regulated by statute.

Fixing time and place of execution is no part of judgment of death, and is in effect only the appointment of a day for executing the judgment and may be regulated by statute.

9. Criminal law §1193—Jurisdiction of trial court after judgment of death is affirmed is limited to making orders to execute judgment (Pen. Code, §§ 1221-1224, and section 1227, as amended by St. 1905, p. 700).

On affirmance of judgment of death, trial court's jurisdiction is limited to making orders to execute the judgment, in view of Pen. Code, § 1227, as amended by St. 1905, p. 700, denying appeal from order fixing date of execution, and Pen. Code, §§ 1221-1224, providing that warden of prison may initiate proceedings to determine defendant's sanity.

10. Criminal law §1023(12)—After affirmance of judgment of death, no appeal lies from denial of motion that jury determine defendant's sanity, because no substantial right of defendant is affected (Pen. Code, §§ 1221 to 1224, inclusive; section 1237, subd. 3).

After affirmance of judgment of death, no appeal lies from order denying motion that date of execution be not refixed and that jury try defendant's sanity, as no substantial right of defendant, within meaning of Pen. Code, § 1237, subd. 3, is affected, in view of Pen. Code, §§ 1221 to 1224, inclusive, providing that the prison warden, if there is good reason to believe defendant insane, shall initiate proceedings to determine his sanity.

11. Criminal law §1001—After affirmance of judgment of death, no judge, court, or officer other than Governor can suspend execution, except that prison warden may do so to determine defendant's sanity (Pen. Code, §§ 1221 to 1224, inclusive).

After affirmance of judgment of death, no judge, court, or officer other than the Governor can suspend the execution, except that under Pen. Code, §§ 1221 to 1224, inclusive, warden of prison may do so in order to determine defendant's sanity.

In Bank.

Criminal prosecution by the People against Felix Sloper. Application by defendant for stay of execution of death sentence, and for writ of probable cause to have determined the sanity of petitioner following affirmance of conviction of murder in the first degree, with death penalty. Denied.

Wm. F. Herron and Harry A. McKenzie, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

WASTE, C. J. [1] Application for a stay of execution of death sentence, and for a writ of probable cause. The defendant, Felix Sloper, was placed on trial for the murder of George W. Campbell, a police officer of the city and county of San Francisco. The jury returned a simple verdict of guilty of murder in the first degree, and the defendant was sentenced to pay the extreme penalty. On appeal to this court the conviction was affirmed. *People v. Sloper*, 244 P. 362. During the pendency of the appeal Sloper was confined in the county jail of the city

and county of San Francisco, and was there confined when the remittitur went down and was spread on the minutes of the superior court. It then became the duty of the court below to make all orders necessary to carry the judgment into effect. Pen. Code, § 1265; *People v. Dick*, 39 Cal. 102.

Section 1227 of the Penal Code provides that if, for any reason, a judgment of death has not been executed, and remains in force, the court in which the conviction was had shall, on application of the district attorney, or may, upon its own motion, make and cause to be entered an order appointing a day upon which the judgment shall be executed. Pursuant to the provisions of the section, Sloper was brought before the superior court of the city and county of San Francisco for the purpose of having a day fixed for the execution of the judgment. His counsel thereupon interposed a motion that no proceedings relating to the refixing of the time for execution be taken against the defendant for the reason that, since the rendition of the original judgment in the cause, Sloper had become, and was at the time of making the motion, violently insane. Demand was also made by counsel that the sanity of the defendant be determined by a jury to be impaneled for that purpose. The motion and demand were supported by the affidavits of several persons, each of whom stated, in substance, that the affiant believed that Sloper was insane, and gave reasons for such belief. There was also offered the oral testimony of a number of witnesses who testified that they knew the defendant, had closely observed him, and that, in their opinion, he was insane and did not realize the nature of the proceedings against him nor of his impending fate. After these proceedings, which appear to have consumed several days, the court denied the motion and refused to submit the question of Sloper's sanity to a jury. The defendant, by his counsel, thereupon announced in open court that, pursuant to subdivision 3 of section 1237 of the Penal Code, he appealed to the Supreme Court from the order denying his motion. Over the objection of appellant's counsel that it had lost jurisdiction to proceed further, by reason of the fact that an appeal had been taken, the lower court appointed the 25th day of June, 1926, as the day upon which the judgment of death should be executed. Application subsequently made on behalf of the defendant to the court below for a certificate of probable cause for the appeal was denied, and a stay of proceedings pending the application to this court for such certificate was refused.

It is alleged that, unless a certificate of probable cause be granted, the defendant will be put to death by the warden of the penitentiary before an appeal from the order of the lower court refusing to permit the question of his sanity to be heard and determined

by a jury can come on for hearing and determination here. The question presented by the application is that of the jurisdiction of the superior court to do anything in this case other than to appoint a day upon which the judgment of death shall be executed, and of the power of either the court below or of this court to stay the execution or grant a writ of probable cause under the circumstances herein appearing.

[2, 3] An appeal to the Supreme Court from a judgment of conviction stays execution in all capital cases until the determination of the appeal. Pen. Code, § 1243; *Ex parte Edgar*, 119 Cal. 123, 127, 51 P. 29. In this case the appeal from the final judgment of conviction and from the order denying defendant's motion for a new trial has been determined and the appeal from the judgment no longer acts as a stay. An appeal may also be taken by the defendant in a criminal cause from any order made after judgment affecting the substantial rights of the party. Pen. Code, § 1237, subd. 3. While it was formerly the rule, well supported by the decisions of this court, that an order fixing the date of execution of a prisoner under previous sentence of death was one made after final judgment, from which an appeal might be taken, such is not now the law. In 1905 the Legislature amended section 1227 of the Penal Code, relating to judgments of death remaining unexecuted, by adding thereto the provision that, from an order fixing the time for, and directing the execution of such judgments, there shall be no appeal. Stats. 1905, p. 700. It follows, therefore, that, unless the defendant, Sloper, has the right of appeal from the action of the court refusing to submit the question of his sanity to a jury, his application to this court for relief must be denied. It is most earnestly contended in his behalf that the order denying his motion very vitally affected his substantial rights, in that it might result in the execution of an insane person. For the reasons we shall advance, we do not share that contention.

[4] It is, of course, the law that a person cannot be tried, adjudged to punishment, or punished for a public offense while he is insane. Pen. Code, § 1367. If at any time during the pendency of the action against the defendant, Sloper, up to the time when he was arraigned for judgment after his conviction, a doubt had arisen as to his sanity, it would have been the duty of the trial court to submit that question to a jury, and to suspend the trial, or the pronouncement of judgment, until the question was determined by its verdict. Pen. Code, § 1368. Although it was argued to the jury in the trial court that Sloper should be relieved of the legal consequences of his act in causing the death of Campbell, for the reason that the defendant was afflicted with insanity, it does not appear that any effort was made to interrupt the trial or stay the proceedings until

the question of his sanity could be tried by a jury. Consequently the verdict of the jury finding him guilty of the murder must be accepted as finally determining that Sloper was not insane when he fired the fatal shot, and any contention concerning his sanity before judgment in the court below cannot now be considered. Therefore the provision of the section, *supra*, that a person cannot be tried or adjudged to punishment while he is insane is not involved in this proceeding. But, on behalf of the defendant, it is contended that there still remains to support his application the provision that he may not be punished while he is insane, and that the court ought not appoint a day for his execution.

[5-8] The refixing of the time for the carrying out of the execution does not constitute the pronouncement or rendition of a judgment. Neither the statutes of California nor due process of law require that, upon the affirmance of a judgment of conviction, the accused shall be sentenced anew by the trial court to suffer punishment of death. An adjudication of punishment is not vacated by an appeal from the judgment; only its execution is stayed pending the proceedings in the Supreme Court. The fixing of time and place of execution is no part of the judgment of sentence of death, and may be regulated by statute. *Schwab v. Berggren*, 143 U. S. 442, 451, 12 S. Ct. 525, 36 L. Ed. 218; *Costley v. Commonwealth*, 118 Mass. 1, 35. The original judgment in this case became final and conclusive upon affirmance by the Supreme Court. The order fixing a day upon which the judgment shall be executed, made on the going down of the remittitur, amounts in effect to nothing more than appointing a day for carrying the judgment into execution. *In re Spagnoli*, 193 Cal. 472, 225 P. 274.

[9-11] Adequate statutory provision, as we have pointed out, is made for the determination of the question of the sanity of a defendant during the pendency of a trial, and when he is brought before the court for judgment on conviction. Equally adequate statutory provision is made for the complete protection of the rights of a defendant who may have become insane after his conviction and sentence. It is provided in section 1221 of the Penal Code that if, after his delivery to the warden of the state prison for execution, there is good reason to believe that a defendant under judgment of death has become insane, the warden must call such fact

to the attention of the district attorney of the county in which the prison is situate, whose duty it is to immediately take the necessary steps that the question of the sanity of the defendant may be inquired into. If it be found that the defendant is insane, the court must direct that he be taken to one of the state hospitals for the insane and there kept in safe confinement until his reason is restored. When the defendant recovers his reason the superintendent of the hospital must certify that fact to the Governor, who must thereupon issue to the warden his warrant appointing a day for the execution of the judgment. Pen. Code, §§ 1222-1224. These sections of the Code were enacted at the same session at which it was provided there shall be no appeal from the order fixing the time for, and directing the execution of, judgments of death which remain in force but, for some reason, have not been executed. We must conclude, therefore, that it was the intention of the Legislature to limit the jurisdiction of the trial court in proceedings of this nature to the making of the orders necessary to carry the judgment into effect. We are of opinion, also, that, in view of the comprehensive and adequate provision made for the determination of the question of the sanity of a defendant who is alleged to have become insane after the rendition of a judgment of death, no substantial right of the defendant, Sloper, was affected by the action of the court below in denying his motion. For that reason no appeal lies to this court, and the facts do not present a proper case for the issuance of a certificate of probable cause. Neither can any judge, court, or officer, other than the Governor, suspend the execution of the judgment of death, except that the warden of the state prison, to whom the defendant is delivered for execution, may do so for the purpose of inquiring into the question of his sanity. Pen. Code, § 1221. If it be a fact in this case that the condemned man is insane, it must be assumed that the warden of the state prison will do his full duty to the end that the question of the prisoner's sanity may be judicially determined.

The application for a writ of probable cause, and for a stay of proceedings until a transcript of the proceedings in the court below can be prepared and transmitted to this court, must be denied. It is so ordered.

We concur: RICHARDS, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; LENNON, J.

193 Cal. 594

(246 P.)

BELL v. McDERMOTH. (L. A. 8060.)

(Supreme Court of California. May 18, 1926.)

1. Judgment $\hookrightarrow$ 142—Year within which defendant not personally served may answer to merits commences to run from date of filing and signing decree, that being "date of rendition of judgment" (Code Civ. Proc. § 473).

Under Code Civ. Proc. § 473, providing that, when summons in action has not been personally served, court may allow defendant or his legal representative, within one year from rendition of judgment, to answer to merits, the year begins to run from date of signing and filing of decree, since that is the date of rendition.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Date.]

2. Judgment $\hookrightarrow$ 525—Recourse may be had to affidavits in judgment roll to determine whether showing made for order of publication of summons was sufficient to confer jurisdiction on court (Code Civ. Proc. § 670, subd. 1).

Under Code Civ. Proc. § 670, subd. 1, including in judgment roll affidavits for publication of summons, recourse may be had thereto on issue of validity of decree apparently valid on its face, based on substituted service, to determine whether showing made for order of publication was sufficient to confer jurisdiction on court to make the order.

3. Process $\hookrightarrow$ 96(4)—Showing that defendant cannot with due diligence be found within state, sufficient for order of publication, held embraced in showing he was absent from state.

A sufficient showing that defendant cannot with due diligence be found within state, to support order of publication of summons, is embraced within showing, if otherwise sufficient, that he was absent from state, notwithstanding absence of showing that summons had been placed in hands of a process server.

4. Process $\hookrightarrow$ 96(4)—Affidavit that defendant's wife informed affiant that defendant was in another state, and affidavit that letter apparently written elsewhere, though posted in state, was received from defendant, held sufficient showing for order of publication.

Showing, though slight, that defendant in action to quiet title was absent from state, predicated on affidavit that defendant's wife had informed affiant that defendant was in another state, and affidavit that plaintiff's attorney received letter from defendant, apparently written in another state, though posted within state, held sufficient basis for order of publication of summons.

In Bank.

Appeal from Superior Court, Los Angeles County; C. W. Guerin, Judge.

Action by Chester A. Bell against Joe Freeman Jack, wherein default judgment was rendered on publication of summons. Thereafter Rosabelle H. McDermoth, as special ad-

ministratrix of the estate of said Jack, deceased, made motion to have the judgment set aside and to permit her to appeal and answer. Judgment for defendant on motion, and plaintiff appeals. Reversed.

Emmet H. Wilson, of Los Angeles, for appellant.

J. Everett Brown, of Los Angeles, for respondent.

RICHARDS, J. This appeal is by the plaintiff from an order of the trial court, made upon motion of the defendant, setting aside its judgment theretofore entered in an action to quiet title, and permitting the said defendant to appear and answer in said action. The original complaint was filed on April 5, 1922, and is in the usual form of an action to quiet title. The defendant named in said action was one J. F. Jack, who has since died, and of whose estate the present defendant is special administratrix. On July 26, 1922, the judge of the court in which said action was pending made an order for the publication of summons therein, which order was based upon certain affidavits presented by the plaintiff as a basis for his application for said order. Thereafter the said summons was published in accordance with the terms of said order, and thereafter, and upon a proper showing of the fact of said publication and mailing conformable to the terms of said order, and after the time had expired for the appearance of said defendant, a decree quieting title was signed and filed by the judge of the trial court. The date of the signing and filing of said decree was December 27, 1922. Said decree, however, was not entered by the clerk of said court until January 4, 1923. On December 31, 1923, the present defendant, having in the meantime been appointed special administratrix of the estate of J. F. Jack, deceased, filed her notice of motion to set aside said decree upon the several grounds set forth therein, and said motion coming on to be heard on January 10, 1924, was granted by the trial court, and the proffered answer of said defendant was permitted to be filed. The plaintiff appeals from said order, and upon said appeal sets forth certain reasons why the same should be reversed.

[1] The first contention made by the appellant is that, since the application of the defendant for said order appears to have been made upon a date more than one year after the rendition of said decree, the trial court had no longer jurisdiction to entertain the same under the provisions of section 473 of the Code of Civil Procedure. The provisions of said Code relating to the time within which such an application must, under its terms, be made, reads as follows:

"When from any cause the summons in an action has not been personally served on the

defendant, the court may allow, on such terms, as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action."

The decree in the instant case was signed by the trial judge and filed with the clerk of said court on December 27, 1922. That date, under the authorities, was the date of the rendition of said judgment. *Gray v. Palmer*, 28 Cal. 416; *Peck v. Courtis*, 31 Cal. 207; *Genella v. Relyea*, 32 Cal. 159; *Wetherbee v. Dunn*, 36 Cal. 249.

[2-4] The date of the filing of defendant's motion to set aside such decree being December 31, 1923, it was therefore presented more than one year after the rendition of said decree. Respondent, in answer to this objection, however, contends that her motion to set aside said decree was not made under section 473 of the Code of Civil Procedure, but was made generally, upon the ground that said decree was void upon its face, and, being made upon said ground, was not required to be made within the period provided by said section of the Code of Civil Procedure. We are thus brought to a consideration of the question as to whether the decree in question was or was not void upon its face. An examination of the decree will serve to show that, strictly speaking, it was entirely regular upon its face, since its recitals showed that the original defendant, J. F. Jack, had been duly and regularly served with process, and had failed to appear and answer the complaint on file within the time required by law.

Prior to the year 1895, wherein subdivision 1 of section 670 of the Code of Civil Procedure was amended, so as to include within the judgment roll the affidavits and other documents upon which an order for the publication of summons was predicated, it could not be questioned that the decree herein, containing the foregoing recitals, was valid upon the face thereof. Since said amendment, however, it would seem to have been held that recourse may be had to the judgment roll and the contents thereof for the purpose of determining whether a decree, apparently valid upon the face thereof, but predicated upon a prior substituted service, is sufficiently supported by the showing made as a basis for the order of the court providing for the publication of the summons in such a proceeding. The decision in this case is thus made to turn, at the last analysis, on the question as to whether the trial court, making its order for the publication of summons, had acquired jurisdiction to make the same by virtue of the showing which the plaintiff presented as a basis for such order.

The respondent herein contends that such showing was entirely inadequate, and hence that the said order of the trial court directing the publication of summons as against the

then living defendant was utterly void. We are unable to agree with that contention. The showing which the plaintiff presented upon his application for said order of publication was substantially as follows:

He presented the affidavit of a competent witness to the effect that the affiant, acting on behalf of the plaintiff, having ascertained that the residence of the defendant, J. F. Jack, was at No. 992 South Serrano avenue, in the city of Los Angeles, had called at said residence, seeking said defendant, impliedly for the purpose of making personal service of the summons in said action upon him, and had been then and there informed by the wife of said defendant that the latter was in Arizona, and that his address there was unknown to her, and that, if any one desired to transact business with said defendant, mail should be addressed to him at his said designated residence, and that she (his wife) would forward the same to him when she ascertained his address. There was also filed the affidavit of the plaintiff's attorney to the effect that, after receiving the report from the former affiant to the effect that the defendant was then in Arizona, he addressed a letter to him, directing the same to his Los Angeles residence, and about two weeks later received a response to said letter, in the form of a letter from said defendant, dated "Arizona, 5/10/22," which letter, however, appeared from the postmark thereon to have been posted at Los Angeles. The contents of said letter indicated that the said defendant was in Arizona. The plaintiff also filed an affidavit of merits, wherein he deposed that personal service of summons could not be made upon the said defendant for the reasons which appeared in the affidavit aforesaid.

The order for publication of summons was predicated upon the foregoing showing. It was recited in said order "that the defendant, J. F. Jack, cannot after due diligence be found within this state"; but it also contained the recital "that the said defendant is absent from the state of California, and that his address outside of the state cannot be ascertained." It was therefore ordered that said summons be published for the time required by law, and that a copy thereof be mailed to the defendant at his said place of residence in Los Angeles. It would thus appear that the trial court had as a basis for its said order some substantial showing that the defendant, Jack, was at the time said order was sought absent from the state of California, and hence beyond the jurisdiction of said court for the purpose of a personal service upon him of the summons in said action. It is true that said showing is slight, and it is also true that it is predicated in the main upon the information and belief of the affiant, who interviewed the wife of said defendant and was informed by her that the said defendant was absent from the state. This

showing, however, is supported in some degree by the affidavit of plaintiff's attorney to the effect that he received from said defendant, shortly after the foregoing information was imparted to him, a letter which indicated that it had been written by the defendant in Arizona, though posted in Los Angeles, but by whom posted did not appear.

It is argued by the respondent that this showing should have been supported by a further showing that said summons had been placed with the sheriff or other process server for personal service upon the defendant in this state, and that said defendant could not, after due diligence, be found therein. But it is clear, that, if said defendant was in fact in Arizona, as shown by the foregoing inquiry as to his whereabouts, the placing of said summons with the sheriff or other process server would have been an idle and futile act, and that a sufficient showing that the defendant could not with due diligence be found within the state of California would be embraced within the showing, if otherwise sufficient, that the said defendant was absent from the state. We are, therefore, of the opinion that a sufficient predicate was laid by the plaintiff for the issuance by the court of its order for the publication of summons.

It is true that said order, in the earlier recitals thereof, recited as the basis for its issuance that it had been satisfactorily shown to the court that the defendant, Jack, "cannot after due diligence be found within this state," and that the said recital did not truly represent the basis upon which said order of publication was sought; but whatever defect there may have been in this recital was, we think, cured by the later recital in the same order to the effect that the said defendant was at the time of the issuance thereof "absent from the state of California." The sufficiency of the showing as to the proper publication of said summons, and as to the mailing thereof as required by law and by the terms of said order, was not questioned by the substituted defendant moving to set aside said order and the decree predicated thereon, and it follows that, unless we should treat the showing made as a predicate for said order of publication as being wholly inadequate, and said order for that reason as being wholly void, we must, under the authorities above cited, reverse the order of the trial court setting aside its said decree. It is to be noted that said defendant, in seeking to have set aside said decree, tendered no showing whatever that at the time of the making of the order for publication of summons, and at the time of the making of the showing upon which said order was based, the then existing defendant was not in fact, and at all said times, and up to the time of the rendition of the said decree, absent from the state of Cal-

ifornia, and beyond the reach of personal service of the process of said court.

The showing of the said respondent upon her motion to set aside said decree being thus wholly based upon her technical objection to the sufficiency of the showing made by the plaintiff as the basis for the issuance of the order of publication, we incline to the opinion that the said respondent did not present a sufficient showing to justify the trial court in making the order appealed from herein, and that the respondent's motion for said order, not having been made within one year after the rendition of said decree, and not being sufficiently supported by a showing that said decree was void upon the face thereof, should have been denied.

It follows that the said order of the trial court granting said motion should be and the same is hereby reversed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LAWLOR, J.; LENNON, J.

198 Cal. 609

WESTLAKE PARK INV. CO. v. JORDAN,
Secretary of State. (L. A. 9198.)

(Supreme Court of California. May 19, 1926.
Rehearing Denied June 17, 1926.)

1. Corporations ⇨28(1)—Investment company held de facto corporation after three years' existence under articles of incorporation providing for stock structure in violation of statute (Civ. Code, §§ 290, 290b; Const. art. 12, §§ 3, 12).

Investment company, whose articles of incorporation provided for preferred stock at \$100 par value and common stock without par value, in violation of Civ. Code, § 290, and inconsistent with Const. art. 12, §§ 3, 12, but otherwise conforming with Civ. Code, § 290, and in which attempt was made to bring stock structure within section 290b, to which original certificate of incorporation was issued, and which functioned in good faith as corporation for three years, *held* de facto corporation.

2. Corporations ⇨62.

Corporations cannot be created, having as their stock structure capital stock of differing par values, in view of Civ. Code, § 290.

3. Corporations ⇨28(1)—Attempt to organize under charter or general law under which corporation might be lawfully organized and user of corporate franchise held to create de facto corporation.

Attempt to organize corporation under charter or general law, under which such corporation as it purports to be might be lawfully organized and actual user of corporate franchise, *held* to create de facto corporation.

4. Corporations ⇨29(2).

Validity of existence of de facto corporation ought not to be inquired into collaterally.

5. Corporations $\Rightarrow$ 18—It is right and duty of secretary of state to determine whether corporate organization has been legally accomplished before he issues its charter or certificate of corporation.

It is right and duty of secretary of state to determine whether corporate organization has been accomplished in conformity with statutory laws relating thereto, before he issues its charter or certificate of corporation.

6. Corporations $\Rightarrow$ 29(1)—De facto corporation, which had existed three years, held entitled to license to do business for current year.

De facto corporation, which had existed three years, held entitled to license to do business for current year, since license tax neither imports nor requires any other inquiry into original legality of corporate organization than that of determining whether on face of things it appears to be such organization as would be properly subject to such tax.

7. Corporations $\Rightarrow$ 29(1)—Secretary of state held neither bound nor authorized to determine whether corporation acting de facto as such is de jure corporation, when it applies for license to do business (Corporation License Act, § 3, as amended by St. 1917, p. 373).

Secretary of state held neither bound nor empowered to determine whether corporation acting de facto as such is de jure corporation, when in either capacity it offers to pay annual license tax and demands issuance of license permitting it to do business within state for current year, since Corporation License Act, § 3, as amended by St. 1917, p. 373, does not authorize such inquiry.

8. Corporations $\Rightarrow$ 29(1)—Legal existence of corporation de facto can only be inquired into in proceeding in nature of writ of quo warranto, instituted by state on relation of Attorney General.

Legal existence of corporation de facto can only be inquired into in proceeding in nature of writ of quo warranto, instituted by state on relation of Attorney General, wherein right of corporation to exercise its franchise may be judicially inquired into and determined.

- 9 Corporations $\Rightarrow$ 40.

De facto corporation held to have right to file amended articles of incorporation.

In Bank.

Application for writ of mandate by the Westlake Park Investment Company, prayed to be directed to Frank C. Jordan as Secretary of State. Writ granted.

Newlin & Ashburn, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., Robert W. Harrison, Deputy Atty. Gen., and Lionel B. Browne, of San Francisco, for respondent.

RICHARDS, J. The petitioner herein applies for a writ of mandate to compel the respondent, as secretary of state of the state

of California, to accept from the petitioner its corporation license tax for the year 1926 and to thereupon issue a license in conformity with the Corporation License Act (St. 1915, p. 422, as amended), authorizing the transaction of business by it in this state for the current year. The petitioner appends to its said application a copy of its articles of incorporation, made, executed, and filed in the office of the said secretary of state during the month of October, 1923, whereupon, as the petitioner alleges, a certificate of incorporation was issued to it by the respondent as such secretary of state, and further alleges that, ever since the issuance thereof, the petitioner has been and now is a corporation engaged in the transaction of business in this state; that the petitioner during the years 1924 and 1925, respectively, paid to the respondent upon his demand the license tax required of said petitioner under the said Corporation License Act for each of said years, respectively, and received from said respondent a license authorizing the transaction by it of business in the state of California during each of said years. It is further alleged that the proffer of the similar license tax by the petitioner, and its request for a like license for the year 1926, have been refused by the respondent for the reasons which will hereinafter appear; wherefore its application for this writ. The respondent has presented his answer and return to the alternative writ issued herein in the form of a demurrer, and we are thus presented with the questions of law which arise upon the face of the petitioner's said application.

[1, 2] The first of these questions has reference to the status of the petitioner as a corporation organized and doing business in and under the laws of the state of California. The respondent herein contends that it is not such a corporation for the reason that in its attempted organization as such corporation it has omitted in a vitally essential respect to conform to the requirements of the state Constitution, in that it has provided in its articles of incorporation for a corporate stock structure which is in violation of such Constitution, and particularly of sections 3 and 12 of article 12 thereof, as these sections of said Constitution have been interpreted by this court in the cases of *Film Producers Co. v. Jordan*, 171 Cal. 664, 154 P. 605, and *Del Monte L. & P. Co. v. Jordan* (Cal. Sup.) 238 P. 710. The particular defect in the petitioner's original articles of incorporation to which the respondent thus directs our attention is this: That it is therein provided that the corporation thus attempted to be created was to have as its authorized capital stock "10,000 shares of preferred stock of the par value of \$100 per share, amounting in the aggregate to \$1,000,000, and 10,000 shares of common stock without nominal or par value." The preferences provided for in said articles

of incorporation in favor of the preferred stock have reference to preferences in the profits and dividends of the corporation and in the division of its assets in the event of its liquidation or dissolution. It may not be questioned that the effect of the two decisions of this court above referred to is to forbid the initial creation of corporations having as their stock structure capital stock of differing par values. It must further be considered as settled by said decisions that, if the petitioner herein were now presenting to the secretary of state for filing, and for the issuance of a charter thereon, its said articles of incorporation showing its organization upon the aforesaid double basis as to the par values of its stock issues, the secretary of state might have been justified in refusing to file said original articles or to issue a certificate of incorporation thereon. It may be noted, however, as having some more or less important bearing upon the present inquiry, that the original articles of incorporation, which the petitioner herein presented for filing to the secretary of state during the year 1923, contained two particular provisions in addition to those above referred to, each having relation to its stock capitalization. In the first of these it was stipulated as follows:

"(c) No preference is hereby granted, nor shall any distinction be made between the classes of stock either as to voting power or as to the statutory or constitutional liability of the holders thereof to creditors of the corporation, and no distinction shall exist between the said classes of stock or the owners thereof except as to the preferences herein prescribed."

The other of the provisions of the petitioner's said original articles of incorporation was that set forth in article VIII thereof, which showed that the actual stock subscription of the said corporation at the time of the formation thereof and of the offer for filing of its said articles of incorporation was that of 5 shares of preferred stock of the par value of \$100 per share. The effect of the foregoing provisions of the petitioner's said original articles of incorporation has not been emphasized before this court as to their bearing upon the immediate inquiry, but, even if it must be assumed in the light of the foregoing decisions of this court that the petitioner herein was not, strictly speaking, a corporation de jure at the time of its proffer for filing of its original articles of incorporation containing the foregoing provisions, we are nevertheless of the opinion that said corporation, by virtue of the above provisions of its said articles which, except in the one particular above set forth, were in exact conformity with the provisions of section 290 of the Civil Code, and also by virtue of the issuance to it of its original certificate of incorporation, and also by virtue of the fact that said corporation, upon the receipt and filing of its said articles and the issuance to it of

its said certificate of incorporation, began and has since continued to function as a corporation and is a going concern in this state, became a de facto corporation, and that it was such de facto corporation at the time of its last proffer of its license tax and demand for the issuance to it of a license to continue to do business as a corporation during the year 1926. The authorities, we think, support us in this conclusion.

In the early case of *Rondell v. Fay*, 32 Cal. 354, 361, it was held that a corporation attempted to be organized by 5 persons and to exist for a period of 25 years under the terms of an act authorizing the formation of such corporations (Stats. 1861, p. 567), which provided that not less than 7 persons might so incorporate for a period of not longer than 5 years, was nevertheless a corporation de facto, when in fact and in good faith it had undertaken to perform the functions of such a corporation, and that its corporate existence could only be attacked at the suit of the state or on information by the Attorney General.

In the case of *People v. Perrin*, 56 Cal. 345, the corporation, the legal existence of which was therein brought into question by a quo warranto, had been organized under the act of the Legislature of 1853 (Stats. 1853, p. 87), which required the specification in the articles of the amount of capital stock and the number of shares into which the same was divided. The articles of the corporation in question omitted both of these requirements, but nevertheless received a certificate of incorporation and became a going concern. A later act of the Legislature undertook to validate corporations thus defectively organized. Thereafter the Attorney General instituted a quo warranto proceeding to test the legality of the existence of said corporation, and in that proceeding this court held that the certificate of said corporation, though thus defectively organized, was not void and that the corporation thus formed and transacting the business of a corporation was entitled to the benefits of the validating act.

[3, 4] In the case of *Tulare Irrigation Dist. v. Shepard*, 185 U. S. 1, 13, 22 S. Ct. 531, 536 (46 L. Ed. 773) Mr. Justice Peckham, after a quite full review of certain California and other decisions touching the question as to what would constitute a de facto corporation stated:

"From the authorities, some of which are above cited, it appears that the requisites to constitute a corporation de facto are three: (1) A charter or general law under which such a corporation as it purports to be might lawfully be organized; (2) an attempt to organize thereunder; and (3) actual user of the corporate franchise."

In the latest edition of *Thompson on Corporations* the foregoing statement is adopted as stating the consensus of authority upon the subject, and many cases are referred to as

illustrating the application of the foregoing rule. Among these the California decisions above referred to are cited and other similar instances given, wherein, notwithstanding serious defects or omissions to comply with the laws governing the organization of corporations, there had been a colorable attempt to comply with the statutes authorizing the formation of such a corporation as the one under criticism, purported to be followed by an actual exercise of corporate functions in good faith. See 1 Thompson on Corporations (2d Ed.) c. 9, § 225 et seq. The philosophy upon which the courts of practically every state and of the United States have gone far toward upholding the existence de facto of corporations which have colorably attempted to organize under statutes permitting incorporation for the general purposes which the persons forming the same seek to incorporate, and which have thereafter in good faith proceeded to function as such corporations, is that the law encourages and shares in the universal desire for the stability of business transactions, and that, where such an organization has thus attempted to be created and has in fact organized and entered upon the transaction of business in good faith, the validity of its existence ought not to be inquired into collaterally. *Id.* § 248.

The foregoing citations and principles we think apply to the case in hand. Section 290 of the Civil Code is the section thereof which purports to provide for the organization of commercial corporations and to set forth the seven requisites of articles of incorporation of such organizations. It supplies the first condition above referred to, in that it is the general law under which corporations having the purposes of the corporation here under consideration may be formed. An examination of the articles of the instant corporation shows an almost meticulous effort to comply with the requirements of this section of the Code; and, while it is true that in designating the stock structure the organizers of this corporation have attempted to bring its said stock structure within the permissive provisions of another and later adopted section of said Code, viz. section 290b thereof, they have also and in their said articles of incorporation undertaken to provide in strict conformity with section 290 thereof that the voting power or constitutional liability of the holders of the stock thereof shall in no wise be affected thereby. Whether these provisions in said articles of incorporation would or would not be entirely effectual to accomplish the stated result may be debatable, but it cannot, we think, be said either that this corporation has sought to become organized under an unconstitutional statute or that its attempt so to do has not been colorable and done in good faith. Nor is the bona fides of its subsequent acts in its assumed corporate capacity questioned in this proceeding. The cases cited by the respondent, and especially

the case of *Brandenstein v. Hoke*, 101 Cal. 131, 35 P. 562, holding that an attempted organization of a corporation under an unconstitutional law, there being no other law under which such a corporation could be organized at all, will not suffice to call into being a de facto corporation, has, we think, no application to the instant case; nor are the Washington cases cited by respondent applicable, since these refer to the filing of the original or amended articles of incorporation which were subject to the defects noted therein. The distinction between those cases and the instant case will be more fully considered presently. It is our conclusion upon the point now under consideration that the petitioner herein, at the time it proffered the amount of its license tax for the year 1926 and requested the issuance of a license permitting it to engage in the business for which it was organized and had theretofore been functioning prior to and during the year 1926, was a de facto corporation.

[5, 6] This brings us to the second question presented upon this application, and which concerns the right and power of the respondent as secretary of state to decline to receive the license tax and to refuse to issue a license to a de facto corporation, duly tendering such tax and requesting the issuance of such license permitting such corporation to continue to do business in this state during the current year. The secretary of state, with respect to those powers and duties which have been reposed in that office having to do with the issuance of original or amended certificates of incorporation, exercises a function which was originally reposed in the crown or sovereign under the English law. The issuance of a corporate charter by the king was a royal prerogative, and necessarily its exercise contemplated a determination of the due organization and legal right of the applicant for such a charter. Under our American inheritance of the English system of laws, the issuance of corporate charters was a like attribute of sovereignty, and was attended with a like duty to be exercised by the officials of the state. It is therefore the right and duty of the secretary of state to determine whether a corporate organization has been accomplished in conformity with the statutory laws relating to the same before he issues its charter or certificate of incorporation. But the secretary of state, in his capacity as a collector of licenses under the revenue laws of this state, is exercising no such royal function or prerogative. He is engaged in the performance of a strictly ministerial function—such a function as might have been reposed in the state treasurer or state controller or any other state official, or even in county officials in counties where the principal place of business of corporations seeking such licenses might be located. The tax imposed in this form upon corporations is a strictly revenue measure. It is merely a

license fee or tax charged upon corporations for the privilege of continuing to carry on their business in this state during the current year. *Kaiser Land & Fruit Co. v. Curry*, 155 Cal. 638, 103 P. 341. Its charge or its collection or the issuance of the receipt, or so-called license, issued upon the payment of the impost, neither imports nor requires any other or further inquiry into the original legality of the corporate organization than that possibly of determining whether on the face of things it appears to be such an organization as would be properly subject to such a tax.

[7] For convenience in the making of this inquiry the tax is made collectible by the secretary of state, for the apparent reason that the official records of corporate organizations under the laws of this state are on file in his office. But it should be clear that the secretary of state, in the exercise of this purely ministerial function of a tax gatherer, has been neither charged with the duty nor cumbered by the burden of annually ransacking the files of his office when the time for the collection of this license tax arrives for the purpose of discovering whether the corporation purporting to be such and offering to pay the same has in law or in fact been legally organized. To essay such an inquiry would entail upon this official an undue and endless burden for which he might, in point of learning or experience, be entirely unfitted; and would measurably defeat the very object of the law, viz.: The collection of the largest possible revenue to the state from this resource of taxation. We find nowhere in the act relating to the collection of this corporate license tax any express investiture of the secretary of state with the powers he here seeks to exercise and the only language therein upon which the respondent relies as importing such power is that embraced in section 3 of said act, as amended by St. 1917, p. 373, which provides that "every corporation incorporated under the laws of this state" must procure the license provided for therein. This general phrase would, however, apply equally to de facto as to de jure corporations, since the former, however defectively organized, would still be incorporated under the laws of the state. Otherwise they could not, as we have seen, become de facto corporations at all. We therefore reach the conclusion that the respondent herein is neither bound to the duty nor invested with the power of determining whether a corporation, acting de facto as such, is or is not a de jure corporation when in either capacity it offers to pay its annual license tax and demands the issuance of a license permitting it to continue to do business in this state for the current year.

[8, 9] We do not need to consider the application or nonapplication of section 358 of the Civil Code to a proceeding of this nature,

for the reason that, entirely independent of said Code section, it is a long-established principle of law that the legal existence of a corporation de facto can only be inquired into in a proceeding in the nature of a writ of quo warranto instituted by the state on the relation of its Attorney General, wherein the right of the corporation to exercise its franchise may be judicially inquired into and determined. Nor do we need to pass upon the petitioner's further contention as to its present right to file amended articles of incorporation, further than to say that our holding that it is a de facto corporation implies the existence of such right.

Let a writ issue directed to the secretary of state requiring him to receive the petitioner's license tax and issue to it the required license as prayed for in its petition herein.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LENNON, J.; SEAWELL, J.; NOURSE, Justice pro tem.

77 Cal. App. 384

PEOPLE v. BRANCH. (Cr. 1295.)

(District Court of Appeal, Second District, Division 1, California. April 9, 1926.)

1. Rape $\hookrightarrow$ 38(1).

In prosecution for statutory rape, under Pen. Code, § 261, subd. 1, permitting prosecutrix to testify that she knew what was meant by the expression "sexual intercourse" and to base her subsequent testimony on such assumed knowledge held not error.

2. Criminal law $\hookrightarrow$ 371(9)—In prosecution for statutory rape, evidence that, on other occasions than charged, defendant had been guilty of similar acts, held properly admitted (Pen. Code, § 261, subd. 1).

In prosecution for statutory rape, under Pen. Code, § 261, subd. 1, evidence that, on other occasions than specified in the information, defendant had been guilty of acts similar to those for the commission of which he was on trial, held properly admitted.

3. Rape $\hookrightarrow$ 48(2).

In prosecution for rape, under Pen. Code, § 261, subd. 1, prosecutrix may properly testify that she made complaint, but may not recite details.

4. Criminal law $\hookrightarrow$ 1186(4).

In prosecution for statutory rape, under Pen. Code, § 261, subd. 1, improperly permitting prosecutrix to recite details and particulars of complaint made by her held not reversible error, in view of Const. art. 6, § 4½.

5. Criminal law $\hookrightarrow$ 730(11)—In prosecution for rape, improper argument that defendant had not denied traveling in automobile with prosecutrix and others held not prejudicial error. In view of Instructions (Pen. Code, § 261, subd. 1).

In prosecution for statutory rape, under Pen. Code, § 261, subd. 1, where there was evi-

dence that defendant, prosecuting witness, his 13 year old daughter, and another traveled through several states in an automobile, improper argument that defendant had not denied such fact held not prejudicial error, in view of court's instructions.

6. Criminal law ⚡730(7).

In prosecution for rape, under Pen. Code, § 261, subd. 1, argument of district attorney that one of the streets on which defendant drove his automobile on the night of the alleged assault was a very rough street, if not based on evidence, held not prejudicial, in view of court's instructions.

7. Indictment and information ⚡176.

In prosecution for statutory rape, under Pen. Code, § 261, subd. 1, state is not required to prove that act was committed on certain date, but only that it was committed on or about date specified in information.

8. Criminal law ⚡829(1).

Refusal of requested instructions covered by other given instructions is not error.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

R. I. Branch was convicted of statutory rape, and he appeals. Affirmed.

Emmons & Aldrich and J. O. Reavis, all of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

HOUSER, J. Defendant appeals from a judgment of conviction of the crime of rape as defined by subdivision 1 of section 261 of the Penal Code of the state of California. He also appeals from an order denying his motion for a new trial.

[1] Appellant's first specification of prejudicial error is that, over defendant's objection, the prosecuting witness was permitted to state that she knew what was meant by the expression "sexual intercourse," and that her subsequent testimony with reference to the alleged acts of defendant was based upon such assumed knowledge. The reporter's transcript of the proceedings had on the trial of the action shows that on the cross-examination of the prosecuting witness she stated that the matron of the detention home had told her the meaning of the expression under consideration. Although thereafter defendant had ample opportunity otherwise to test the knowledge of the witness, no attempt of any sort was made to do so. It must therefore be presumed that defendant was satisfied with the source of information of the prosecuting witness and as a consequence that she had been correctly informed as to the significance of the words which she used. But aside therefrom, the evidence shows that the prosecuting witness was a girl of the age of 14 years and, judging from her testimony, was

apparently of fair intelligence. The fact, as shown by the evidence, that on one occasion defendant, in company with the prosecuting witness and his 13 year old daughter and a youth of 16 years of age, drove an automobile at night to a secluded spot, and that on such occasion defendant fondled and caressed the prosecuting witness, and shortly thereafter defendant and the prosecuting witness left the automobile for 15 or 20 minutes, and that they took a blanket with them, together with the further fact that the evidence discloses that on numerous occasions at night defendant occupied the same bed with the prosecuting witness, would justify the inference that, judged by "the usual passions and propensities of men," the act of sexual intercourse took place between defendant and the prosecuting witness, and consequently, that the knowledge possessed by the prosecuting witness as to the meaning of the expression was accurate. In such circumstances, that appellant's contention be adopted would require an indulgence in a presumption of ignorance on the part of the prosecuting witness which would be wholly out of keeping with the ordinary observations of everyday life and its surroundings.

[2] Appellant complains of the ruling of the trial court in admitting in evidence, over defendant's objection, the testimony of each of several different witnesses, including that of the prosecuting witness, which tended to establish the fact that on several occasions other than that specified in the information defendant had been guilty of acts similar to those for the commission of which he was on trial. Appellant cites no authority to sustain his position. On the other hand, the authorities are numerous, if not universal, to the effect that in criminal cases of the nature of that here under consideration evidence of identical acts on the part of the defendant is admissible for the purpose of showing the libidinous proclivities of the defendant. In prosecutions of this character the lascivious disposition of the defendant, if proven, is a circumstance tending to establish the proneness of the defendant to commit the particular act of which he is charged. In the instant case the lecherous traits in the character of the defendant having been proven to exist at a time not remote from the time specified in the information as that at which the offense charged was committed, it is but a fair inference that in circumstances affording a favorable opportunity for the commission by defendant of a similar act he would indulge his adulterous passions in accordance with his characteristic propensity.

[3, 4] Appellant contends that prejudicial error was committed by the court in permitting the prosecuting witness to testify to certain self-serving declarations. It appears that on redirect examination the complaining witness was permitted to state that immedi-

ately after the act of which complaint is made had taken place she told her girl companion that she had had sexual intercourse with the defendant; also that on the trial of defendant such companion was allowed to testify on direct examination that shortly after the offense was alleged to have been committed the prosecuting witness had told her *something*, although the court sustained defendant's objection to a question as to what was actually told her at that time.

It seems to be conceded by appellant that evidence of the fact that the prosecuting witness *complained* of defendant's objectionable conduct immediately after its occurrence was admissible; but the point is made that it was error to permit the prosecuting witness to state of what the complaint consisted as well as to allow the girl companion to corroborate the prosecuting witness by testifying that she had told her an indefinite *something*.

The law appears to be well established that evidence may be received of the fact that *complaint* was made, by the victim of an assault of the nature of that charged herein, provided that such complaint be made within a reasonable time after the assault was committed. *People v. Stewart*, 32 P. S. 97 Cal. 238; *People v. Baldwin*, 49 P. 186, 117 Cal. 244; *People v. Barney*, 47 P. 41, 114 Cal. 554; *People v. Wilmot*, 72 P. 838, 139 Cal. 103. The rule, however, limits the evidence to the bald statement that a *complaint* was made and expressly forbids a recital of details or particularities.

A complaint by a prosecuting witness, to have been properly admissible in evidence as such, should at least have been pertinent to the issue. But the relevancy of the "complaint" can be tested only by the defendant on cross-examination of the witness. Had the prosecuting witness "complained" of the weather or of the roughness of the road over which the automobile was being driven on this particular occasion, without cross-examination to develop of what the complaint consisted (which could have been done only by defendant and at his own risk of having stated the very things from which the rule protects him on direct examination of the witness), the mere fact that a "complaint" had been made would have suggested the surmise, and probably would have been so interpreted by the jury, that the prosecuting witness had genuinely complained of some conduct on the part of the defendant which was relevant to the charge against him.

In the instant case the prosecuting witness was asked:

"Q. Now after you had the first act of sexual intercourse with Mr. Branch the Sunday that you and Mr. Branch and Mr. Louis Dwight and Sylvia Branch went in this Ford coupé did you tell anybody that you had sexual intercourse with Mr. Branch?"

The answer was: "Yes, sir; * * * Sylvia Branch."

In the case of *People v. Wilmot*, 72 P. 838, 139 Cal. 103, the facts were that several days after the assault was committed the prosecuting witness as a matter of "gossip" told several of her friends of the occurrence. Thereafter one of them was called as a witness, and asked the question, "Did she [the prosecuting witness] say whether or not this defendant had had sexual intercourse with her?"

* * * Did she say that he had?" to which question the witness replied: "She did say that he had on the 9th of May."

In ruling upon the admissibility of such evidence, the court said:

"That the testimony elicited was incompetent is very clear, and that it must have substantially affected defendant's cause is likewise clear. * * *

In *People v. Prietz*, 164 P. 13, 32 Cal. App. 727, the judgment was reversed and a new trial granted because of the error of the trial court in permitting a similar question to be answered. To like effect, see the following cases: *People v. Lambert*, 52 P. 307, 120 Cal. 170; *People v. Tierney*, 7 P. 37, 67 Cal. 54; *People v. Mayes*, 6 P. 691, 66 Cal. 597, 56 Am. Rep. 126; *People v. Graham*, 21 Cal. 261; *People v. Fernandez*, 87 P. 1112, 4 Cal. App. 314.

With one exception, each of the foregoing cases was decided prior to the adoption of section 4½ of article 6 of the Constitution, which provides in substance that—

"No judgment shall be set aside, or new trial granted, in any case, on the ground of * * * the improper admission or rejection of evidence, * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

In the *Prietz* Case, *supra*, it does not appear that the constitutional provision to which reference has just been had was taken into consideration; but even though the attention of the court was directed to such provision, by the language of the opinion it is made clear that the reason why the error in admitting in evidence the statement made by the prosecuting witness was held so prejudicial to the case of the defendant as to require a reversal of the judgment was because the case was one "lying so close to the borderline of incredibility." In other words, the case made by the prosecution was so weak and unsatisfactory that it could not be stated with certainty that the admission of the objectionable evidence was not the determining factor in the verdict against the defendant. In the instant case no such situation is presented. The evidence of defendant's guilt, if not direct and positive, is at least convincing. The information charges that at a certain time and place defendant "did then and there willfully, unlawfully, and feloniously have and accomplish an act of sexual intercourse with and upon one (the prosecuting witness) then

and there a female person under the age of 18 years." Assuming as true that which is shown by the evidence, that neither force nor violence of any sort was used to accomplish the act of which defendant is charged, any proper "complaint" made by the prosecuting witness would necessarily have included a statement, at least in effect, that the act itself had been committed. No other possible deduction could have been drawn by the jury. Consequently the testimony by the prosecuting witness that she had made a direct statement of the fact merely made certain in the minds of the jury that which otherwise would have been an inference. But, while the prosecuting witness stated to her friend that the defendant had committed the act of which he was charged, such fact added very little to the volume of the remaining evidence as to his guilt and in itself was comparatively unimportant. It was but one circumstance of many which pointed toward the correctness of the conclusion reached by the jury. Taking into consideration, as we must, "the entire cause, including the evidence," this court cannot say that "the error complained of has resulted in a miscarriage of justice."

Appellant contends that, by reason of certain comments made by the district attorney during his argument to the jury, defendant was precluded from having a fair trial.

[5] The evidence showed, among other things, that the defendant, the prosecuting witness, the 13 year old daughter of the defendant, and a youth of 16 years of age traveled together in an automobile through several of the western and southern states of the United States. During the argument the district attorney referred to the fact that the defendant did not deny the truth of such evidence, to which statement defendant objected and requested the trial court to instruct the jury to disregard such statement, to which request the court immediately acceded. The defendant was not called upon to deny that fact, and it was improper for the district attorney to refer to his failure to deny it. But, considering the instructions of the trial court on the subject, together with the insignificance of the fact as compared with the whole body of the evidence in the case, we are constrained to hold that the error worked no hardship on the defendant.

[6] Complaint is also made by appellant that the district attorney misconducted himself in his argument to the jury, in that he made the statement that one of the streets on which defendant drove his automobile on the night of the alleged assault upon the prosecuting witness was a very rough street. It is unquestionable that in the way of argument to the jury the district attorney is not justified in making statements as to facts not

based upon the evidence. While the conduct of the district attorney perhaps was not entirely excusable, the natural assumption would be that, in view of the fact that the district attorney was not sworn as a witness, but was arguing the case to the jury, his remarks would be understood by the jury as argumentative rather than evidentiary in their nature. The evidence shows that the street used by the defendant at the time in question was the most direct route to the point of his destination, and that it was no "rougher than that other road"—which would seem to give color at least to the conclusion, as stated by the district attorney, that the street over which defendant traveled was somewhat rough. So considered, the damage, if any, to defendant's cause was very slight. Moreover, at the conclusion of the trial, the jury was instructed:

That it was "precluded from the consideration of any statements made by counsel, and you should disregard anything which has been said by them, except it may be conclusions which are legitimately deduced from the evidence. * * * The evidence which has been admitted should and must be your sole and only guide in the determination of this cause."

From the foregoing it would seem incontrovertible that the defendant suffered no injury by reason of the error (assuming it to be such) committed by the district attorney in making the statement to which reference has been had.

[7, 8] Appellant complains that the trial court erred in refusing to give to the jury certain instructions requested by defendant, being in substance that the prosecution was obliged to prove beyond a reasonable doubt that the act of which defendant was charged was committed on the date specified in the information, and that at said time an actual sexual penetration was accomplished.

With reference to the first part of the requested instruction, in the case of *People v. Wademan*, 175 P. 791, 38 Cal. App. 116, it is held that the prosecution is not required to prove that the act was committed on a certain date, but only that it was committed on or about the date specified in the information. The latter part of the instruction, as well as each of the other of defendant's refused instructions, was fully covered by other instructions which the court gave to the jury.

While, as hereinbefore intimated, some errors were committed in the course of the trial, we are of the opinion that none of such errors, nor all of them combined, seriously or at all affected the verdict.

The judgment and the order denying defendant's motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

77 Cal. App. 366

PEOPLE v. WALLINGTON. (Cr. 1372.)

(District Court of Appeal, Second District, Division 2, California. April 7, 1926.)

1. Criminal law — 1084.

Application under Pen. Code, § 1243, for stay of execution of judgment will be denied, where appeal from judgment was not taken in time under section 1239.

2. Indictment and information — 196(5).

Sufficiency of indictment cannot be questioned on motion made in lower court to set aside judgment after it has become final.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

F. Amy Wallington was convicted of an offense, and he appeals. On application for a stay of execution pending appeal. Application denied.

Max Schleimer, of Los Angeles, for appellant.

PER CURIAM. [1, 2] It appears from the face of the application for a stay of execution of the judgment under section 1243 of the Penal Code that the appeal from the judgment is abortive and that the order made after judgment necessarily must be affirmed. The appeal from the judgment was not taken in time. Pen. Code, § 1239; *Starr v. Superior Court*, 139 P. 241, 23 Cal. App. 670. The sufficiency of the indictment could not be questioned on the motion made in the lower court to set aside the judgment after it had become final. *People v. Mooney*, 174 P. 325, 178 Cal. 525; *People v. Reid* (Cal. Sup.) 232 P. 457, 36 A. L. R. 1435.

The application for stay of execution is denied.

77 Cal. App. 375

PEOPLE v. BRYANT. (Cr. 879.)

(District Court of Appeal, Third District, California. April 8, 1926.)

1. Assault and battery — 92—Evidence of severe cuts inflicted by defendant, and evidence supporting finding either way on issue of self-defense, held sufficient to support conviction for assault with deadly weapon.

Evidence that defendant severely cut prosecuting witness, and evidence sufficient to support finding either way on question whether defendant acted in necessary self-defense, held sufficient to support conviction for assault with deadly weapon.

2. Criminal law — 1120(3)—Whether exclusion of testimony of witness given at preliminary examination was prejudicial cannot be determined, where record does not set out proffered testimony (Pen. Code, § 686).

Where record does not set out testimony of absent witness given at preliminary examina-

tion sought to be introduced under Pen. Code, § 686, it cannot be determined whether exclusion of testimony prejudiced right of defendant.

3. Criminal law — 825(3)—Defendant believing that jury would misinterpret instruction on self-defense should request further instructions in accordance with statute (Pen. Code, § 197, subd. 3).

If defendant had reason to believe that jury would misinterpret instruction on self-defense by construing it as forfeiting right of party first in fault to thereafter defend himself, he should have proposed an instruction in accordance with Pen. Code, § 197, subd. 3, stating conditions under which defendant, though assailant, may resort to use of deadly weapon in self-defense.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Lawrel Bryant was convicted of assault with a deadly weapon, and he appeals. Affirmed.

Hale Day, of Los Angeles, and Donald McKisick, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was charged with the crime of assault with a deadly weapon with intent to commit murder. He was convicted of assault with a deadly weapon. This appeal is from the judgment and the order denying a new trial.

[1] There can be no possible doubt as to the sufficiency of the evidence to support the verdict and judgment. The defendant severely cut the prosecuting witness in several places, including "laceration of the face and left ear, * * * two large, long incisions on the abdomen, which took seventeen horsehair stitches, * * * many small lacerations on the left arm and the side, * * * some of them were very superficial and some of them deep enough to suture, * * * a laceration of the left hand, and it took six horsehair sutures to sew that up." The defendant claimed that he acted in necessary self-defense. There is sufficient evidence to support a finding either way upon that issue.

[2] Appellant contends that the court erred in excluding the testimony of a certain witness given at the preliminary examination. Evidence was introduced which tended in some degree to show that the witness could not "with due diligence be found within the state." Pen. Code, § 686. The trial court held that the evidence failed to show due diligence. While it appears that the court was justified in so holding, it is unnecessary to examine the evidence bearing upon that question, because the record does not show what the proffered testimony was, and, in the absence thereof, it is impossible to determine whether its exclusion prejudiced the rights of the defendant. *People v. Brotherton*, 47 Cal. 388, 404; *People v. Bidleman*, 38 P. 502,

104 Cal. 608, 615; *People v. Singh*, 188 P. 987, 182 Cal. 457, 482; *People v. Balmain*, 116 P. 303, 16 Cal. App. 28, 32; *People v. Lowrie*, 87 P. 253, 4 Cal. App. 137, 141.

[3] Complaint is made that the court erred in giving a certain instruction. The instruction is in the language of the third general rule of self-defense, stated by the Supreme Court in *People v. Hecker*, 42 P. 307, 109 Cal. 451, 462, 30 L. R. A. 403, and approved in *People v. Glover*, 74 P. 745, 141 Cal. 233, 241, and was followed by another instruction, setting forth that the defendant was entitled to act upon appearances and to defend himself against threatened danger, whether real or apparent only. Appellant says that, under this instruction, "the party first at fault forfeits any right to defend himself thereafter." The instruction cannot be so interpreted. If the defendant had any reason to believe that the jury would so understand it, he should have proposed an instruction in accordance with the provisions of section 197, subd. 3, of the Penal Code, which states the conditions upon which a defendant, even though the assailant, may resort to the use of a deadly weapon in self-defense. The defendant proposed no instructions whatever, and those given by the court contain a concise and fair statement of the law applicable to the case and are exceptionally free from error. If the defendant desired further instructions, he should have requested them.

The judgment and the order are affirmed.

We concur: HART, J.; PLUMMER, J.

77 Cal. App. 306

TODD v. PAYNE. (Civ. 5367.)

(District Court of Appeal, First District, Division 2, California. March 31, 1926. Hearing Denied by Supreme Court May 27, 1926.)

1. Corporations § 133—Transferee of corporate stock is "person aggrieved," entitled to recover penalty for refusal to issue certificate (Civ. Code, § 324).

Transferee of share of corporate stock is "person aggrieved," within Civ. Code, § 324, providing for recovery of penalty for refusal to issue certificate of stock.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Aggrieved.]

2. Corporations § 133—Transferee of corporate stock need not prove that he is bona fide stockholder, in action for statutory penalty for refusing to issue certificate, notwithstanding showing that inspection of books was one purpose of transfer (Civ. Code, §§ 324, 378).

In action under Civ. Code, § 324, to recover penalty for refusal to issue certificate of cor-

porate stock, transferee held not required to prove that he was bona fide stockholder, notwithstanding it appeared that inspection of corporate books was one of purposes of transfer for which good faith is necessary under section 378.

3. Evidence § 70.

There is a presumption of good faith which attaches to written documents.

4. Evidence § 82.

There is a presumption in favor of judgment that findings of fact cover all issues presented at trial.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by James H. Todd against Howard M. Payne to recover penalty for refusal to issue certificate of stock. Judgment for plaintiff, and defendant appeals. Affirmed.

Walter G. Bonta, of San Francisco, for appellant.

Lovett K. Fraser, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued to recover the penalty provided by section 324 of the Civil Code for defendant's refusal to issue to him a certificate of stock in the Greater Berkeley Land Company, a corporation of which the defendant was secretary. The complaint was in the terms of the statute, and alleged that the original owner of the stock had indorsed, transferred, and delivered to the plaintiff; that he presented the indorsed certificate to defendant, and demanded the entry thereof on the corporation books in plaintiff's name and the issuance of a new certificate to him. The answer admitted the demand, and justified the refusal only on the ground that defendant was uncertain as to the validity of the indorsement. The trial court found all the facts true as alleged in the complaint, and also found that defendant had ample opportunity to satisfy himself as to the indorsement, but made no effort to do so. Judgment followed for plaintiff in the sum of \$400, as provided in the Code section cited. Defendant has appealed on the judgment roll and a bill of exceptions.

The appeal is based upon the ground that the respondent failed to show that he was the "party aggrieved" to whom the Code gives the right of action, and that he failed to show that he was a "bona fide" owner of the stock.

[1] The first point is answered by the Code section cited, which provides that the shares of stock of a corporation of this nature are personal property which may be "transferred by indorsement by signature of the proprietor * * * and the delivery of the certificate." But such transfer is not valid, except for certain purposes, until entered upon the books of the corporation. By the same sec-

tion a right of action for the stipulated penalty is given to the "person aggrieved" whenever a corporate officer shall refuse to make the entry, or to transfer the stock or to issue a certificate "to the transferee as provided by this and the next preceding section." The transferee mentioned in the same section is the one to whom a certificate of stock has been duly indorsed and delivered by the original owner. He is the "person aggrieved" to whom the right of action is given, and it is not necessary for him to show, in an action under the section that he has any other claim of right than that of such a transferee.

[2-4] The point that the respondent failed to show that he was a "bona fide" stockholder was not raised by the pleadings, and is wholly beyond the issues. The good faith of the stockholder is necessary in a demand for an inspection of the corporate books under section 378 of the Civil Code, and it appears from the evidence that this was one of the purposes for which the transfer to the respondent was made. This is not sufficient to overcome the presumption of good faith which attaches to the written document or the presumption in favor of the judgment that the findings of fact cover all the issues presented at the trial.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

77 Cal. App. 339

JENKINS et al. v. REARDON et al.
(Civ. 5345.)

(District Court of Appeal, First District, Division 2, California. April 5, 1926.)

1. Mandamus ☞3(4), 23(1) — Mandamus against board of public works held properly refused, in absence of proof that plaintiffs were parties beneficially interested in preventing violation of State Housing Act and had no other plain, speedy, or adequate remedy in ordinary course of law (St. 1923, p. 781; Code Civ. Proc. §§ 1086, 1091).

Mandamus against board of public works held properly refused, in absence of proof that plaintiffs were parties beneficially interested in preventing violation of State Housing Act, denied in respondents' answer, and that plaintiffs had no other plain, speedy, or adequate remedy in ordinary course of law, in view of Code Civ. Proc. §§ 1086, 1091.

2. Mandamus ☞3(4)—Plaintiffs, seeking to mandamus board of public works to prevent erection of building claimed to violate State Housing Act, if parties with beneficial interest, had legal remedy by direct action (St. 1923, p. 781).

Plaintiffs, seeking to mandamus members of board of public works to take action to prevent completion of building claimed to violate State

Housing Act, if parties beneficially interested, had legal remedy by direct action against those erecting building, and therefore mandamus was properly refused.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Mandamus by Harry G. Jenkins and another, individually and as executors of the will of Anna Jenkins, deceased, and Charles A. Rossier, as guardian ad litem of Bernice H. Jenkins, a minor, against Timothy A. Reardon and others, as members of the Board of Public Works of the City and County of San Francisco. Judgment for defendants, and plaintiffs appeal. Affirmed.

H. M. Anthony, of San Francisco, for appellants.

John J. O'Toole, City Atty., of San Francisco, for respondents.

NOURSE, J. Plaintiffs sued the defendants as members of the board of public works of the city and county of San Francisco for a writ of mandate to compel them to take some action to prevent the completion of a building in process of construction by one Zimmerman. The basis of the action is that the building was being erected on a lot adjoining one owned by the ward of plaintiffs in accordance with plans and specifications approved by the defendants which called for less air space than that required by the State Housing Act (St. 1923, p. 781). The position of the defendants is that, inasmuch as the lot upon which the apartment house was being erected ran from a main street to a public alley, one-half of the width of the alley should be taken in the estimate of air space for the building, and that the plans accordingly met all the requirements of the statute.

On the hearing in the court below, the plaintiffs offered evidence showing that the plans had been approved by the defendants, and that the amount of air space provided (not including the public alley) was 366 square feet. Evidence was also offered by the plaintiffs to show that the members of the board of public works believed that the plans and specifications fully complied with the demand of the statute. No evidence was offered by the defendants, and the matter was submitted on the showing above noted. Judgment went for the defendants, from which the plaintiffs have appealed on type-written records.

[1, 2] The judgment must be sustained on the ground that the appellants failed to prove two of the essential elements in an application for the extraordinary relief of mandamus—that they were the parties beneficially interested, and that they had no other plain, speedy, or adequate remedy in the ordinary course of law. Code Civ. Proc. § 1086. The

interest of the appellants was denied by the respondents in their answer, and this was not countervailed by proof, "either in direct denial or by way of avoidance." Code Civ. Proc. § 1091; 16 Cal. Jur. pp. 868, 869, § 66. If the appellants were parties beneficially interested, who claimed that the construction of the building involved some private right, it follows as of course that they had their legal remedy by direct action against those erecting the building.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

77 Cal. App. 377

PEOPLE v. ALFONSO. (Cr. 903.)

(District Court of Appeal, Third District, California. April 8, 1926.)

1. Witnesses $\S$ 405(2)—Defendant, charged with driving while intoxicated, could not be impeached on issue whether he had drunk liquor on previous occasions.

Defendant, charged with driving while intoxicated, could not be impeached on issue whether he had drunk liquor at other times during preceding three years, since such issue was immaterial to main issue.

2. Criminal law $\S$ 369(2)—That defendant, charged with driving while intoxicated, was a bootlegger does not tend to show that he drank concoctions vended.

That defendant, charged with driving while intoxicated, was a bootlegger did not tend to show that he drank concoctions which he vended.

3. Criminal law $\S$ 369(2)—Admission on cross-examination of evidence of illegal possession of liquor, and pleas of guilty, and remarks of district attorney that defendant was a bootlegger, held reversible error in prosecution for driving while intoxicated (Code Civ. Proc. § 2051).

In prosecution for driving while intoxicated, admission of evidence, on defendant's cross-examination, of illegal possession of liquor, and number of times he pleaded guilty, and remarks of district attorney in argument that defendant was a bootlegger, held reversible error, since illegal possession of liquor is only a misdemeanor, which cannot be shown for impeachment purposes under Code Civ. Proc. § 2051.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

C. Alfonso was convicted of driving an automobile while under the influence of intoxicating liquor, and he appeals. Reversed.

Frank C. Hale, of Merced, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The information charges that the defendant, on the 20th of July, 1925, "did willfully and unlawfully operate and drive an automobile along and upon the public highway of the state of California, while under the influence of intoxicating liquor." He was convicted, and this appeal is from the judgment and the order denying a new trial.

The defendant's automobile collided with, and seriously damaged, an automobile owned by one witness for the prosecution, and being driven, at the time of the collision, by another witness. Both of these witnesses testified that the defendant was drunk at the time. Several other witnesses, who were at the scene of the collision shortly after it occurred, testified that they saw no indication that the defendant was intoxicated. Two of these witnesses were in such immediate association with the defendant as to enable them to determine his condition as accurately as could the witnesses for the prosecution. The defendant testified that he was not under the influence of liquor; that he "did not have a drink that night at all"; and that he had not indulged in the use of intoxicating liquor for three years. Under the pretext of contradicting the defendant's statement that he had not used intoxicating liquor for three years, and over proper objections by his counsel, the defendant was cross-examined as follows:

"Q. On March 17, 1924, you were charged with possessing liquor in your place of business there. What was that for? * * * A. They never find nothing in the house; they find it in the yard. * * *

"Q. * * * Isn't it a fact that you were charged with the illegal possession of intoxicating liquor at the time and place referred to in the preceding question, before Judge J. T. Norman, * * * and pleaded guilty to that charge? * * * A. No. * * *

"Q. I will ask you if, on the 9th day of December, 1924, you did not have intoxicating liquor at your place of business? * * * A. Yes; I had a bottle then. * * *

"Q. On the 3d day of February, 1925, did you have it in your possession then? A. No.

"Q. I will ask you if on the 26th day of July, 1925, whether you had intoxicating liquor in your possession? A. No, sir.

"Q. I submit that comes as a surprise, and ask you if on the 28th day of July, 1925, you were not charged with having intoxicating liquor in your possession, before J. T. Norman, justice of the peace, * * * and pleaded guilty to that charge? * * * A. I pleaded guilty about the 22d or 23d.

"Q. Of what? A. July, I think so. * * *

"Q. I will ask you how many times since you have been living at Merced Falls have you pleaded guilty to the illegal possession of intoxicating liquor? * * * A. Four times."

During the closing argument of the district attorney, the following occurred:

"Mr. McCray (district attorney): * * * Are you going to believe the testimony of a bootlegger from Mariposa county—

"Mr. Hale (counsel for defendant): We object to that, if the court please. There is no evidence that this defendant was a bootlegger.

"Mr. McCray: No evidence! From his own lips he says he has been convicted four times. If that doesn't constitute bootlegging—

"Mr. Hale: We ask the court to instruct the jury to disregard the remarks of the district attorney and assign them as prejudicial error."

[1-3] The court did not instruct the jury as requested, or make any comment upon the remarks of the district attorney. It may be inferred from the argument of the district attorney that the real purpose of introducing proof of defendant's illegal possession of liquor was not to contradict his statement that he had not indulged in the use of liquor for three years, but to show that he was of such degraded character as to be unworthy of belief. The material issue in the case was whether the defendant was under the influence of liquor at the time of the collision. Whether he had or had not drunk liquor at other times during the preceding three years was immaterial to that issue, and a witness is not to be impeached upon an immaterial matter. Neither does proof that one is a bootlegger tend to show that he is foolish enough to drink the concoctions which he vends. Many errors in the trial of criminal cases would be avoided by observance of the plain provisions of section 2051 of the Code of Civil Procedure that a witness may not be impeached "by evidence of particular wrongful acts, except that it may be shown * * * that he had been convicted of a felony." Illegal possession of liquor is not a felony, but a misdemeanor only. The admission of the foregoing evidence and the comments of the district attorney thereon were clearly erroneous and highly prejudicial to the rights of the defendant. *People v. Adams* (Cal. App.) 244 P. 106, and cases there cited.

The judgment and the order are reversed.

We concur: HART, J.; PLUMMER, J.

77 Cal. App. 367

PEOPLE, on Inf. of WEBB, Atty. Gen., v. HONEY LAKE VALLEY IRR. DIST. (AN-HEIM NAT. BANK et al., Interveners). (Civ. 3056.)

(District Court of Appeal, Third District, California. April 7, 1926. Hearing Denied by Supreme Court June 3, 1926.)

I. Limitation of actions § 48(2), 66(2).

Cause of action for money payable on demand accrues with inception of obligation and without necessity of demand.

2. Limitation of actions § 48(6)—Limitations held to run against warrants of irrigation district which recited that they were payable from specified funds from time they were due and payable and not from time fund was provided (Code Civ. Proc. § 337, subd. 1; Irrigation Act, § 61 [as amended by St. 1915, p. 1369, § 6], section 39 [as amended by St. 1917, p. 765, § 27]).

Statute of limitations, Code Civ. Proc. § 337, subd. 1, held to run against warrants of irrigation district reciting that they were payable from specified "funds" from time they were due and payable, and not from time fund was provided, since they were not payable out of special funds in view of Irrigation Act, § 61 (as amended by St. 1915, p. 1369, § 6), and holders of warrants could by mandamus compel levy of assessments to pay them after such date in view of section 39 (as amended by St. 1917, p. 765, § 27), or convert their claims to judgments.

3. Mandamus § 114—Holders of warrants of irrigation district having secured judgment in proceeding for dissolution of such district can enforce payment of their claims only by mandamus against board of supervisors to compel levy of assessments (St. 1919, p. 751).

Holders of warrants of irrigation district having secured judgment in proceeding under St. 1919, p. 751, for dissolution of such district, can enforce payment of their claims only by mandamus against board of supervisors to compel levy of assessments.

4. Limitation of actions § 118(1)—Presentation of petition to Attorney General by holders of irrigation district warrants, asking that proceedings for dissolution of district be commenced, held not to constitute commencement of action on warrants so as to stop running of statute of limitations (St. 1919, p. 751; Code Civ. Proc. § 337, subd. 1, and sections 22, 350).

Presentation of petition to Attorney General by holders of irrigation district warrants, asking that proceeding under St. 1919, p. 751, for dissolution of district be commenced, held not to constitute commencement of action on such warrants so as to stop running of statute of limitations, Code of Civ. Proc. § 337, subd. 1, in view of section 22, defining action, and section 350 stating when action is commenced.

5. Limitation of actions § 142—Resolution of directors of irrigation district ordering second assessment for payment of outstanding warrants held not acknowledgment or new promise that would stop running of statute of limitations against holders of warrants, no acknowledgment being made to them (Code Civ. Proc. § 337, subd. 1, and section 360).

Resolution of board of directors of irrigation district ordering second assessment for payment of outstanding warrants held not to constitute such acknowledgment or new promise as to stop running of statute of limitations, Code Civ. Proc. § 337, subd. 1, against claims of holders of warrants under section 360, since an acknowledgment must be made to creditor or some one duly authorized to act in his behalf.

6. Limitation of actions — 182(5)—Defendant held not to waive right to plead statute of limitations by failure to set it up as defense in answer or amended answer.

Defendant held not to waive right to plead statute of limitations by failure to set it up as defense in answer or amended answer to complaint, since such plea is to merits.

7. Appeal and error — 235.

Objection that attorneys who appeared for defendant irrigation district were not authorized by it to so appear should be urged in trial court by motion to strike answer from files.

Appeal from Superior Court, Lassen County; W. I. Redding, Judge.

Proceeding by the People, on the information of U. S. Webb, Attorney General, under St. 1919, p. 751, for the dissolution of the Honey Lake Valley Irrigation District, on the petition of the Anaheim National Bank and others, interveners. From a judgment denying the interveners any relief, they appeal. Affirmed.

Hoyt, Norcross, Thatcher, Woodburn & Henley and John D. Hoyt, all of Reno, Nev., Curler & Curler, of Susanville, and A. Moore, of Whittier, for appellants.

U. S. Webb, Atty. Gen., for plaintiff.

J. A. Pardee and J. E. Pardee, both of Susanville, for defendant.

FINCH, P. J. The defendant was organized under the Irrigation District Act of 1897 (Stats. 1897, p. 254) and the amendments thereto. The organization was completed September 18, 1916. It embraced something over 30,000 acres of land and was governed by a board of three directors. The first assessment of the lands therein was levied September 10, 1917. Prior to that time, under the provisions of section 61 of the act, the board of directors had incurred indebtedness and had caused warrants therefor to be issued to the engineer of the district. These warrants recited that they were issued for "engineering" or "administration" expenses, in accordance with the provisions of section 61, and that they were "payable January 1, 1918, and bear interest from the date thereon." Some of them stated that they were payable "from the revolving fund"; others "from the warrant fund," and one "from the — fund." The Anaheim National Bank became the owner by assignment of fifteen of these warrants, of the face value of \$7,425, and the City National Bank acquired six of them, of the face value of \$2,600. September 10, 1917, the board of directors caused warrants to be issued to the engineer of the district in the total sum of \$5,000, "for engineering expense, from the warrant fund." These warrants recited that they bore interest at 7 per cent. per annum, but did not specify any date of payment.

[1] As stated by counsel for appellant Plotts, they were payable on demand. "A cause of action for money payable on demand accrues with the inception of the obligation and without the necessity for any demand." *Miguel v. Miguel*, 193 P. 935, 936, 184 Cal. 311, 314. They were presented to the treasurer on the day of the issuance thereof and by him indorsed: "Funds not available for payment. This warrant bears 7% interest from date Sept. 10th, 1917." They were thereafter assigned to appellant Plotts. July 16, 1918, the board of directors adopted a resolution containing the following:

"It appearing to the board, and the board so finds, that it is necessary to raise the sum of \$7,800, as follows, to wit: The sum of \$6,300 to pay in full all unpaid warrants of the district issued in accordance with and which the board hereby finds to have been issued in accordance with the act of the Legislature of the State of California, under which the district is organized and existing: * * * It is ordered that for the purpose of raising said sums as aforesaid, an assessment be levied upon all the lands within the district and that the rate of assessment be and the same is hereby, fixed as follows, to wit: For the purpose of raising the amount sufficient to pay all unpaid warrants as aforesaid, the sum of 102.3 cents on each one hundred dollars of the valuation of the said real estate as it appears upon the assessment roll for the current year."

The sum of \$2,037.04 only of this assessment was paid. The first assessment was levied at the rate of \$2.80 on each \$100 of assessed value and \$7,684 was paid thereon.

The district never acquired any property and it constructed no irrigation works. In the latter part of the year 1920, the appellants separately petitioned the Attorney General to institute proceedings under the provisions of chapter 356 of the Statutes of 1919 (Stats. 1919, p. 751) for the dissolution of the district. February 23, 1922, the Attorney General commenced this action in accordance with the provisions of such statute, praying that the district be dissolved and the amount of its indebtedness determined. Section 3 of the statute provides:

"Upon final judgment of dissolution in such action, the district in question shall be deemed dissolved and annulled. The court shall determine the amount of indebtedness outstanding against said district, including the costs of the court action herein provided for, and thereafter the appropriate county officers shall act as ex officio officers of the district; the records and papers of every kind belonging to the district shall be turned over to the proper county officers. The county treasurer shall perform the duties of the district treasurer; the county tax collector shall perform the duties of the district tax collector; the county assessor shall perform the duties of the district assessor; the county clerk shall perform the duties of the secretary of the board of directors; the board of supervisors shall perform the duties of the board of direc-

tors; they shall proceed to levy and collect such additional taxes as may be necessary upon the lands embraced within such district in the same manner and with the same procedure for non-payment that county taxes are levied and collected for the purpose of paying such outstanding indebtedness not provided for by previous assessments."

May 17, 1922, pursuant to stipulation of all the parties, appellants filed, as their complaints in intervention, the aforesaid petitions which they had theretofore presented to the Attorney General. Thereafter the defendant answered such complaints in intervention, alleging, among other things, that the causes of action set up therein were barred by the provisions of subdivision 1 of section 337 of the Code of Civil Procedure. The court found in accordance with such plea of the statute of limitations and denied the interveners any relief. They have appealed from the judgment.

[2] All of the warrants were due and payable not later than January 1, 1918. If the statute of limitations commenced to run against them at that time, it is clear that any action thereon was barred at the time this suit was commenced. Appellants contend, however, that the warrants were made payable out of a special fund, and that in such a case the statute does not commence to run until such fund has been provided. The funds upon which the warrants were drawn were in no sense special funds, to be provided in a particular way, nor were they funds created by the statute under which the district was organized. In *Carter v. Tilghman*, 51 P. 34, 35, 119 Cal. 104, 106, in discussing a similar question relating to the funds of an irrigation district, it is said:

"As a matter of bookkeeping, the board may keep as many accounts or funds as deemed necessary or convenient, but such a system of bookkeeping in no way affects the rights of creditors."

Section 61 of the Irrigation Act, at the time the warrants in suit were issued, authorized the board of directors, "before the collection of the first assessment," to incur indebtedness in a sum not exceeding 50 cents an acre and to issue warrants therefor "payable not later than the first day of January after the first assessment shall be levied." Stats. 1915, p. 1369. The statute does not provide for a particular fund out of which to pay such warrants, but at all times since July 27, 1917, section 39 of the act has made it the duty of the board of directors, "within fifteen days after the close of its session as a board of equalization," to "levy an assessment upon the lands within the district in an amount * * * sufficient to pay in full the amount of all unpaid warrants of the district issued in accordance with this act." Stats. 1917, p. 765. At any time after January 1, 1918, appellants could have maintained actions to

compel the board of directors to levy assessments sufficient in amounts to pay their warrants in full, and it must be held that the statute of limitations commenced to run against them on that day. *S. F. Savings Union v. Reclamation Dist.*, 79 P. 374, 144 Cal. 639; *Barnes v. Glide*, 48 P. 804, 117 Cal. 1, 59 Am. St. Rep. 153.

[3] Had the appellants been given judgment in this action, such judgment could not be enforced by execution against the district, but only by a suit in mandamus against the board of supervisors to compel the levying of an assessment to raise money with which to pay their claims, a remedy which they had in the first instance against the directors of the district. *S. F. Savings Union v. Reclamation Dist.*, supra. In addition to the remedy pointed out, the appellants could have avoided the bar of the statute by converting their claims into judgments. *Farwell v. San Jacinto, etc., Irr. Dist.*, 192 P. 1034, 1036, 49 Cal. App. 167, 171, was a suit to recover the amount of certain bonds of the district owned by the plaintiff. The defendant alleged that the cause of action was barred by the statute of limitations, and the trial court so held. The plaintiff contended on appeal that the statute of limitations was not available to the district for the reason that it had failed to provide a particular fund out of which the bonds could be paid. The appellate court said:

"Just because there was no fund in the treasury or because the directors of the district had failed to provide a fund out of which these general obligations could be paid, furnish no sufficient excuse to the holders of such bonds for not converting their claims into judgments against the corporation."

The question here presented is wholly unlike that considered in *Sawyer v. Colgan*, 36 P. 580, 834, 102 Cal. 283, relied on by appellants. The obligations there in question were payable out of a fund to be provided in a particular way, and the holder of the obligations could maintain no action of any character to compel the state or its officers to provide such fund. Neither could he convert the obligations into a judgment, because the state had not authorized a suit against itself. Under such circumstances, the plaintiff's cause of action did not accrue until a fund had been provided for the payment of the obligations.

[4] Appellants contend that they "moved with due diligence to cause the action to be instituted by the Attorney General," their petitions to that officer having been served upon defendant and presented to the Attorney General in the latter part of the year 1920. Presentation of such petitions to the Attorney General, however, did not constitute the commencement of an action on the warrants. "An action is an ordinary proceeding in a court of justice." Code Civ. Proc. § 22. Sec-

tion 350 of the Code of Civil Procedure, included in title 2 of part 2 thereof relating to the time within which civil actions must be commenced, provides: "An action is commenced, within the meaning of this title, when the complaint is filed."

[5] It is contended that the resolution adopted by the board of directors July 16, 1918, ordering the second assessment to raise funds for the payment of outstanding warrants, constituted such an acknowledgment or new promise as "to take the case out of the operation" of the statute under the provisions of section 360 of the Code of Civil Procedure. The resolution was not an acknowledgment or promise made to the holders of the warrants.

"The rule in California, in accordance with the weight of authority, is that an acknowledgment must be made to the creditor, or some one duly authorized to act in his behalf." 16 Cal. Jur. 593; *Searles v. Gonzalez*, 216 P. 1003, 191 Cal. 426, 430, 28 A. L. R. 73; *Clunin v. First Federal Trust Co.*, 207 P. 1009, 189 Cal. 248, 250.

[6] It is urged that the defendant waived the right to plead the statute by its failure to set it up as a defense, either in its answer or amended answer to the complaint filed by the Attorney General. The defendant subsequently pleaded the statute as a defense to the several causes of action alleged in the complaints in intervention. It did not waive such defense by its failure to plead the statute at the first opportunity, if it be conceded that there was an opportunity to plead the statute prior to the filing of the complaints in intervention. "A plea of the statute of limitations is to the merits, and a trial court has the same discretion to permit it to be pleaded by way of amendment as it has to allow the pleading of any other meritorious defense." 16 Cal. Jur. 619.

[7] It is contended that the attorneys who appeared for defendant were not authorized by defendant to so appear or to plead the statute of limitations. A deputy secretary of the district testified as follows:

"Q. You hired Mr. Pardee to defend these suits? A. I made arrangements with Mr. Pardee to represent the district. * * *

"Q. How long since the board have met in the district? A. June 9, 1919.

"Q. And there has been no action by the board calling for the defense of these claims? * * * A. Only in this way. Two members of the board signed an approval of the employment."

No motion was made in the trial court to strike out defendant's answer on the ground that it was unauthorized, and the record does not disclose that the objection here urged was made in the trial court.

"The proper mode of procedure, if the suit were not authorized, was for the defendant to

move the court upon proper affidavits to dismiss the suit, upon the ground that it was not authorized by those in whose names it was brought. * * * But it is not admissible, upon a mere suggestion at the bar by the adverse party or his attorney, to deny the right of a party to appear by the attorney of record, or to deny that the attorney so appearing has full authority to prosecute the suit." *Turner v. Caruthers*, 17 Cal. 432, 433.

"That a motion to dismiss was the proper procedure to take when the authority of the attorney is challenged, there can be no doubt." *Ventura County v. Clay*, 51 P. 189, 190, 119 Cal. 213, 215.

For like reasons, appellants should have raised the objection here urged by motion in the trial court to strike defendant's answer from the files. *Sullivan v. Dunne* (Cal. Sup.) 244 P. 343.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

77 Cal. App. 434

PEOPLE v. KING. (Cr. 1293.)

(District Court of Appeal, First District, Division 2, California. April 14, 1926. Rehearing Denied May 11, 1926. Hearing Denied by Supreme Court June 9, 1926.)

1. Criminal law §1169(5)—Error, in introducing evidence of prior offense by defendant held cured, where court struck all such evidence from record and instructed jury to disregard it.

In prosecution for grand larceny from complaining witness whom defendant had married, error, if any, in the introduction of evidence that defendant had married another woman under similar circumstances and had absconded with money she had intrusted to his keeping was cured, where court, on ascertaining that prior offense was one of embezzlement, struck all evidence from record and instructed jury to disregard it.

2. Criminal law §1169(3)—Evidence of marriage relation between accused and complaining witness held not prejudicial, where admitted by accused while testifying.

In prosecution for grand larceny from complaining witness whom defendant had married, evidence of marriage relation of defendant and complaining witness was not prejudicial, where it was freely admitted by defendant while testifying.

3. Witnesses §270(1)—Court held to have properly exercised discretion in refusing to let lengthy cross-examination of complaining witness, who was defendant's wife, on irrelevant and trivial matters, to continue (Code Civ. Proc. § 2055).

In prosecution for grand larceny from complaining witness whom defendant had married, held that, irrespective of application of Code Civ. Proc. § 2055, where defendant subjected

complaining witness to lengthy cross-examination on irrelevant and trivial matters, court properly exercised his discretion in refusing to let such method of examination continue.

4. Witnesses $\Rightarrow$ 337(5)—Compelling answer on cross-examination of accused that he had been convicted of felonies, elicited for purpose of impeachment, held within bounds of cross-examination.

Where accused took stand in his own behalf, compelling him to answer on cross-examination that he had been previously convicted of two separate felonies in another state, elicited for purpose of impeachment, held within bounds of cross-examination.

5. Criminal law $\Rightarrow$ 804(2)—Where accused requested certain instructions to be given in writing and waived all other written instructions, giving in writing such requested instructions as court deemed proper, held not ground for complaint (Pen. Code, § 1127).

Where accused requested certain instructions to be given in writing and waived written instructions as to all other matters, and trial judge gave such requested written instructions as he deemed proper, there was no violation of Pen. Code, § 1127.

Appeal from Superior Court, City and County of San Francisco; Claude F. Purkitt, Judge.

Charles F. King was convicted of grand larceny, and he appeals. Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Chas. A. Wetmore, Jr., Deputy Atty. Gen., for the People.

NOURSE, J. The defendant was tried on an indictment charging him with the larceny of \$700 from one Martha J. King. From the judgment which followed his conviction and from the order denying his motion for a new trial, he has appealed upon a typewritten record.

The facts of the case are that the defendant married the complaining witness on March 28, 1925, having met her through a correspondence club of which he was a member, and that on the 2d day of April following he left the rooms which they were occupying in the city and county of San Francisco, taking with him the sum of \$700 in currency which he had persuaded his wife to draw from her bank on that day upon the representation that he would invest the money in a grocery business which he proposed to conduct for their benefit. The defendant was found some time later in the city of San Diego, where his arrest was made.

[1] On this appeal he complains that he was prejudiced by the introduction of evidence showing that a few years before he had married a Mrs. McDonald under similar circumstances, and that a short time after his marriage he had separated from her and

taken with him the sum of \$1,750 of her funds which he had persuaded her to intrust to his keeping. This evidence was offered over the objection of appellant, but when it developed that the offense which was then committed was one of embezzlement rather than grand larceny, the trial judge struck all the evidence from the record and fully instructed the jury to disregard it. Though we do not pass on the question that the two offenses were so dissimilar as to require the elimination of this evidence, it is plain that if any error occurred it was cured by the rulings of the trial court.

[2] Appellant claims that the court erred in admitting evidence of the marriage relation of appellant and the complaining witness. This evidence was merely a part of the story of the case as presented by the prosecution. Furthermore, the marriage relation was freely admitted by the appellant when he took the stand in his own behalf, and no possible prejudice arose from the admission of the evidence in the prosecution's case.

[3] It is argued that the court erred in refusing to allow the appellant to call the complaining witness for cross-examination under section 2055, Code of Civil Procedure. Without passing on the question of the applicability of this section to a situation of this kind, it is sufficient to say that the appellant subjected the complaining witness to a lengthy cross-examination on matters which were irrelevant and trivial, and that the trial judge properly exercised the discretion vested in him when he refused to let this method of examination continue.

[4] The next point is that the constitutional rights of the appellant were violated when he was compelled to answer on cross-examination that he had been previously convicted of two separate felonies in another state. The appellant had voluntarily offered himself as a witness in his own behalf, and these questions, which were for the purpose of impeachment, were plainly within the bounds of cross-examination on the part of the state.

[5] Complaint is made that the court erred in refusing to instruct the jury by written instructions, as required by section 1127, Penal Code. The facts are that the appellant requested certain instructions to be given in writing, and expressly waived written instructions as to all other matters. Such of the instructions as the appellant requested in writing and which the trial judge deemed proper to give were given to the jury in writing as requested, and were filed in open court in full compliance with the Code section cited. Other points do not require consideration.

Judgment and order affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

77 Cal. App. 381

CALIFORNIA CREDIT & COLLECTION CORPORATION v. BERNARDINI.
(Civ. 5023.)

(District Court of Appeal, First District, Division 1, California. April 9, 1926.)

Corporations — 80(11)—Finding of failure to establish falsity of representations concerning value of corporate stock sustained.

In action on note given in payment for corporate stock, evidence held insufficient to establish falsity of representations made concerning value of such stock to an extent warranting appellate court in reversing a contrary finding of trial court.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by the California Credit & Collection Corporation against Gomes Bernardini. Judgment for plaintiff, and defendant appeals. Affirmed.

C. F. Lacey, of Salinas, for appellant.

J. R. Cunningham, of San Francisco, C. C. Baker, of Salinas, and Daly B. Robnett, of San Francisco, for respondent.

KNIGHT, J. The defendant, Gomes Bernardini, has taken this appeal from an adverse judgment in an action brought against him by the plaintiff California Credit & Collection Corporation upon an assigned promissory note dated May 4, 1920, for the principal sum of \$750 given by him to plaintiff's assignor, Viriden Packing Company, as payment for the balance of the purchase price of corporate stock issued and sold to him by said Viriden Packing Company.

Appellant resisted payment of the note upon the ground that its execution had been obtained through fraudulent representations made to him by the representative of said packing company at the time the stock was purchased. Those representations, as they are set forth in the answer, were as follows: That "said Viriden Packing Company was doing a large and profitable business, and that the actual value and the market value of its capital stock was \$100 per share, and it would soon thereafter be worth \$125 per share and was paying big dividends." It was further alleged that said representations were false; that at the time the same were made neither the actual nor the market value of the capital stock of said packing company exceeded \$65 a share; and that the prospective value did not exceed \$40 a share. The trial court found that said representations were made to appellant, as claimed, but further found that the same were not made with the intent to cheat and defraud, and that the same were not false.

Much of the argument presented on the appeal has been devoted to the question of

whether or not the representations, if false, are sufficient in law to relieve appellant from the payment of said note. Assuming appellant's contention with respect to that question to be supported by the authorities cited by him, he is still confronted with the finding of the trial court that said representations were not proved to be false.

In order that representations may warrant relief in any case they must, of course, be false. 12 Cal. Jur. 743, citing cases. The entire proof pertaining to this issue, as it is set forth in the bill of exceptions upon which the appeal has been taken, consists, first, of a stipulation reading as follows: "It was here stipulated by the parties that the only dividends declared upon the capital stock of the Viriden Packing Company from May 4, 1920, to the time of the trial, was a dividend of \$2 per share declared on this stock in March, 1922, and a like dividend of \$2 per share declared on January 25, 1923, and each credited on the defendant's note" (italics ours); secondly, the introduction in evidence by appellant over respondent's objections of three newspapers containing the San Francisco stock market reports. One of the newspapers introduced was of an issue of October 15, 1921, more than a year and a half subsequent to the sale of the stock; the other two were of later issues, dated, respectively, December 15 and December 17, 1923. It appeared therefrom that on the dates mentioned Viriden Packing Company stock was classed among the "unlisted securities" at buying and selling prices of \$25 and \$29 a share.

It will be observed that, while the representations regarding the financial condition of said company, namely, that said packing company was doing a large and profitable business, and that its stock was paying big dividends, obviously related to the company's affairs as they existed prior to and at the time said representations were made, the period of time covered by the proof adduced by appellant to prove their falseness was limited to the three years following the making of said representations. The evidence offered was, therefore, too remote in point of time to be effective for the purpose for which it was intended. In this connection it may be stated that appellant testified that the company's salesman promised "to give a big dividend in a short time"; but such representation, if not amounting to a matter of mere opinion, related to a dividend to be declared in the future, and was not one of those pleaded by him or upon which he claims to have relied in entering into the transaction for the purchase of the stock. In reference to the question of the falseness of the representations as to the value of the stock, appellant claims that the record shows that the stock was not being bought or sold or even quoted

in the market at the time this transaction took place. We have been unable to find the evidence referred to, but, assuming that there was evidence introduced from which that fact was fairly deducible, it cannot be said that the terms "actual value" and "market value," as employed in said representations, meant necessarily that the stock was listed for sale at the prices mentioned or at all in the stock exchange. There was no evidence offered whatever to show the condition of the company's affairs or the value of said stock in the open market prior to or at the time of the making of such representations, or the actual value of said stock at any time. We are not prepared to say, therefore, that the evidence is legally sufficient to warrant this court in nullifying the finding of the trial court to the effect that appellant failed to prove the falseness of said representations. The recent case of *California Credit & Collection Corporation v. Randall* (Cal App.) 244 P. 958, to which appellant calls attention, is clearly distinguishable from the instant one. There the representation alleged and proved was "that said stock * * * was then paying twelve per cent. dividends" (italics ours), and the evidence offered by the defendant established the falsity of that representation. In the case before us there was no such representation alleged or proved.

For the foregoing reasons, the judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

77 Cal. App. 424

PACIFIC EMPLOYERS' INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 5445.)

(District Court of Appeal, First District, Division 1. California. April 13, 1926.)

1. Master and servant — 404 — Testimony of compensation claimant as to condition of employment held admissible, though hearsay.

Testimony by employee that he had heard parties say that employees were required to take meals at cookhouse maintained by employer as condition of employment, though hearsay, was admissible in compensation case, and, where uncontradicted, supported conclusion that employees were required to obtain meals there.

2. Master and servant — 375(1) — Injury to employee before working hours on premises of employer while on way to cookhouse for meal held sustained in "course of employment."

Injury to employee, sustained a few minutes before working hours, while passing over working premises of employer to obtain breakfast at employer's cookhouse, where employees were

required to take their meals, is sustained in course of and grows out of employment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

Proceeding under the Workmen's Compensation Act by Ed. Terrell, employé, opposed by the Pacific Employers' Insurance Company, insurer, and Papageorge & Smario, employers. An order of the Industrial Accident Commission awarded compensation, and the insurer brings certiorari. Affirmed.

H. C. Kelsey, of San Francisco, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondents.

CASHIN, J. Certiorari to review an award of compensation made by the Industrial Accident Commission of the state of California to Ed. Terrell.

It is contended by petitioner—which was the compensation insurance carrier for Papageorge & Smario, the employers of Terrell—that the evidence is insufficient to support the findings, and that the commission in making the award exceeded its jurisdiction.

It was found by the commission—Terrell being the only witness examined so far as shown by the record—that the latter was employed by the insured as a truck driver in railroad construction work at a point about two miles from Valley Springs, Cal.; that a few minutes before his working hours commenced on the date of the accident, while passing over the working premises of the employers for the purpose of obtaining breakfast at the latter's cookhouse situated thereon, he fell suffering a fracture of the kneecap, and that the injury was sustained in the course of and grew out of the employment.

[1, 2] It appears from the testimony that Terrell lodged at a hotel situated a short distance from the working premises of the insured; that the latter provided meals for their employees at a cookhouse upon the premises mentioned for which the employees paid from their wages; that, while meals were at times served at the hotel and it was possible for the employee to have obtained them there, according to his testimony such meals were usually served "only if transient people went through"; and that the nearest place other than the hotel and cookhouse where meals could be procured was at Valley Springs. The witness further testified, in substance, in response to a question as to whether employees were required by the insured to take their meals at the cookhouse, that "he had heard parties say" that the employees were required to do so as a condition to employment, relating a specific instance in which an employee was so required. While the evidence on this point was hearsay in character, such evidence in this class

of cases is admissible, and, if probatively sufficient in the judgment of the Commission, will sustain an award. *Ocean Accident & Guarantee Corporation, Limited, v. Ind. Acc. Comm.*, 182 P. 35, 180 Cal. 389; *Pac. Gas & Elec. Co. v. Ind. Acc. Comm.*, 181 P. 788, 180 Cal. 497; *State Compensation Insurance Fund v. Ind. Acc. Comm.* (Cal. Sup.) 231 P. 996; *Stats.* 1917, p. 831. There being no evidence to the contrary, the testimony mentioned had probative weight sufficient to support the conclusion that the employees were expected and in effect required to procure their meals at the cookhouse. As said in *Judson Mfg. Co. v. Ind. Acc. Comm.*, 184 P. 1, 181 Cal. 300, 302, "the right to compensation is by no means restricted to those cases where the injury occurs while the employee is actually * * * manipulating the tools of his calling"; and, where it appears, as here, that the injury occurred on the working premises of the employers, that the employee, while not actually performing the work for which he was employed, was thereon for a purpose contemplated, and, by fair inference from the testimony, required by them at a time, which, though not within his specified working hours, closely preceded their commencement, the situation is one in principle within the decision in *State Compensation Insurance Fund v. Ind. Acc. Comm.*, 227 P. 168, 194 Cal. 28, and the injury was reasonably held to have been sustained in the course of and to have grown out of the employment.

The award is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

198 Cal. 665

**ASPEGREN & CO., INC., v. SHERWOOD
SWAN & CO. (S. F. 11966.)**

(Supreme Court of California. May 28, 1926.)

1. Appeal and error ⚡798—Motion to dismiss appeal noticed to be made on certain day, "or as soon thereafter as counsel may be heard," will not be stricken because court was not in session, or scheduled to be, on designated day.

It is not ground for striking motion to dismiss appeal, where notice was that it would be made on a certain day, "or as soon thereafter as counsel may be heard," that the court was not in session, or scheduled to be in session on that day.

2. Appeal and error ⚡794.

Merits of motion to dismiss appeal will not be considered on motion to strike the motion.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Aspegren & Co., Inc., against Sherwood Swan & Co. From judgment for defendant, plaintiff appealed. Heard on motion to strike from files respondent's motion to dismiss appeal. Motion to strike denied.

Daniel N. Dougherty, of San Francisco, for appellant.

Harrison S. Robinson and Harry L. Price, both of Oakland, for respondent.

PER CURIAM. On April 12, 1926, the respondent filed with the clerk of this court a notice that it would, on the 3d day of May, 1926, at the hour of 10 o'clock a. m., "or as soon thereafter as counsel may be heard," at the courtroom of this court in the city and county of San Francisco, move to dismiss the appeal herein on the ground set forth in said notice. Thereafter, on April 20, 1926, the appellant filed a notice that it would, on the 4th day of May, 1926, at the courtroom of this court, in the city of Sacramento, move to strike from the files the respondent's motion to dismiss the said appeal on the grounds: (1) That "there will be no session of this court at the time and place specified in respondent's notice of motion to dismiss the appeal herein"; and (2) that there is no merit in the respondent's motion to dismiss the said appeal. The appellant's motion was presented on the call of the regular calendar at Sacramento on May 4th, and was submitted on the files of this court, and an additional certificate of the clerk of the trial court attached to the notice of motion setting forth certain proceed-

ings taken in the trial court during the course of the litigation and pertaining to the merits of the respondent's motion to dismiss the appeal.

[1] As to the first ground of appellant's motion, it appears that this court was not in session, nor was it scheduled to be in session, on the 3d day of May, 1926, for the purpose of hearing motions made on notice. Since the plan of calling the regular San Francisco calendar at more frequent intervals was inaugurated some years since, it has been the practice to entertain motions made on notice on the first day of said calendar, notwithstanding subdivision 1 of rule XX of this court had not been amended to conform to the new plan. That rule has recently been amended so as to so conform, but the fact that it had not been so amended prior to the date for which respondent's motion to dismiss the appeal had been noticed undoubtedly accounts for the action of the respondent in noticing said motion for the first Monday in May in San Francisco. But the fact that the court was not in session at San Francisco on that date should not of itself defeat said motion nor deprive the respondent of the right to have it heard and determined. The form of the notice specifying the time when the motion would be made, "or as soon thereafter as counsel may be heard," would entitle the respondent to the right to present its motion on the first day of the next regular session of the court in San Francisco, especially in view of the fact that respondent's action was taken in reliance upon the rule of court in effect at the time the notice was served and filed.

[2] As to the second ground of appellant's motion, we deem it the better practice, and more conducive to orderly proceeding, not to entertain and pass upon the merits of a motion to dismiss an appeal on a motion to strike the motion to dismiss from the files. The appellant's motion to strike is therefore denied.

198 Cal. 641

WIXOM v. DAVIS. (L. A. 8093.)

(Supreme Court of California. May 25, 1926.)

1. Chattel mortgages $\S$ 138(3)—Cotton raised pursuant to terms of lease held subject to chattel mortgage of lessee on future crop, notwithstanding agreement, after recording of mortgage, between lessee and lessor only, for title of cotton to be in lessor.

Cotton raised pursuant to terms of lease is subject to lien of chattel mortgage given by lessee, on cotton to be raised on leased premises, whether or not it was planted after agreement between lessor and lessee, made after recording of mortgage, and to which mortgagee was not party, that title to cotton should be in lessor.

2. Trial $\S$ 388(4)—Findings of fact are unnecessary, where agreed statement, with facts admitted in pleadings, contains all facts essential to support judgment.

Findings of fact are unnecessary, where agreed statement on which case was submitted, in connection with facts admitted in pleadings, contains all the facts essential to support judgment for plaintiff, which necessarily follows from them and the laws of the case as established on former appeal.

3. Appeal and error $\S$ 1071(5)—Making findings of facts where unnecessary in view of agreed statement held not prejudicial since they may be disregarded.

That findings of fact were made when unnecessary, in view of agreed statement, on which case was submitted, held not prejudicial, since they may be disregarded where unsupported by stipulated facts.

4. Judgment $\S$ 272—Entry in December of judgment then filed may be deemed entry of the judgment ordered in preceding January to be entered, and so not beyond jurisdiction of court.

Where, in January, there was minute order that judgment be entered for defendant, entry the following December of judgment for defendant then filed cannot be said to be beyond the court's jurisdiction, as it may be deemed entry of the judgment previously ordered.

5. Appeal and error $\S$ 1176(3)—On reversal, cause will be remanded, with directions to enter judgment which conclusions to be drawn from undisputed facts require.

The conclusions to be drawn from the undisputed facts requiring judgment for plaintiff, cause will, on reversal of judgment for defendant, be remanded, with directions to enter required judgment.

In Bank.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Action by Bertha E. Wixom against George Herrick Davis. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

H. E. Gleason, of Madera, for appellant.

Jas. F. Seymour, of El Centro, and Clarence B. Conlin and E. R. Simon, both of Los Angeles, for respondent.

SHENK, J. Conversion. The plaintiff appeals from a judgment in favor of the defendant. On a former trial of this action judgment also in favor of the defendant was reversed on the ground that, from the facts found, the conclusions of law and the judgment were unsupported. *Wixom v. Davis*, 57 Cal. App. 620, 207 P. 694. On the second trial the cause was determined on an agreed statement of facts, from which it appears that the plaintiff is the owner and holder of a chattel mortgage which covered a one-third interest in 16 bales of cotton of the value of \$1,442. In October and November, 1920, the defend-

ant took possession of and sold said cotton to and for his own use, and refused to account to the plaintiff for her one-third interest therein. The chattel mortgage was recorded February 13, 1920. It was decided on the former appeal that, upon the maturity of the notes secured thereby, on May 1, 1920, the plaintiff became immediately entitled to the possession of the cotton for the purpose of the sale of her interest therein. The defendant is the owner of a tract of land in Imperial county suitable for the raising of cotton. December 16, 1919, he leased said land on shares for a period of one year to V. E., S. H., and A. L. Edge. In March, 1920, the lessees notified the defendant that they would be unable to finance themselves in the production of a cotton crop on said land and solicited the aid of the defendant in that behalf; whereupon the defendant orally agreed to advance money and finance his lessees, provided the title to the crop should be in him and he receive one-fourth the net profits. There were no profits; in fact the value of the crop was less than the amount of the defendant's advances. The oral agreement was reduced to writing on October 25, 1920.

[1] The defendant assumes to justify his right to retain the proceeds of the sale of said cotton on the theory that the plaintiff's chattel mortgage covered only such cotton as might thereafter be grown on the premises, that the cotton could not have been planted before the execution of said oral agreement, and that said oral agreement superseded the lease, and the plaintiff was thereby cut off. The plaintiff was not a party to the agreement between the defendant and his lessees, and it was immaterial whether the cotton was planted before or after the said oral agreement, for the reason that it was stipulated in the agreed statement "that all the cotton in question in the case at bar was that cotton raised under and pursuant to the terms of the lease dated December 16, 1919." Such being the fact, it is clear that the plaintiff's mortgage lien attached to the harvested crop sold by the defendant, and that her interest in the same, under the circumstances here shown, could not be set at naught by any agreement between the defendant and his lessees to which she was not a party.

After the submission of the cause on the agreed statement of facts, the court, on January 3, 1923, entered a minute order that judgment "be ordered for the defendant." Before the entry of the judgment so ordered, the plaintiff, on September 24, 1923, filed her notice of appeal. On December 17, 1923, the court settled a bill of exceptions to be used on said appeal. Three days thereafter the court signed and filed findings of fact and conclusions of law and a judgment in favor of the defendant. The court found, in addition to facts found in accordance with the agreed state-

ment, that it was agreed between the defendant and his lessees that the oral agreement of March, 1920, subsequently reduced to writing, should supersede the said lease; that by said agreement title to the cotton crop had passed to the defendant; that no cotton had been planted prior to the oral agreement; that no interest in said cotton had become vested in the plaintiff by reason of her chattel mortgage; and that she was not entitled to the possession of the same or any part thereof. These findings are not supported by the stipulated and undisputed evidence, and no reasonable inferences may be drawn from that evidence which will support said findings.

[2-4] The plaintiff insists that the court had no authority to make findings when the case was submitted on an agreed statement of facts, citing *Gregory v. Gregory*, 102 Cal. 50, 36 P. 364, and *Bailey v. Market St. Ry. Co.*, 110 Cal. 320, 42 P. 914. The defendant does not question the rule laid down in those cases, but contends that, to render findings unnecessary, the agreed statement must contain the ultimate facts and not evidentiary facts, and it is urged that the facts contained in the agreed statement herein are evidentiary and not ultimate. To this we cannot accede. The agreed statement herein considered in connection with facts admitted in the pleadings contains all the facts essential to support a judgment for the plaintiff. From those facts and the law of the case as established on the former appeal, to the effect that the plaintiff was entitled to the possession of the cotton for the purpose of the satisfaction of her lien, it necessarily follows that the judgment should be so entered. Findings of fact were unnecessary, but the fact that they were made did not prejudice the plaintiff on this appeal for the reason that, wherein the same are in harmony with the stipulated facts, they are harmless, and, wherein they are unsupported by those facts as above noted, they may now be disregarded. The entry on December 24, 1923, of the judgment filed on December 20, cannot be said to have been beyond the jurisdiction of the court, for the reason that such entry may be deemed the entry of the judgment ordered to be entered on January 3, 1923.

[5] The judgment is therefore reversed. As the conclusions to be drawn from the undisputed facts require judgment to be entered for the plaintiff, the cause is remanded to the trial court, with directions to enter judgment in favor of the plaintiff and against the defendant for the amount prayed for in the complaint. See *Perkins v. Cowles*, 157 Cal. 625, 108 P. 711, 137 Am. St. Rep. 158, 30 L. R. A. (N. S.) 283; 2 Cal. Jur. 991.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; LENNON, J.; LAWLOR, J.; RICHARDS, J.

198 Cal. 645

HENNESSEY et al. v. ROBINETT et al.
(S. F. 11054.)

(Supreme Court of California. May 25, 1926.)

1. Trial $\S$ 396(3)—Finding that defendants maintained fence between their lot and plaintiffs' for over 20 years; that plaintiffs and their predecessors acquiesced in boundary line marked thereby and consented to erection of dwelling house by defendants on their land; and that such house was on land marked by fence, held not responsive to issues raised by complaint alleging, and answer denying, encroachment on plaintiffs' lot by addition to house flush with new fence erected thereon by plaintiffs.

Court's finding in ejectment that defendants maintained a fence between their lot and plaintiffs' for over 20 years last past; that plaintiffs and their predecessors acquiesced in boundary line marked by such fence for such time and made no objection to, but consented to defendants' erection of dwelling house on their land, and that such house was on land marked by such fence, held not responsive to issues raised by complaint alleging, and answer denying, encroachment on plaintiffs' lot by erecting addition to dwelling house flush with new fence erected by plaintiffs on their lot.

2. Appeal and error $\S$ 763.

Failure to print in appellant's opening brief, containing evidence relied on, portion of record on which they relied, was cured by filing supplementary brief incorporating pleadings on which they also relied.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter E. Herzinger, Judge.

Action by Ellen Hennessey and another against Thomas Robinett and another. Judgment for defendants, and plaintiffs appeal. Reversed.

Paul F. Fratessa and Fabius T. Finch, both of San Francisco, for appellants.

R. M. F. Soto and John R. Jones, both of San Francisco, for respondents.

SHENK, J. Ejectment. The complaint alleges that the plaintiffs are the owners of a parcel of land on the westerly side of Eighth avenue between Moraga and Noriega streets in San Francisco, having a frontage of 25 feet by a uniform depth of 120 feet, and that the defendants, who are the owners of the lot immediately to the south, encroach upon the southerly 2 inches of the plaintiffs' lot. The answer denies the encroachment. The court found that the plaintiffs are the owners and entitled to the immediate possession of the land described in the complaint, but found that it is not true that the defendants are encroaching upon the plaintiffs' land. The court further found:

"That the defendants own a certain lot of land 50x120 feet on the southerly boundary of

the land owned by plaintiffs; that defendants have maintained a fence between the northerly boundary of defendants' land and the southerly boundary of plaintiffs' land for more than 20 years last past; and that, at all times in the complaint mentioned, plaintiffs and their predecessors in interest acquiesced in the boundary line marked by said fence, as said boundary line had been established for more than 20 years last past; that during the month of September, 1921, defendants erected a dwelling house upon the parcel of land so owned by them; that at all times during the construction of said dwelling house plaintiffs saw said dwelling house being constructed, made no objection thereto, but, on the contrary consented to the erection of said dwelling house, and had a complete knowledge thereof; that said dwelling house is upon the land marked by said fence as hereinbefore set forth for a period of more than 20 years last past and is upon the land owned and occupied by the defendants."

From a judgment in favor of the defendants, the plaintiffs appeal. The plaintiffs contend: (1) That the finding above quoted is not in accordance with any issue raised by the pleadings; (2) that the finding that defendants' house is built on the line of the old fence is contrary to the evidence; and (3) that the finding that the plaintiffs knew that the defendants' house was being built upon their lot and consented thereto is contrary to the evidence.

[1] Twenty years or more before this controversy arose, a fence was erected along what was then deemed to be the division line between said properties. The fence encroached upon the defendants' property from 6 to 8 inches at the front and upon the plaintiffs' property about 1¼ inches at the rear. The old fence became dilapidated, and the plaintiffs, in 1921, suggested that the same be removed and a new fence constructed at the joint expense of the parties. To this defendants refused to agree. Thereupon the plaintiffs, with the consent of the defendants, removed the old fence and erected a new one at their own expense, extending about 60 feet from the front property line. The true dividing line between the lots was located and the new fence was placed about 2 inches northerly of the plaintiffs' southerly line. The defendants, evidently believing that the new fence was on the true dividing line, erected an addition to their dwelling house flush with the fence and overlapping the plaintiffs' property by from 1½ to 1¾ inches. It appears, from the evidence, beyond question that the defendants are encroaching upon the plaintiffs' land to the extent of said overlap. The finding above quoted is not responsive to any issue raised by the pleadings. All question as to the location of the old fence on an agreed boundary line was eliminated, at least so far as the front 60 feet of said fence was concerned, by the construction of the new fence. The fact

that the old fence encroached on the defendants' property and established an agreed boundary line by long acquiescence might have been available to the plaintiffs as a basis for the contention that the old fence line was the division line, but they are not so contending. The removal of the old fence and the construction of the new fence entirely on the plaintiffs' land removed all controversy as to the old fence line. No issue as to the estoppel of the plaintiffs by reason of consent to the construction of the defendants' building at its present location or by failure to object thereto was raised by the pleadings, nor does it appear that such an issue was raised by the evidence. There was also no evidence that the defendants' building conforms to the line marked by the old fence.

[2] The only point made by the defendants is that the appeal herein should be dismissed because there was not printed in the appellants' opening brief, nor in a supplement thereto, the portion of the record on which the appellants rely. The opening brief of the appellants contains the evidence upon which they rely and by leave of court they filed a supplement to said brief, incorporating therein the pleadings in the action upon which they also rely. Any defect in the record which theretofore existed was cured by the filing of the supplement.

The judgment is reversed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; RICHARDS, J.; LENNON, J.; CASHIN, Justice pro tem.

198 Cal. 649

BARBER v. PALO VERDE MUT. WATER CO. et al. (L. A. 9051.)

(Supreme Court of California. May 26, 1926.)

1. Appeal and error $\S$ 106, 870(2)—Statute authorizes appeals only from orders changing place of trial from one county to another, not from order changing place to another place in same county; but such order is reviewable on appeal from final judgment (Code Civ. Proc. $\S$ 142, 397, 963, subd. 2).

Code Civ. Proc. $\S$ 963, subd. 2, authorizes appeals only from orders changing place of trial from one county to another, under section 397, enacted at same time, not from order changing place to another place in same county, under section 142, as amended in 1919, though section 963 was re-enacted in 1923 by statute amending it in another particular; but such order may be reviewed on appeal from final judgment.

2. Statutes $\S$ 230.

Clause in statute will be given no different meaning after amendment than before, if amendment relates to other matters, and was obviously designed not to affect meaning.

3. Courts $\S$ 74—Judges of superior court may revoke order to hold court elsewhere than at county seat, and order change of place of trial to county seat, subject to review on appeal from final judgment (Code Civ. Proc. $\S$ 142, as amended in 1919).

Judges of superior court, being authorized by Code Civ. Proc. $\S$ 142, as amended in 1919, to direct that court be held or continued anywhere in county at least 120 miles from county seat, may revoke such order, and order change of place to county seat, court retaining jurisdiction of parties and subject-matter at all times, and parties not being entitled to demand that place of trial be changed from appointed place; but order changing place to county seat may be reviewed on appeal from final judgment.

In Bank.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Allyn H. Barber against the Palo Verde Mutual Water Company and another. From an order changing the date and place of trial, the named defendant appeals. Appeal dismissed.

I. W. Stewart, Ward Chapman and Arvin B. Shaw, Jr., all of Los Angeles, for appellant.

Culver & Nourse, of Los Angeles, for respondent.

A. T. Stadler, pro se.

WASTE, C. J. Motion to dismiss an appeal from an order of the superior court of Riverside county purporting to change the place of trial of the action from the city of Blythe, in said county, to Riverside, the county seat. The action was brought for conversion of shares of stock of the defendant company. The answer denied conversion and set up specifically that plaintiff was not the real party in interest. When the cause was at issue it was stipulated between the parties that it might be set down for trial. It is the custom in Riverside county for the superior court, acting under the permission granted by section 142 of the Code of Civil Procedure, to hold a regular semiannual term of the court at Blythe, which is situated more than 200 miles from the county seat. This section, as amended in 1919, provides that, whenever the judge or judges of the superior court, authorized to hold or preside at a court appointed to be held in a particular place in a county, "deem it necessary or advisable," they may "direct that the court be held or continued at any other place in the city and county, county, city or town not less than one hundred twenty miles distant from the county seat." The court set the present action for trial during the term to be held in Blythe, beginning October 26, 1925. Subsequently the plaintiff moved for an order changing the date and place from the October term at Blythe to a date convenient to the calendar of the court

at Riverside. The motion was supported by affidavits, and was made upon the ground that a fair and impartial trial could not be had at Blythe. The court granted the motion, and the defendant Palo Verde Mutual Water Company has appealed. The plaintiff and respondent now moves to dismiss on the ground that the order granting the motion is not appealable.

[1, 2] Appellant's contention in support of its appeal is that the order of the lower court directing that the cause be heard at Riverside instead of Blythe was, in effect, an order changing the place of trial, within the contemplation of section 963, subd. 2, of the Code of Civil Procedure, granting an appeal from such orders. We are not persuaded that that is so. The authority given the superior court to change the place of trial of actions is found in section 397 et seq. of the Code, which clearly, by language and intent, relate to changing the place of trial from one county to another. We are of the view that the language in section 963 of the Code, providing that an appeal may be taken from an order of the superior court "changing or refusing to change the place of trial," should not be construed to include an order changing or refusing to change the place of trial from one place in the county to another place in the same county. Section 397, providing in what cases the place of trial may be changed from county to county on motion, and the provision of section 963, permitting an appeal from an order changing or refusing to change the place of trial, were enacted at the same time (1872) as part of the Code of Civil Procedure. Until section 142 of the Code was amended, in 1919, to permit the holding or continuance of court at some place in the county not less than 120 miles distant from the county seat, there was no opportunity for the contention now advanced by appellant to be made. In 1923, section 963, relating to appeals, was amended in one particular not here pertinent. Appellant argues that, by the re-enactment of the section, including the provision giving the

right of appeal from an order changing or refusing to change the place of trial, it must follow that the Legislature not only had in mind the provisions of section 397, but intended to allow an appeal from an order changing or refusing to change the place of trial in the same county. The rule is, however, that a clause in a statute will be given no different meaning after an amendment than it had before, if the amendment relates to other matters, and was obviously not designed to affect its meaning. 23 Cal. Jur. 778, par. 154. We are of opinion that the provision in section 963 that an appeal may be taken from an order changing or refusing to change the place of trial must be held to refer only to orders made under section 397, relating to changing the place of trial from one county to another.

[3] The provision of section 142, supra, permits the judges of the superior court, in their discretion and for the convenient dispatch of business, to direct that the court be held or continued at any place in the county not less than 120 miles distant from the county seat. As a corollary thereto there must exist like power to revoke any order made with that object in view. The court at all times retains jurisdiction of the parties and of the subject-matter of the action. The section does not purport to authorize the parties to an action to demand that the place of trial be changed from the appointed place of holding the court to some other place in the county. The order here complained of, under the circumstances disclosed by the record, amounted to no more than an order that the cause be reset for trial at the regular place of holding the court, and at a time convenient for court and counsel. If the material rights of the defendant were prejudiced by the court's action, the order may be reviewed on appeal from the final judgment.

The appeal is dismissed.

We concur: FINLAYSON, Justice pro tem.; CURTIS, J.; SHENK, J.; SEAWELL, J.; LENNON, J.; RICHARDS, J.

198 Cal. 631

DAVIS & McMILLAN et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.
(S. F. 11567.)

(Supreme Court of California. May 25, 1926.)

1. Constitutional law ⚡107.

There is no vested right in running of statute of limitations, unless action is completely barred.

2. Constitutional law ⚡107.

Prior to time that statute of limitations has expired, Legislature may extend time before action will be outlawed.

3. Constitutional law ⚡191—Amendment of statute of limitations, enlarging period within which action can be brought as to pending causes, is not "retroactive" legislation as respects vested rights.

Amendment of statute of limitations enlarging period within which action can be brought as to pending causes is not "retroactive" legislation; retroactive or retrospective law being one that takes away or impairs vested rights acquired under existing laws, or creates new obligations, imposes new duty, or attaches new disability in respect to transactions already passed.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Retroactive.]

4. Master and servant ⚡398—Time for asserting claim for injuries held extended as to medical, surgical, and hospital expenses by act passed before claim was barred (Workmen's Compensation Act, § 9, subds. [a], [b], section 11, subds. [b(1)], [c], and section 27, subd. [e] [St. 1917, p. 831, amended by St. 1919, p. 910, and St. 1923, p. 770]).

Where settlement for injury was made, and proceeding for compensation, brought later, would have been barred under Workmen's Compensation Act, § 11, subd. (b[1]), subdivision (c), and St. 1919, p. 910, held that St. 1923, p. 770, adding subdivision (e) to section 27, passed before claim had been barred, extended time within which proceedings could be instituted for recovery of medical, surgical, and hospital treatment, as provided under section 9, subd. (a), though not for disability payments provided for by section 9, subd. (b).

5. Master and servant ⚡398—Statute extending time for filing proceedings in case of release or settlement held not strictly construed (Workmen's Compensation Act [St. 1917, p. 831] § 69, subd. [a], and section 27, subd. [e], as amended by St. 1923, p. 770).

Workmen's Compensation Act, § 27, subd. (e), as amended by St. 1923, p. 770, extending time for filing proceedings for certain benefits under act in case of release or settlement, held not to be strictly construed so as to apply only to claims arising subsequent to its going into effect, especially in view of section 69, subd. (a).

In Banc.

Proceeding under the Workmen's Compensation Act by Bob Pulliam, claimant, for in-

juries, opposed by Davis & McMillan, a co-partnership, employer, and the Columbia Casualty Company, insurer. From an order of the Industrial Accident Commission awarding compensation, the employer and insurer bring certiorari. Award annulled without prejudice.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioners.

Warren H. Pillsbury, of San Francisco, for respondents.

CURTIS, J. [1, 2] This proceeding comes before this court at this time after the granting of the motion of respondents for a rehearing thereof. In the decision upon the former submission the award of the Industrial Accident Commission in favor of the employee, Pulliam, was annulled by this court on the ground that his claim for benefits, instituted against his employer and the insurance carrier, was barred by certain provisions of the Workmen's Compensation Act (St. 1917, p. 831, as amended), and "that said subsection (e) of section 27 did not have the effect of extending the statute of limitations on Pulliam's claim against the petitioners; and, as a consequence, that it was outlawed at the time he instituted proceedings for the collection of his claim." At the time of the consideration of the petition for rehearing of said cause a serious doubt arose in the minds of the members of this court as to the correctness of this conclusion, and for this reason said petition for a rehearing was granted. After a further consideration of this question, we are now of the opinion that the effect of subsection (e) of section 27 of said act (as amended by St. 1923, p. 771) was to extend the statute of limitations in favor of Pulliam, and that, as extended, the statute was not a bar to the prosecution of his entire claim against the petitioners herein. To a large extent, however, the opinion of the court at the former hearing, written by Mr. Justice Houser, sitting as justice pro tem., contains a correct expression of our present views of the questions considered therein, and that portion of said opinion to which we now adhere and hereby adopt is as follows:

"On January 11, 1923, a man by the name of Pulliam, who prior to that time had been in the employ of petitioner, Davis & McMillan, was severely injured in an accident. It is admitted that the accident occurred within the scope of the employment, and that Pulliam was entitled to certain benefits accruing to him by virtue of the provisions of the Workmen's Compensation Act (Stats. 1917, p. 831, as amended, Stats. 1919, p. 910, and Stats. 1923, pp. 165, 375, 438, 770 and 772).

"On February 15, 1923, which was a few days more than one month after the accident occurred, in consideration of the sum of \$41.66 paid by petitioners to Pulliam on account of accrued compensation, and the further sum of

\$750 paid to Pulliam by petitioners, Pulliam executed a release to petitioners from 'all liability arising out of the injury.'

"On June 17, 1924, Pulliam instituted proceedings before the Industrial Accident Commission for the collection of benefits under the provisions of said Workmen's Compensation Act, and which proceedings resulted in a finding by that body, among other things, that 'said injury caused temporary total disability continuing from the date thereof indefinitely, entitling the employee to \$20.83 a week during said time, exclusive of the waiting period of seven days. The foregoing weekly benefit is based upon maximum wages. The employee is in need of further medical, surgical, and hospital treatment to cure and relieve him from the effects of said injury, and the insurance carrier is liable to furnish the same.'

"An award was thereupon made by the Industrial Accident Commission 'in favor of Bob Pulliam against Columbia Casualty Company, a corporation, of \$20.83 a week beginning January 19, 1923, less all sums heretofore paid as compensation, and until termination of disability or the further order of this commission.'

"A petition for rehearing was denied by the commission, and by a writ of certiorari petitioners seek to have this court review the entire proceeding.

"Section 11 (b[1]) of the Statutes of 1917, page 831, as amended by a statute of 1919, page 910, places a limit upon the time within which a proceeding of this nature and character may be commenced for the collection of benefits to which an injured person may be entitled of six months from the date of the injury; but by section 11 (c) of said statute it is provided, in substance, that a payment of compensation, or any part thereof, or agreement therefor, shall have the effect of extending the period within which such proceedings may be commenced, six months from the expiration of the period covered by any such payment.

"Assuming that the amount of \$750 plus the \$41.66 paid by petitioners to appellant was a payment of compensation at the rate of \$20.83 a week as provided by the findings of the commission, the six-month limitation would not commence to run until October 12, 1923, and therefore April 12, 1924, would be the last day upon which he would be entitled to institute proceedings for the collection of benefits. On August 17, 1923, however, which was prior to the time when the right to commence proceedings would have outlawed, a statute (Stats. 1923, p. 770) amending section 27 of the original statute of 1917, page 831, became effective. Among the various sections of the amended statute are the following provisions:

"(b) The compensation herein provided shall be the measure of the responsibility which the employer has assumed for injuries or death that may occur to employees in his employment when subject to the provisions of this act, and no release of liability or compromise agreement shall be valid unless it provide for the payment of full compensation in accordance with the provisions of this act or unless it shall be approved by the commission. * * *

"(e) Where a release or compromise is made for an amount less than the full compensation or benefit to which an employee, or his dependents, may be entitled under this act, the limitation of time provided by subsections

(b[1]) and (b[2]) of section 11 of this act in which such employee or his dependents may file proceedings for the collection of the benefits provided by subsection (a) of section 9 is hereby extended to two years from the date of the injury, unless said release or compromise agreement shall have been approved by the commission.'

"It is not denied by the parties hereto either that the release by Pulliam to petitioners was obtained for 'less than full compensation,' or that the release was not approved by the Industrial Accident Commission; and it is the contention of the respondents that by virtue of the terms of the statute (Stats. 1923, p. 770) the time allowed Pulliam for commencing proceedings against petitioners herein for the collection of benefits was thereby extended two years after January 11, 1923, the date of the injury.

"It will be noted that the statute extending the time to two years after the date of the injury in case a release was obtained for 'less than full compensation' or because such release was not approved by the commission, became effective prior to the time when Pulliam's right to commence the action would have outlawed under the other provisions of the statute. Section 11 (c), Stats. 1917, p. 831. The petitioners' contention that the Legislature had no power to thus extend the statute of limitations as to a claimed vested right to have the statute become operative on a certain date, is answered by the rule announced in principle in the case of *Doehla v. Phillips*, 151 Cal. 488, 91 P. 330, that prior to the time that the statute of limitations has expired on a right to maintain an action or proceeding on a claim of any kind, the Legislature has the power to extend the time before such action will be outlawed. To the same effect is *Weldon v. Rogers*, 151 Cal. 432, 90 P. 1062; and *Swamp Land District v. Glide*, 112 Cal. 85, 44 P. 451.

"But petitioners urge that because the language of the statute is that, 'where a release is made,' etc., the consequences flowing therefrom relate only to a release made after the act took effect, for the asserted reason that the words 'is made,' which indicate the present tense, 'would apply to releases and compromises made in the future.' It is also suggested by the petitioners that, if the Legislature had intended to have subdivision (e) of section 27 of the statute of 1923, page 770 (heretofore quoted herein) apply to releases which had been made before the act was to become effective, the Legislature would have used such an expression as 'where a release or compromise has been made.' It may be noticed, however, that further language of the statute (section 27 [e]) is that 'the limitation of time * * * is hereby extended to two years;' and it will may be argued therefrom that, if the intention of the Legislature was that the limitation was to affect releases made after the act became effective, instead of using the words 'is hereby extended,' it would have used the words 'shall be extended.'"

[3] It is clear from the decisions of the courts of this state as well as those of other jurisdictions that a person has no vested right in the running of a statute of limitations unless it has completely run and barred

the action. Before the action is barred by the statute, the Legislature has absolute power to amend the statute and alter the period of limitations prescribed therein, subject only to the requirement that a reasonable time must be allowed for the prosecution of an action or proceedings after the passage of an amendment shortening the period. *Doehla v. Phillips*, 151 Cal. 488, 91 P. 330; *Swamp Land District v. Glide*, 112 Cal. 85, 90, 44 P. 451; *Crothers v. Edison Electric Co. (C. C.)* 149 F. 606, 609, 5 Cal. Jur. 755; *Vance v. Vance*, 108 U. S. 517, 2 S. Ct. 854, 27 L. Ed. 808; 19 Am. & Eng. Ency. of Law (2d Ed.) pp. 167, 168, 171; 36 *Cyclopedia of Law (Cyc.)* 1201. It is equally well settled that an amendment to a statute of limitations enlarging the period of time within which an action can be brought as to pending causes of action is not retroactive legislation, and does not impair any vested right. *Weldon v. Rogers*, 151 Cal. 432, 90 P. 1062; *Allen v. Allen*, 95 Cal. 184, 30 P. 213, 16 L. R. A. 646; *Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead*, 85 Cal. 84, 24 P. 648. In *Weldon v. Rogers*, supra, page 433 (90 P. 1063) the court said:

"Now, appellant contends that this amendment is not applicable to the judgment involved in the case at bar, because to so apply it would be to hold it to be retroactive, and a statute is not to be construed as retroactive unless that meaning clearly appears upon its face. But, really, we do not see how any question arises here as to the retroactive operation of said amendment of April 9, 1895, to section 685. At the time of that amendment the said judgment in *Weldon v. Rogers* was an existing judgment not barred by the statute of limitations, and in full force and effect. The amendment was not in the nature of a revival of that judgment; it did not need revival. The applicability of the amendment to that judgment, as well as to all other live judgments existing at that time, is not, therefore, of retroactive applicability."

In 36 *Cyclopedia of Law (Cyc.)* p. 1201, the rule is laid down in the following language:

"A retroactive or retrospective law, in the legal sense, is one that takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already past. Retrospective laws, in their general sense, include ex post facto laws, and laws impairing the obligation of contracts, but the term 'retrospective' is frequently used as applicable only to civil laws by way of distinguishing them from ex post facto laws. Retrospective statutes are usually considered to embrace only those which relate to substantial rights, as those which destroy or impair an existing right, or give a right which never before existed; and statutes which affect remedies only are not within the scope of the inhibition against retrospective laws, unless the remedy is entirely taken away, or is encumbered with conditions which render it impracticable."

Again, on page 1213 of the same volume, we find the following:

"The presumption against the retrospective construction of statutes is founded on the principle that they should not be given such a construction as will make them unconstitutional or unjust, and therefore as a general rule does not apply to statutes that relate merely to remedies and modes of procedure. The Legislature has full control over the mode, times, and manner of prosecuting suits; and whenever, upon consideration of an entire statute relating to these matters, it appears to have been the legislative intent to make it retroactive, it will be given this effect. A retroactive effect has accordingly been given statutes * * * relating to the limitation of actions. * * *"

As to the effect upon existing claims or causes of action of a general statute of limitation, *Wood on Limitations* lays down the rule as follows:

"If before the statute bar has become complete the statutory period is changed, and no mention is made of existing claims, it is generally held that the old law is not modified by the new so as to give to both statutes a proportional effect; but that the time past is effaced and the new law governs. The period provided by the new law must run on all existing claims in order to constitute a bar." 1 *Wood on Limitations*, § 12, p. 59.

The rule enunciated by this author is relied upon by the court in *Crothers v. Edison Electric Co.*, supra. Judge Wolverton, in rendering the opinion in the last-named case, quoted with approval the following language from *Sohn v. Waterson*, 17 Wall. 596, 21 L. Ed. 737:

"When a statute declares generally that no action, or no action of a certain class, shall be brought, except within a certain limited time after it shall have accrued, the language of the statute would make it apply to past actions as well as to those arising in the future."

[4] From the foregoing authorities it appears to us that there can be no question but that subsection (e) of section 27 of the Workmen's Compensation Act extended the time within which proceedings could be instituted in the case of an ineffectual settlement like that made by the insurance carrier herein with Pulliam to two years after the receipt of the injury, and that such amendment applied, not only to claims that might arise in the future, but also to all existing claims not then barred by the statute of limitations. Pulliam was injured, as we have seen, January 11, 1923. He would, therefore, have had until January 11, 1925, within which to commence proceedings upon his claim. As this proceeding was commenced on June 17, 1924, it was in time, and the statute of limitations then in force was not a bar to the prosecution thereof.

[5] There is no merit, in our opinion, in the suggestion of petitioners that subsection (e) of section 27 is in the nature of a penalty,

and should therefore be strictly construed as applicable to only such claims as might arise subsequent to its going into effect. Aside from the general provisions of said act (section 69, subd. [a]) requiring courts to liberally construe its terms, other good reasons occur to us why we should not place any strict and technical interpretation upon said subdivision (e) of section 27. This subsection only applies to a release or settlement made for an amount less than the full compensation or benefit to which an employee or his dependents may be entitled under said act. It must be obvious, therefore, that no employee would make a settlement for less than he was entitled to except through ignorance of his rights. If ignorant of his rights as to the amount of compensation to which he would be entitled, he may also be ignorant of any right on his part to institute a proceeding to recover compensation. Having made a purported settlement, he would be less liable after such settlement to seek advice and ascertain his rights under the statute than he would have been had no settlement been entered into by him. It is a wise and humane provision of the law to permit such a person under such circumstances additional time in which to act in order to protect his rights. This is particularly so when the only persons who can possibly object to such a construction are those who have taken advantage of his ignorance and imposed upon him an unjust settlement.

Were these the only questions to be considered, it would be our duty to enter an order denying the petition and affirming the award. It is conceded, however, by the parties hereto that the award in favor of Pulliam is excessive. By reference to several sections of the Workmen's Compensation Act, it will be readily seen that subsection (e) of section 27 extends the period of limitation two years for the collection only of medical benefits as provided by subsection (a) of section 9 of said act, and does not apply to disability payments provided by subsection (b) of said section 9. The commission found that the injury sustained by Pulliam caused temporary total disability, and made an award for compensation based thereon. It further found that "the employee is in need of further medical, surgical, and hospital treatment to cure and relieve him from the effects of said injury and the insurance carrier is liable to furnish the same." As the extension of the limitation contained in subsection (e) of section 27 did not apply to disability compensation provided for under subsection (b) of said section 9, Pulliam's claim therefore was barred at the time of the commencement of said proceedings before the Industrial Accident Commission, and the award of the commission in his favor for this reason must be annulled. But, as Pulliam's

claim for medical, surgical, and hospital treatment was not barred by any provision of the Workmen's Compensation Act, he still has the right under the terms of said act and the findings of the commission, as to his claim for further medical, surgical, and hospital treatment, to prosecute the same before said commission. It is therefore ordered that said award be, and the same is hereby, annulled, without prejudice, however, to the right of said Pulliam to further prosecute before said commission his claim against said insurance carrier for medical, surgical, and hospital treatment.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; LENNON, J.; RICHARDS, J.; CASHIN, Justice pro tem.

198 Cal. 652

DEAN et al. v. SHINGLE et al.
(S. F. 10694.)

(Supreme Court of California. May 28, 1926.
Rehearing Denied June 24, 1926.)

1. Principal and agent — 69(5).

If agent buys his own property for his principal without communicating that fact to principal, transaction is voidable at election of principal, in view of Civ. Code, § 2230, providing trustee may not take part in transaction in which he has an interest adverse to the beneficiary.

2. Trusts — 231(2)—If person in fiduciary relation purchases own property for cestui que trust without communicating fact to cestui que trust, transaction is voidable at election of cestui que trust without regard to whether fair and honest (Civ. Code, § 2230).

If person in fiduciary relation purchases his own property for cestui que trust without communicating that fact to cestui que trust, transaction is voidable at election of cestui que trust without regard to whether it is fair and honest, in view of Civ. Code, § 2230, providing trustee may not take part in transaction in which he has interest adverse to beneficiary.

3. Corporations — 316(1)—If corporate officer purchases own property for corporation without communicating fact to corporation, transaction is voidable at election of corporation without regard to whether fair or honest.

If corporate officer purchases own property for the corporation without communicating fact to the corporation, transaction is voidable at election of corporation without regard to whether fair and honest as officer cannot use official position to benefit self individually.

4. Corporations — 312(3) —Where corporate officer purchased for corporation his own automobile at excessive price without communicating fact to corporation directors became personally liable under Constitution as for money embezzled by officer (Const. art. 12, § 3).

Where corporate officer purchased for corporation for \$2,500 his own automobile worth

\$500 without communicating fact to other officers or to corporation, directors of corporation became jointly and severally liable under Const. art. 12, § 3, as for moneys embezzled by officer.

5. Corporations ⚡317(2)—Where corporate officer purchased for corporation his own automobile at excessive price but fraud was never brought to notice of corporation, creditors were not estopped from maintaining action on constitutional liability against directors for officer's embezzlement (Const. art. 12, § 3).

Where corporate officer purchased for corporation for \$2,500 his own automobile worth \$500 and the fraud or means by which automobile was acquired was never brought to the notice of the corporation or of its other officers or directors, *held*, creditors were not estopped to maintain action against directors under Const. art. 12, § 3, making directors liable for moneys embezzled by officers.

6. Bankruptcy ⚡278.

After appointment and qualification of a trustee in bankruptcy, all actions for recovery or protection of assets of estate must be brought by or in name of trustee.

7. Bankruptcy ⚡245.

Creditors' rights which are enforceable under state laws accrue to trustee in bankruptcy.

8. Corporations ⚡351.

Action to recover liability of directors of corporation under Const. art. 12, § 3, for money embezzled by officer is in effect action to recover corporate assets constituting fund to which all creditors may look.

9. Bankruptcy ⚡250(1)—Trustee in bankruptcy of corporation may bring action to enforce constitutional liability to creditors and stockholders of directors for money embezzled by officers (Const. art. 12, § 3).

Trustee in bankruptcy of corporation may maintain action to recover personal liability of directors to creditors and stockholders under Const. art. 12, § 3, for money embezzled by officers of corporation, as he represents creditors, and actions for recovery of assets of bankrupt's estate must be brought by or in name of trustee, and action is in effect to recover assets of estate constituting fund to which creditors may look.

10. Corporations ⚡351—Constitutional liability of corporate directors for money misappropriated by officers can be enforced only by bill in equity (Const. art. 12, § 3).

Liability of directors of corporation under Const. art. 12, § 3, for money misappropriated by officer can be enforced only by bill in equity in which all creditors are parties or are represented and in which equities may be adjusted.

11. Pleading ⚡72.

Complaint entitling plaintiff to relief at law or equity will not be dismissed because he prays for judgment to which he is not entitled.

12. Corporations ⚡351—Action against directors for liability for money misappropriated by officer, where complaint alleged officer purchased for corporation his own automobile at excessive price, is in equity, which will grant appropriate relief though prayer is for wrong relief (Const. art. 12, § 3).

Action against directors of corporation for liability under Const. art. 12, § 3, for money misappropriated by officer where complaint alleges officer purchased for corporation for \$3,500 his own automobile worth \$500, addresses itself to equity, which will grant appropriate relief though prayer is for relief to which plaintiff is not entitled.

13. Bankruptcy ⚡245, 353.

Where trustees in bankruptcy of corporation sue directors to recover liability under Const. art. 12, § 3, for money misappropriated by officer, trustees represent all creditors, and recovery is for benefit of all creditors, in view of Bankr. Act, § 47, as amended by Act Cong. June 25, 1910, § 8 (U. S. Comp. St. § 9631).

14. Bankruptcy ⚡438.

After satisfying claims of creditors, residue of funds secured by action by trustees in bankruptcy of corporation against directors for their liability under Const. art. 12, § 3, for money misappropriated by officer, belongs to stockholders.

15. Bankruptcy ⚡353.

Creditors becoming such after misappropriation of money by officers of corporation are entitled to share in any recovery by trustees in bankruptcy of corporation in action against directors to recover on their personal liability under Const. art. 12, § 3.

16. Statutes ⚡241(2).

Statute making one liable for debts of another, and prescribing how and under what circumstances he shall be liable, is penal.

17. Corporations ⚡333.

Liability of directors of corporation under Const. art. 12, § 3, for moneys embezzled or misappropriated by officers is one of suretyship and contract.

18. Corporations ⚡333.

Directors of corporation are presumed to agree to liability under Const. art. 12, § 3, for moneys misappropriated by officers.

19. Corporations ⚡333.

To recover on liability of directors under Const. art. 12, § 3, for money misappropriated by officers, both misappropriation and resulting loss to corporation must be established.

20. Corporations ⚡345.

In action against directors to recover for liability under Const. art. 12, § 3, for money misappropriated by officer, where officer purchased for corporation his own automobile at excessive price without communicating fact to corporation, value of automobile should be allowed against purchase price.

21. Corporations  345—Where officer purchased for corporation his own automobile at excessive price, in determining constitutional liability of directors for misappropriation value of use of auto may not be deducted (Const. art. 12, § 3).

Where officer of corporation purchased for corporation his own automobile at excessive price, in determining the liability of directors under Const. art. 12, § 3, for the misappropriation of funds, the value of the use of the automobile may not be deducted, where value of its use is same as of any other automobile.

22. Corporations  333.

Liability of directors under Const. art. 12, § 3, for money embezzled or misappropriated by officers does not extend to damages resulting from mere negligence in management of corporate affairs.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action to recover money by W. E. Dean and others, as trustees of the estate of United States Aircraft Corporation (a corporation in bankruptcy), against Fred Shingle and E. S. Mulford. From judgment for plaintiffs, defendant Fred Shingle appeals. Reversed.

Devoto, Richardson & Devoto and Anthony S. Devoto, all of San Francisco, for appellant.

Henry Ach and I. M. Golden, both of San Francisco, for respondents.

WASTE, C. J. The plaintiffs, as trustees of the United States Aircraft Corporation, a bankrupt, brought this action to recover the sum of \$2,500, alleged to have been "wholly lost" to the corporation through misappropriation of corporate funds by the defendant Mulford, a director, and the president and general manager of the corporation; the defendant Shingle having also been a director of the corporation at the time of the alleged misappropriation. The defendant Shingle alone appeared in the action, and demanded that the cause be tried by a jury. When the evidence was all in, the plaintiffs moved the court for a directed verdict. The motion was granted, and the jury returned a verdict in favor of plaintiffs and against the defendant Shingle for the full amount prayed for. The court "accepted" the verdict, and judgment thereon was entered without any formal findings being made. After motion for a new trial made and denied, the defendant Shingle appealed from the judgment.

The complaint is in two counts: The first count is based upon the liability created by section 3 of article 12 of the state Constitution, which provides that—

"The directors or trustees of corporations and joint-stock associations shall be jointly and

severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association, during the term of office of such director or trustee."

The corporate nature of the United States Aircraft Corporation, its adjudication as a bankrupt, and the election and qualification of the plaintiffs as trustees, are sufficiently averred. Then follow allegations to the effect that, prior to the bankruptcy of the corporation, the defendant Shingle was elected, and continued to be, up to the time of the filing of the complaint, a director and secretary of the corporation. Coincident with the election of Shingle as director and secretary, defendant Mulford was also made a director, and was elected president and general manager of the corporation, and continued to act as such. It is then alleged that shortly after his election as president and general manager, and without any resolution, act, or other authority of the board of directors, Mulford sold to the corporation, for the sum of \$2,500, an automobile owned by him, which was not reasonably worth more than the sum of \$500. There are other averments sufficiently charging Mulford with acting in the dual capacity of seller and buyer in the transaction, and misappropriating the moneys of the corporation to the extent of the \$2,500 which he "accepted" and "received" in payment for the automobile. Plaintiffs demanded repayment of the money paid by Mulford to himself in the transaction, and offered to restore and deliver the automobile to him. The money was not repaid, and the offer to restore the automobile was not accepted. The allegation follows that the "sum of \$2,500 has been wholly lost to said United States Aircraft Corporation and to the said bankrupt estate."

[1-4] The allegations of the first cause of action of the complaint bring the case, as to Mulford, within the rule that, with certain exceptions, a trustee may not take part in any transaction concerning the trust in which he has an interest, present or contingent, adverse to that of his beneficiary. Civ. Code, § 2230. An agent authorized to act for a principal in a given negotiation cannot deal with himself. He cannot, when authorized to buy property for his principal, sell his own property to it, without communicating that fact to the principal. He cannot unite his personal and representative character in the same transaction. If he does, the transaction may be treated as voidable, at the election of the cestui que trust, without regard to whether it is fair and honest, or not. *Graves v. Mono Lake H. M. Co.*, 81 Cal. 303, 320, 22 P. 665; *Wickersham v. Crittenden*, 93 Cal. 17, 29, 28 P. 788; *Sims v. Petaluma Gas Light Co.*, 131 Cal. 656, 659, 63 P. 1011. The doctrine applies to all persons

who occupy fiduciary relations, but it is especially applicable to the officers of a corporation when acting for and on behalf of the company. They cannot use their official position to benefit themselves individually. *Pacific Vinegar, etc., Works v. Smith*, 145 Cal. 352, 361, 78 P. 550, 104 Am. St. Rep. 42. Yet, that is precisely what Mulford did in the instant case. His acts amounted to a willful and deliberate misappropriation of the funds of the aircraft corporation, and loss to the corporation was caused thereby. The transaction, according to appellant, amounted merely to a voidable transaction on which no liability on the part of appellant as a director could be predicated. We cannot agree with the contention. The allegations of the complaint and the supported facts clearly bring the case within the rule laid down in *Fox v. Hale & Norcross Mining Co.*, 108 Cal. 369, 426, 41 P. 308. The transaction by Mulford amounted in effect to an embezzlement, and there was "a misappropriation of funds entrusted to an officer for a special purpose, by devoting them to some unauthorized purpose." *Winchester v. Howard*, 136 Cal. 432, 444, 64 P. 692, 69 P. 77, 89 Am. St. Rep. 153. The conclusion is therefore inescapable that Mulford's acts rendered the directors of the aircraft corporation jointly and severally liable.

The second count, which purports to state a cause of action against the defendants for gross negligence of Shingle and fraud of Mulford, in connection with the sale of the automobile by Mulford to the corporation, may be disregarded. The question in the case is not one of negligence or fraud, but is: Are the facts alleged sufficient in an action upon the constitutional liability? *Winchester v. Howard*, supra, page 447 (64 P. 692, 69 P. 77).

[5-9] Appellant contends that, as the constitutional provision does not expressly give a right of action to the trustees of a bankrupt corporation to enforce the liability of directors to creditors and stockholders for money misappropriated by the officers of the corporation, plaintiffs here cannot maintain this suit. It does not appear that the corporation ever ratified the transaction by which Mulford sold the automobile to it. While the machine was used in its service, the fraud perpetrated upon it, or the means by which the automobile was acquired, were never brought home to the notice of the corporation or of any of its officers or directors other than Mulford. Therefore, the creditors could not be held to be estopped from maintaining the action. The trustees are here representing the creditors. Section 47 of the act to establish a uniform system of bankruptcy throughout the United States provides that—

"As to all property not in the custody of the bankruptcy court, [the trustees] shall be deemed vested with all the rights, remedies,

and powers of a judgment creditor holding an execution duly returned unsatisfied." 36 U. S. Stats. at Large, 840 (U. S. Comp. St. § 9631).

After the appointment and qualification of the trustee, all actions for the recovery or protection of the assets of the estate of the bankrupt must be brought by, or in the name of, the trustee. 1 *Remington on Bankruptcy*, § 1718. Creditors' rights, which are enforceable under state laws, accrue to a trustee in bankruptcy. *Schroeter v. Abbott*, 185 Cal. 146, 149, 150, 196 P. 39. The action here is one, in effect, to recover assets of the corporation which constitute a fund to which all the creditors may look for satisfaction of their claims. *Winchester v. Mabury*, 122 Cal. 522, 524, 55 P. 393. The cases cited by appellant in support of his contention that the proper action has not been brought (*Ellsworth v. Bradford*, 186 Cal. 316, 199 P. 335; *People v. Bank of Shasta*, 172 Cal. 507, 157 P. 606; *Williams v. Carver*, 171 Cal. 658, 154 P. 472), are not in point. They merely hold that, under the law as it existed at the time they were decided, the liability of stockholders to the creditors of a bank constituted no part of its property or assets, and could not be enforced, or the amount of the liability collected, by the superintendent of banks in liquidating the affairs of an insolvent institution. The present action, we conclude, was properly brought by the trustees of the bankrupt corporation.

[10-12] Appellant now takes the position that the action brought by plaintiffs here was in its nature one at law, and correctly contends that the constitutional liability of directors for money misappropriated by officers of a corporation cannot be enforced in such an action, but only by a bill in equity in which all the creditors are parties, or are represented, and in which there can be an accounting and equities adjusted after all the facts have been ascertained. *Winchester v. Mabury*, 122 Cal. 522, 55 P. 393; *Winchester v. Howard*, 136 Cal. 432, 447, 64 P. 692, 69 P. 77, 89 Am. St. Rep. 153. But legal and equitable relief are administered in this state in the same forum, and according to the same general plan. A party cannot be sent out of court merely because his facts do not entitle him to relief at law, or merely because he is not entitled to relief in equity, as the case may be. He can be sent out of court only when, upon his facts, he is entitled to no relief, either at law or in equity. Consequently, an action does not now, as formerly fail because a plaintiff has made a mistake as to the form of his remedy. If the case which he states entitles him to any remedy, either legal or equitable, his complaint is not to be dismissed because he has prayed for a judgment to which he is not entitled. If the facts stated are such as address themselves to the equity side of the court, the appropriate relief will be granted by the court sitting as a court of equity. 1 Cal. Jur., p. 312, par. 6.

In the case at bar, the facts pleaded by the plaintiffs clearly address themselves to the equity side of the court. The prayer of the complaint is for judgment for the specific sum alleged to have been lost to the corporation through the misappropriation of Mulford, "and for such other and further relief as may be meet and appropriate." The action was one, therefore, properly cognizable in the equity side of the court below.

[13-15] For another reason we are of opinion that the trustees in bankruptcy may maintain this action in its present form. The reasons advanced in the decisions why a bill in equity is proper, where the creditors institute an action to recover on the constitutional liability, are met and fully satisfied by the situation covered when the action is brought by the trustees of a bankrupt corporation. In such a case there are present all the essential elements of an action in equity. The trustees in bankruptcy represent all the creditors, and are acting in their behalf. The recovery, if any be had, constitutes a fund for the benefit of all the creditors. If, after satisfying their claims, any of the fund remains, it will belong to the stockholders. While the action is not brought primarily to enforce an accounting, which is required only for the purpose of the distribution of the fund which may be recovered for all the creditors, the bringing of the suit implies that such accounting will be ordered. In this case, the corporation is in liquidation, and any amount recovered will pass into the custody of the court having jurisdiction of the bankrupt's estate for distribution, precisely as it would have gone in a creditor's bill, or in some analogous proceeding. See *Winchester v. Howard*, supra, at page 446 (64 P. 692, 69 P. 77).

The contention of appellant that it does not appear that the trustees in bankruptcy represent only creditors of the aircraft corporation who were such at the time of the sale of the automobile, for which reason, it is argued, plaintiffs are not entitled to a judgment against him, is without merit. A creditor who became such after the misappropriation is entitled to share in any recovery had. *Winchester v. Howard*, supra.

[16] The vital question in this case is: To what extent were the directors of the aircraft corporation rendered liable to the creditors and stockholders by the misappropriation of corporate funds by Mulford? It is the contention of appellant that the liability of directors under the constitutional provision is remedial or contractual and that of sureties, rather than penal, and that in the absence of proof of loss or damage to the corporation neither the creditors nor stockholders can recover judgment against the directors, or any of them. From this premise, he argues that, as the aircraft corporation received from Mulford an automobile, admittedly of considerable value, and used

it for many months in its business, no loss resulted from the use of the corporation's funds by Mulford, and, consequently, this action must fail. Respondents, on the other hand, contend that the liability of the directors is penal in its nature, primary and absolute, and by way of providing compensation to creditors, and not to cover loss to the corporation; that the directors must pay the full amount of the money misappropriated, and there can be no deduction because of any benefit the corporation may have received. Statutes making officers and directors of a corporation responsible to its creditors for losses growing out of the wrongful or fraudulent conduct of such officers or directors are regarded by most courts as of a penal nature, and as not arising out of contracts. *Brown v. Major*, 164 F. 673, 677, 90 C. C. A. 489. In this state, it is well settled that a statute which provides for making one liable for the debts of another, and prescribes how and under what circumstances he shall be held thus liable, is penal in its nature. *Snell v. Bradbury*, 139 Cal. 379, 382, 73 P. 150; *Moss v. Smith*, 171 Cal. 777, 784, 155 P. 90; *Miller v. White*, 50 N. Y. 137, 142. But section 3 of article 12 of the Constitution has received a different construction in the previous decisions of this court, in which it has been held that the liability of directors of corporations to the creditors and stockholders for moneys embezzled or misappropriated by the officers of the corporation, during the term of office of such director, is one of suretyship, and therefore one of contract. *Winchester v. Howard*, 136 Cal. 432, 444, 64 P. 692, 69 P. 77, 89 Am. St. Rep. 153. In that case, it was held that the Constitution did not change the nature of the liability of directors of corporations for loss resulting from misappropriations of trust property that always existed, "except that for its purpose it is limited to moneys misappropriated." The court said (page 444 [69 P. 80]):

"The Constitution merely makes the directors sureties for their fellow-directors and for the officers of the corporation for moneys, when so misappropriated as to make the officer misappropriating liable, and authorizing the creditors and stockholders to sue. * * * Nor do I [we] appreciate the importance of the question whether the law is penal or not. It is not penal in the technical sense, as it allows no recovery as a punishment, but only to compensate for a loss. But the liability created is that of suretyship, in which the innocent always suffers for the guilty, and therefore the surety may always stand upon the very letter of his bond."

This construction of the Constitution has been followed by the federal courts (*Brown v. Major*, supra), and by the District Courts of Appeal of this state (*Hercules Oil Co. v. Hocknell*, 5 Cal. App. 702, 705, 91 P. 341; *Major v. Walker*, 23 Cal. App. 465, 467, 138

P. 360), and was in effect, approved in *Moss v. Smith*, 171 Cal. 777, 786, 155 P. 90. Respondents contend that the court took an erroneous view in *Winchester v. Howard*, supra, and that what was said in that case about the liability of directors being that of sureties is dictum and ought not to be followed. We deem it unnecessary to enter into a discussion of the contention. The rule there announced was foreshadowed in the earlier case, *Fox v. Hale & Norcross Mining Co.*, supra, and has been followed and approved in the later cases. In the *Fox* Case, the court, speaking through Mr. Chief Justice Beatty, said that it "was the intention of the framers of the Constitution to make each director of a corporation severally liable, whether individually culpable or not, for certain kinds of losses to the corporation occurring during his term of office; that is to say, he is made liable for embezzlement or misappropriation of corporate funds by officers of the corporation." "The word 'misappropriation,'" said the Chief Justice, is to be construed to mean "the misapplication of funds intrusted to an officer for a particular purpose, by devoting them to some unauthorized purpose, and does not apply to the payment of an extravagant price for services or materials properly appertaining to the business of the corporation—which is this case." In *Winchester v. Howard*, supra, the court said (page 445 [69 P. 81]):

"* * * When an officer of a corporation knowingly appropriates funds intrusted to him, for unlawful and unauthorized purposes, and loss ensues to the corporation, the directors are liable under this clause of the Constitution."

[17-20] We are not unmindful of the purpose for which the particular clause of the Constitution was included among its provisions. In the debates of the constitutional convention it was said that its adoption would make trustees and directors more careful in the management of their business; make them sureties for the good conduct of those in whose custody they place the funds of the corporation; make them responsible for the discharge of their duties. 1 *Debates and Proceedings of the Const. Convention*, p. 396 et seq. The design plainly was to prevent speculation and misappropriation of corporate funds. The liability imposed by the provisions is that of surety, and when loss occurs the innocent surety suffers for another's fault. Directors take office knowing the responsibility they assume in so doing. In the eye of the law they do so as freely and voluntarily as they would do if they signed a bond agreeing to be responsible for the conduct of the corporate officers. *Winchester v. Howard*, supra, page 448 (64 P. 692, 69 P. 77). But before the directors can be held liable for moneys so misappropriated as to

make the officer misappropriating liable, and authorizing the creditors and stockholders to sue, it must be established: First, that there has been a misappropriation; and second, that a loss to the corporation has resulted. The decisions, supra, declare that to be the proper construction to place upon the provision of the Constitution under which it is sought to hold the appellant liable in this case. The misappropriation of Mulford was clearly established; but the exact amount of the loss to the Aircraft Corporation has not been fixed. The transaction by which the president and general manager paid to himself the sum of \$2,500 for the automobile worth much less than that sum, was an unlawful and unauthorized appropriation of the money of the corporation, but it is admitted that the automobile had some value—alleged in the complaint not to exceed \$500. The loss to the corporation was therefore something less than the sum of money misappropriated. Under all the circumstances, it seems only reasonable and proper to hold that the corporation profited by the transaction to the extent of the actual value of the automobile when received and placed in its service. For that reason, the trial court was in error in entering judgment against appellant for the full amount of \$2,500, alleged in the first count of the complaint, and proved to have been misappropriated by Mulford, and in refusing to ascertain and make an allowance for the value of the automobile at the time of its purported sale to the corporation.

[21] But we agree with the respondents that appellant was not entitled to prove the reasonable, or any, value of the use of the automobile during the time it was in the service of the corporation. The actual value of the automobile may be deducted from the amount of money of the corporation which was misappropriated; but the value of its use, which would no doubt be the same as that of any other automobile of like description rightfully purchased for the corporation, cannot be said to be a profit or benefit derived through the misappropriation of the money by Mulford.

[22] For the reason that the obligation of suretyship imposed by the Constitution does not extend to damages resulting from mere negligence in the management of the affairs of the corporation, not amounting to a misappropriation of funds, in the sense of that term as we have referred to it, plaintiffs cannot recover at all under the theory of the case relied on in the second count of the complaint.

The judgment is reversed.

We concur: SHENK, J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; LAWLOR, J.; LENNON, J.

77 Cal. App. 343

**HYER v. INTER-INSURANCE EXCHANGE
OF AUTOMOBILE CLUB OF SOUTH-
ERN CALIFORNIA. (Civ. 4120.)**

(District Court of Appeal, Second District, Division 2, California. April 6, 1926. Rehearing Denied May 5, 1926. Hearing Denied by Supreme Court June 3, 1926.)

1. Negligence ⇨62(1)—Negligent act is "proximate cause" of injury if without act injury would not have happened.

Though negligent act or omission be removed from injury by intermediate causes or effects, it is in law the proximate cause if, in natural and continuous sequence, unbroken by any new efficient cause, it produces the injury, and if without it the injury would not have happened.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

2. Insurance ⇨146(2).

Terms used in insurance policy should be given their plain, ordinary, and popular meaning.

3. Insurance ⇨512—Automobile insurer whose liability on "claims arising from one accident" was limited to certain amount held not liable in greater sum, where insured's car struck another and broke steering gear, by reason of which it ran into a third; "accident."

Automobile insurer whose liability on "claims arising from one accident" was limited to certain amount held not liable in greater sum, where insured's car struck another and broke steering gear, by reason of which it ran into a third, since where one negligent act is sole proximate cause of occurrence there is but one accident, even though there be several resultant injuries; "accident" being any unintended and unexpected occurrence which produces hurt or loss.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accident—Accidental.]

Craig, J., dissenting.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by Grainger Hyer against the Inter-Insurance Exchange of the Automobile Club of Southern California. Judgment for plaintiff, when defendant elected to stand on its demurrer, which was overruled, and defendant appeals. Reversed, with directions.

David R. Faries, John R. Berryman, Jr., and J. Allen Davis, all of Los Angeles, for appellant.

FINLAYSON, P. J. This is an action to recover upon a liability insurance policy. Plaintiff is the assignee of the assured. A general demurrer to the complaint was overruled. Defendant elected to stand upon its demurrer and declined to answer, whereupon

a judgment was entered in favor of plaintiff for \$500 and costs. Defendant claims that the complaint does not state a cause of action and that its demurrer was improperly overruled. The sufficiency of the complaint turns upon the construction to be placed upon the word "accident," as employed in a clause of the policy which limits defendant's liability to \$1,000 for claims arising from "one accident."

The facts alleged in the complaint are substantially these: On July 29, 1920, defendant executed and issued to the assured a policy which insured him for the term of one year against liability to other persons for injury to or destruction of their property resulting from the use of the assured's automobile, a Marmon touring car. Defendant is referred to in the policy as the "Exchange." The provisions of the instrument which are germane to the present inquiry read:

"In consideration of an additional deposit of \$13.95 this policy also covers assured's legal liability to other persons for injury to or destruction of the property of such persons * * * resulting solely and directly from the ownership, maintenance and/or use of the automobile herein described, * * * subject, however, to the following limitations and exclusions: (1) the Exchange's liability for such injury or destruction is limited to the actual value of the property destroyed at the time of its destruction, * * * but in no case shall the Exchange be liable with respect to claims (including claims for loss of use) arising from one accident for more than one thousand dollars." (Italics ours.)

On March 27, 1921, the policy then being in full force and effect, the assured, by and through his chauffeur, was driving his Marmon car in a southerly direction upon a state highway in California. At the same time two other automobiles—one an Overland owned by a man of the name of Chance, and the other a Cadillac owned by the Keck Company, a corporation—were being driven in a northerly direction on the same highway; the Cadillac was traveling about 100 feet to the rear of the Overland; the Marmon car was so negligently operated by the assured's chauffeur that it collided with the Overland, damaging the latter vehicle in the sum of \$500; the force of that collision broke the steering gear of the Marmon, causing it to become unmanageable, so that its path of travel could not be controlled, by reason whereof its course was so deflected toward the east side of the highway that it collided with the Cadillac, damaging it in the sum of \$1,500 and causing the assured to incur a liability to pay that amount of money to the owner of that car; defendant already has paid \$1,000 to the owner of the Cadillac; that sum is the total amount which has been paid by it on account of these collisions; the owner of the Overland has recovered a judgment against

the assured in the sum of \$500, which remains unpaid; defendant refuses to pay that judgment or any part of it, and disclaims all further liability under its policy of insurance. The action was brought to recover the amount for which the assured so became liable to the owner of the Overland.

Appellant claims that, though there were two "injuries," one to the Overland and the other to the Cadillac, there was but one "accident," within the meaning of the policy, and that therefore it complied with its obligations under its contract of insurance when it paid the sum of \$1,000 to the owner of the Cadillac.

It is only from a liability which grows out of negligence on the part of the assured, his agents or servants that policies of this character are issued. *Tinline v. White Cross Ins. Ass'n* [1921] 3 K. B. 327, and notes to that case in 11 B. R. 265 et seq. The policy indemnified the assured against sums which he shall become legally liable to pay to any other person as compensation for injury to or destruction of the property of such other person. A man does not become liable to pay compensation for accidental injury to the property of another unless the accident is due to his wrongful act. As was said in *Ford v. Stevens Motor Car Co.*, 220 S. W. 980, 203 Mo. App. 669:

"Such so-called liability policies on automobiles in general, protect the owner or his agent or servant operating the same, from liability for his own negligence, and unless he or his said agent or servant is found to be negligent there is no liability. That is the very purpose of such policies."

[1] Here the assured's liability to the owner of each of the two automobiles damaged in the collisions accrued from one act of negligence on the part of the assured's servant, namely, the negligent operation of the Marmon car, which caused it to collide first with the Overland and then with the Cadillac. This act of negligence, the one cause which set in motion all that followed, was the proximate cause of both collisions. That is to say, the chauffeur's negligence which caused the injury to the Overland was also the cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produced the injury to the Cadillac. Without the initial act of negligence the injury to the Cadillac would not have occurred. "Proximate cause" literally means the cause nearest to the effect produced; but in legal terminology it is not confined to its literal meaning. Though a negligent act or omission be removed from the injury by intermediate causes or effects, yet if, in a natural and continuous sequence, unbroken by any new efficient cause, it produces that injury, and if without it the injury would not have happened, it is in law the proximate cause of such injury, or the *causa causans*

of the schoolmen. Proximity in point of time or space is no part of the definition. That is of no importance except as it may afford evidence for or against proximity of causation. *Dickson v. Omaha, etc., Ry. Co.*, 27 S. W. 476, 124 Mo. 140, 25 L. R. A. 320, 46 Am. St. Rep. 429, quoting 1 Shearman and Redfield on Negligence (4th Ed.) § 26.

Though there was in this case but one proximate cause of the unexpected and untoward occurrence in which the double injury happened, it does not for that reason alone necessarily follow that the injuries resulted from but "one accident," as that term is used in the policy. For, obviously, there is a clear distinction between the chauffeur's want of due care considered as the cause of the accident and the accident considered as the cause of the resulting injuries. Whether there were two accidents or only one accident presents a question, the solution whereof depends upon the meaning to be given to the word "accident" as used in this contract of insurance.

[2, 3] The terms used in an insurance policy should be given their plain, ordinary, and popular meaning. We should, however, be careful on the one hand not to be over liberal in our interpretation of the word "accident," and, on the other hand, not to be too technical. But whether we give to the word, as used in this policy, a strict interpretation or assign to it a liberal and popular meaning, we think it must be held that there was but one accident. The word "accident" probably has been discussed in adjudications as often as any other word in the English language. It is not a technical term, with a clearly defined meaning, and it has been used in more than one sense. In its most commonly accepted meaning it signifies an event which takes place without one's foresight or expectation. It was defined by Lord Macnaghten in *Fenton v. Thorley, etc., Limited*, [1903] A. C. 443, as an "unlooked for mishap or an untoward event which is not expected or designed." Its meaning is well stated in *Corpus Juris* (volume 1, pp. 394, 395), where it is said:

"Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause, and if the cause is not known the loss or hurt itself would certainly be called an accident. The word is also often used to denote both the cause and the effect, no attempt being made to discriminate between them."

This definition, originally given by Lord Robertson in *Fenton v. Thorley*, supra, is now generally accepted by the authorities. See *Standard Oil Co. v. United States* (C. C. A.) 264 F. 69, 12 A. L. R. 1407.

It will be noticed that in Lord Robertson's definition an accident is an "occurrence." It

is an "occurrence which produces hurt or injury." It also will be noticed that under this quite generally approved definition the word, as used in some classes of cases, denotes the cause of the hurt or loss; in other classes of cases it denotes the event, i. e., the unintended and unexpected loss or hurt apart from its cause; and in still other instances it may denote both the cause and the event, no attempt being made to discriminate between them. The use of the word to denote the unexpected and unintended result—the loss or hurt—rather than the cause, is quite common in cases arising under Workmen's Compensation Acts, as, for instance, where a workman performing his usual task in his wonted way suffers, by reason of strain, an internal injury that is itself sudden, unusual, and unexpected. *Brown's Case*, 123 A. 421, 123 Me. 424; *Fidelity, etc., Co. v. Industrial Acc. Comm.*, 171 P. 429, 177 Cal. 614, L. R. A. 1918F, 856. See, also *Carroll v. Industrial Comm.*, 195 P. 1097, 69 Colo. 473, 19 A. L. R. 107. In 25 *Harvard Law Review*, 340, it is said:

"Since the case of *Fenton v. Thorley*, nothing more is required [in cases arising under Workmen's Compensation Acts] than that the harm that the plaintiff has sustained shall be unexpected."

This latitudinarian use of the word in that class of cases is justifiable for the reason that the phrase "injuries sustained by accident," as used in Workmen's Compensation Acts (St. 1913, p. 279, § 12), is to be given a broad interpretation in harmony with the evident purpose of such enactments and with the spirit of liberality in which they were conceived. *Fidelity, etc., Co. v. Industrial Acc. Comm.*, supra. But, as commonly used in liability insurance policies, the word "accident" is predicated on an occurrence which is the cause of the injury. That is to say, as used in liability insurance contracts the word is employed to denote the cause, rather than the effect. In automobile accidents, particularly in such as involve collisions, the injury and its cause may be practically inseparable. They may be, and often are, inseparable in time and space. And yet in such instances the accident is clearly and necessarily the cause from which the resultant injury flows as an incident. In *Lewis v. Commercial Casualty Ins. Co.*, 121 A. 259, 142 Md. 472, 28 A. L. R. 1287, the court, having under consideration a liability insurance policy insuring an automobile owner, employed this language: "The meaning of the word 'loss,' as used in the clause under construction, is the injury or damage caused by the accident." (*Italics ours.*) In *Tuttle v. Pacific Mutual L. Ins. Co.*, 190 P. 993, 58 Mont. 121, 16 A. L. R. 601, the court, having under consideration the meaning of the word "accident," as used in an accident insurance policy, says: "A result, though unexpected, is not an accident; the means or cause must

be accidental." This language applies with equal force to such accidents as fall within the purview of liability insurance policies such as the one before us. Liability insurance is but a branch of accident and casualty insurance. *Employers' Liability Assur. Corp. v. Merrill*, 29 N. E. 529, 155 Mass. 404; *Metropolitan Casualty Ins. Co. v. Basford*, 139 N. W. 795, 31 S. D. 149.

Where, as here, one negligent act or omission is the sole proximate cause, or *causa causans*, there is, as a general rule, but one accident, even though there be several resultant injuries or losses. Let us suppose that in the instant case the owner of the Overland car had likewise been the owner of the Cadillac, and that the former vehicle had been towing the latter when the successive but causally connected collisions occurred—just as each car in a freight train pulls the car which is immediately behind it. Could it correctly be said in the case just supposed that there were two accidents, merely because two automobiles were damaged in sudden and unexpected crashes happening in continuous sequence as a connected chain of events, but springing from a single initial cause? Clearly not. It would no more be correct to say of such a case that there were two accidents than it would be to predicate two or more accidents on a general freight train wreck, merely because two or more cars in the train might have been demolished in the same catastrophe. If, in our supposititious case, there would be but one accident, though two automobiles belonging to the same person were injured, then how could that accident become two accidents merely because, under the facts of this case, the two injured vehicles were separately operated and owned? To ask the question is to answer it.

In *Allen v. London Guarantee, etc., Co.*, 28 T. L. R. 254, the policy limited the liability of the insurance company to £300 for all claims arising out of "any accident or occurrence." Two persons were injured in an accident caused by a cart belonging to the assured. It was held that there was only one "occurrence" within the meaning of the policy, and that therefore the limitation of defendant's liability to £300 applied. It is true that in that case the learned justice who rendered the decision was constrained to the view that there were two "accidents," though only one "occurrence." He appears to have been guided to this seeming incongruity by the interpretation which he put upon the decision of the Court of Appeal in *South Staffordshire Tramways Company, Limited, v. Sickness & Accident Assurance Association, Limited*, [1891] 1 Q. B. 402—a case presently to be adverted to by us. For our present purpose, however, it suffices that the *Allen Case* holds that there was but one "occurrence," even though two persons were injured.

If it be proper to say that there is but one "occurrence" where two persons are injured in an automobile collision, then it is a mistake to say of such a case that there are two "accidents"; for in a general sense every automobile accident is an occurrence. In *Chaplin v. Ocean Accident & Guarantee Corporation*, 147 N. W. 465, 96 Neb. 213, 52 L. R. A. (N. S.) 227, the court, speaking of an automobile indemnity insurance policy, says:

"As used in an indemnity policy such as this, we are of opinion that the word 'accident' means an undesigned and unforeseen *occurrence* of an afflictive or unfortunate character resulting in bodily injury to a person other than the insured." (Italics ours.)

If, as the Nebraska court says, the word "accident," as used in an automobile indemnity policy, means an undesigned and unforeseen "occurrence" resulting in loss or injury to a third person, it follows that if the facts shown in *Allen v. London Guarantee, etc., Co.*, supra, presented the case of one "occurrence," as was held by the English court, then they also presented the case of but one "accident."

That part of the continuous sequence of events which embraces the second collision in this case, the collision of the Marmon car with the Cadillac, may well be described in the language of *Bailhache, J.*, in *Tinline v. White Cross Insurance Association*, supra, as "the incident of the accident." In that case the White Cross Insurance Association insured the plaintiff against legal liability to pay to third persons compensation for "accidental personal injury" caused through the driving of plaintiff's motor car. While driving the car at an excessive rate of speed the assured knocked down three persons, injuring two of them and killing the third. The defendants contended that a recovery under the insurance contract would violate public policy, for the reason that the assured was guilty of a crime, he having pleaded guilty to manslaughter for the killing of one of the persons knocked down by his car. In ruling against this contention Judge *Bailhache*, before whom the action was tried, said:

"The fact that one of the three persons was killed is, as I have said, really immaterial for the purposes of this case; it was the *incident* of the accident, or the accident of the accident." (Italics ours.)

So here, the collision with the Cadillac, a part of the general catastrophe in which the three automobiles were involved, was but an "incident" of the accident, and not a separate accident.

Thus far in our consideration of the words "one accident," as used in this policy, we have purposely approached the question from the standpoint of a somewhat philosophical interpretation of the word "accident." We shall now endeavor to ascertain the ordinary

and popular meaning of the word, premising by saying that we are convinced that the ultimate result, so far as this case is concerned, will be found to be the same whether the word "accident" be taken in a philosophical sense or be given its ordinary and popular meaning, one which it may be assumed any intelligent business man would give it. Fortunately the books afford several instances of the business man's construction of the word. In *Klein v. Liability Assurance Corp.*, 9 Ohio App. 241, the court had before it an automobile indemnity insurance policy which contained a clause to the effect that the insurer's liability, "on account of any one accident," resulting in injuries "to more than one person," is limited to a named sum of money. A similar provision is found in the policy which was before the court in *McClung v. Pennsylvania Taximeter Cab Co.*, 25 Pa. Dist. R. 583. In *Capelle v. United States Fidelity & Guaranty Co.*, 120 A. 556, 80 N. H. 481, the policy indemnified the assured from liability resulting from claims upon him for damages on account of bodily injuries or death resulting at any one time and suffered by any person or "persons" as the result of "an accident." These contracts—and doubtless many other similar instances could be cited—illustrate the fact that in the realm of business, in contracts presumably entered into between ordinary men of affairs, employing language in a sense which is commonly understood by such men, the term "one accident," or "an accident," is used to cover cases where two or more persons may suffer loss or injury. In *Tinline v. White Cross Insurance Association*, supra, the case where the assured knocked down three persons while driving his automobile, killing one of them, Judge *Bailhache* commences his opinion thus:

"In this case plaintiff claims a declaration that he is entitled to be indemnified against the consequences of *an accident*." (Italics ours.)

These few illustrations will suffice to show that when the term "one accident" or "an accident" is used in automobile indemnity insurance contracts it is ordinarily and popularly understood to include a case where two or more persons are injured in person or in property as the result of an undesigned and unforeseen occurrence of an afflictive or unfortunate character, such as happened in this case.

There would have been no occasion for an opinion of this length were it not for the decision of the English court in the *South Staffordshire Tramways Case*, [1891] 1 Q. B. 402, referred to supra. Without some thoughtful consideration that case might seem to be at variance with our conclusion. However, a careful analysis of the policy there under consideration will show that case to be *sui generis*, and that the conflict be-

tween it and the views which we entertain is more apparent than real or substantial. There the assured made a written application, which was recited in the policy. When the insurance clauses in the policy and the written application were read together it was apparent that the words "any one accident," in the policy, were intended by the parties to mean an accident to each of several persons who might be injured by the vehicles of the assured upon any one occasion. The policy, after reciting that the plaintiffs had applied to defendants "for an indemnity against all such claims as herein-after mentioned for compensation for personal injuries, and damage to property, caused by vehicles in their possession," witnessed that the defendants did thereby agree that:

"So far as regards claims for personal injury and damage to property made against the assured in respect of accidents caused by vehicles * * * belonging to the assured * * * and for which accidents the assured shall be liable, the association shall pay the assured the sum of £250 in respect of any one accident."

It will be noticed that the application was for indemnity against all claims for personal "injuries" and damage to property, caused by plaintiffs' vehicles. As was pointed out by Bowen, L. J., in his concurring opinion, when the policy is looked to it appears that it limits the words of the application by adding the words "in respect of accidents." This word "accidents," in the plural, occurs twice in the policy preceding the phrase "any one accident," and was evidently intended to refer to "accidents" occurring at any one time, and not to independent and wholly disconnected accidents such as might possibly occur at different times during the life of the policy. It is evident, therefore, that by the use of the word "accidents" in the insurance clause which provides for indemnity against "claims for personal injury * * * made against the assured in respect of accidents caused by vehicles," the parties intended to treat as several accidents all such untoward occurrences as might happen to several persons upon any one occasion; i. e., to regard as one accident whatever happened to each of the persons injured. It follows as a corollary to this construction that the words "any one accident," subsequently appearing in the policy, were intended to mean any one unexpected and untoward event happening to each of several persons who might be injured by plaintiffs' vehicles at any one time. That is to say, if in the preceding part of the policy the word "accidents" was intended to embrace each separate untoward occurrence happening to each of the several persons who might be injured upon any one occasion, then, as was said by Lord Bowen, the word "accident," in the

phrase "any one accident," must receive the same construction.

The policy under consideration in the instant case differs radically from that which was before the Court of Appeal in the South Staffordshire Tramways Case. In the insurance contract here in question it is declared that the policy "covers all the assured's legal liability to other persons for the injury to or destruction of the property of such persons * * * resulting solely and directly from the ownership, maintenance, and/or use of the automobile" of the assured, but that in no case shall the insurer be liable for more than one thousand dollars "with respect to claims * * * arising from one accident." The use of the word "claims," in the plural, in connection with the words "one accident," clearly indicates that the parties understood that there might be several claims arising from one accident—as, for instance, where, as here, the vehicles of two or more persons are injured—but that though there might be several injuries and therefore several claims, the total liability of the insurer should not exceed \$1,000 if the claims all arose from one accident.

Concluding, as we do, that there was but one accident, and that, therefore, by its payment of \$1,000 to the owner of the Cadillac appellant has fully discharged the liability which devolved upon it by reason of the accident, it follows that the demurrer to the complaint was improperly overruled.

The judgment is reversed, with directions to the lower court to sustain the demurrer.

WORKS, J. I concur in the judgment and in everything that is said in the foregoing opinion. I desire, especially, to announce my concurrence in the reasoning whereby the writer of the opinion distinguishes the case of *Staffordshire Tramways Co. v. Sickness & Accident Ass'n*, 1 Q. B. 402, from the present one. If, however, that case is not distinguishable from this, I am of the opinion that it was wrongly decided. So much, to my mind, is evident from the general reasoning of the above opinion. I think the English case has been given a fictitious importance by the very general application of its doctrine which has been made by annotators, text-writers, and judges.

CRAIG, J. I dissent, because to my mind the word "accident" in the indemnity policy in suit was intended by the parties to be given its ordinary meaning, and this the opinion of my associates holds it should not receive.

It must be conceded that it is a necessary presumption that the word in question was understood to denote its usual meaning unless some consideration of fact or law appears to the contrary. I find neither. The word "accident," as used in indemnity insur-

ance, appears to have a definite meaning. There can be no dispute upon the proposition that all authorities agree that an "accident" means an "unintended and unexpected occurrence which produces hurt or loss." It is impossible to read into this language any reference to the cause of the occurrence other than that suggested by the words "unintended and unexpected." These words merely describe the quality of the event as unforeseen and undesigned. It cannot be doubted that if this generally accepted definition be taken as applicable here, the facts of this case show that separate accidents occurred to the Overland and Cadillac cars. But my associates hold that an unusual meaning was intended by the parties, and that the word "accident" had reference to the cause of the events rather than to the events themselves. Of course, if this indemnity policy contemplated that an "accident" referred to a cause, and not to an "event," but one accident occurred, for there was but one cause.

Two cases are cited in the majority opinion to sustain the statement that in automobile accidents the injury and the cause are often inseparable, and yet, in such instances the accident is the cause from which the resultant injury flows as an incident. I am compelled to acknowledge an entire inability to discover anything in the language contained in either of these cases to sustain this assertion. *Lewis v. Commercial Casualty Insurance Co.*, 121 A. 259, 142 Md. 472, 28 A. L. R. 1287, was an action upon an indemnity insurance policy, and in which the contest had been based entirely upon the question of whether or not sufficient notice of loss had been given, or, if not given, the requirement thereof had been waived. I find no attempt in the opinion to define the word "accident." In *Tuttle v. Pacific Mutual Life Insurance Co.*, 190 P. 993, 58 Mont. 121, 16 A. L. R. 601, the court does use the language quoted: "A result, though unexpected, is not an accident; the means or cause must be accidental." But the sentence which immediately precedes explains why the language quoted was used and the limitation clearly intended to be placed upon the same. It is said:

"The word 'accident', in *accident policies*, means *an event* which takes place without one's foresight or expectation. A result, though unexpected, is not an accident; the means or cause must be accidental." (Italics mine.)

Of course, it is true that in accident insurance the means must be accidental, for in such policies the form universally employed insures against injury sustained by the insured "caused solely by external, violent and accidental means." Such was the language of the policy which the court had before it. It needs no argument to sustain the proposition that, where the contract expressly provides that the means must be accidental, it is not sufficient that the event only was

an accidental one. However, the policy which is the basis of this suit makes no reference to the means. In it we find no provision that the means shall be accidental. It stipulates to indemnify the assured against loss from legal liability paid to others for injury to or destruction of their property, resulting from an accident—that is, a certain kind of an event.

No decision has come to my attention in which the definition of an accident is announced which states that the cause of the event must be accidental, except those construing accident and life insurance policies, using the words "accidental means" in specifying and limiting the grounds of liability of the assured. This was true in the case of *Rock v. Travelers' Insurance Co.*, 156 P. 1029, 172 Cal. 462, L. R. A. 1916E, 1196, and a long list of decisions therein enumerated.

Since it is conceded that in cases arising under the Workmen's Compensation Acts, to produce an accident nothing more is required than that the harm which the plaintiff has sustained shall be unexpected and unintended, such decisions need not be cited. But under them the circumstances of the instant case would necessarily constitute two accidents. However, it is asserted that there are decisions construing accident and life insurance policies which hold otherwise.

If there be such a distinction (and I have found none) both reason and authority make the conclusion inevitable that the decisions which have arisen under the Workmen's Compensation Acts are to be classed with those under ordinary indemnity contracts, rather than accident and life insurance policies in so far as the matter under consideration is concerned. The former, like the second class mentioned, provide for the indemnifying of persons from loss or hurt which has resulted to others. In each of the classes last mentioned the loss which the insurer is obligated to make good is not only one which has befallen a third party, but is one which the insured is required by law or agreement to compensate. Under the former the obligation arises from the direct mandate of the statute; under the indemnity contract it comes about through the fact that the insured is responsible for a happening which makes him liable in damages to another. In both instances the law compels the payment by the insured of the loss sustained. This legal compulsion supplies the element of cause in all indemnity liability, and would supplant that element, if it be conceded as ever included within the definition of an "accident."

If it were true that in certain cases the word "accident" denotes both the cause and its effect, while generally it means the loss or hurt without including in its content any reference to the cause thereof, there is reason for this distinction. This is well exemplified in the considerations which form the foundation for measuring the liability of the insurer.

er in accident insurance policies, and indemnity policies, respectively.

There is a clear distinction between an insurance against accidents which may happen to the insured, and one indemnifying him against loss for injuries which he may wrongfully cause to others. The former, in so far as fixing liability is concerned, clearly involves an inquiry into the intention, and care exercised by the insured, and his part in producing the event from which the loss occurs. The insurer would not agree to pay the insured for a loss which was intentionally caused by the insured himself. It is understood that the insured in such cases must be free from blame and wrongdoing, but in an indemnity contract the opposite is true. There, the contract contemplates reimbursement of the assured by the insurer of loss sustained as a consequence of the latter being required to pay a third party for injuries inflicted upon said third party or his property. Of course, this necessarily involves a recognition of the fact that the assured was guilty of an act violative of the rights of another, so as to create a liability for damages to that other. In such a contract the insurer is not concerned with the cause, except as above indicated; and so, when a limit is placed upon his liability for any one accident, the cause is not taken into consideration, but only the event and the loss resulting therefrom to the assured. Hence, aside from the difference in language to which attention has been called, the definition of an "accident" contained in the ordinary accident insurance policy, and decisions construing it, are not necessarily applicable, but, rather, the more general meaning of the word "accident" is to be accepted, which, as stated in *Fenton v. Thorley, etc., Limited*, [1903] A. C. 443, is an unintended and unexpected occurrence which produces hurt or loss apart from its cause. Under this definition it is clear that there were two accidents in the instant case.

Nor is the application of the ordinarily accepted meaning of the word "accident," arising under Workmen's Compensation Acts, due to any peculiar phraseology of such acts. It is true that in construing these statutes the courts have said that their language should be given a broad interpretation, but in so stating no exception is made, but rather the general rule is recognized. Substantially the same thing has been said by the courts of various states in construing indemnity insurance policies founded upon contracts having nothing to do with Workmen's Compensation Acts; that is, in interpreting such indemnity policies it has repeatedly been held that they are to be liberally construed with a view to providing fair protection to the insured, and that in all such instances words are to be given their ordinary and accepted meaning, which is all that the Workmen's Compensation Act decisions have done in defining the word "accident." *Alabama Fidelity, etc., Co.*

v. Alabama Penny Sav. Bank, 76 So. 103, 200 Ala. 337; *Murray v. Kaskaskia Live Stock Ins. Co.*, 204 Ill. App. 568.

But it would seem that all doubt upon this subject should be removed by the decision of the Supreme Court of Nebraska in *Chapin v. Ocean Accident & Guar. Corp., Limited*, 147 N. W. 465, 96 Neb. 213, 52 L. R. A. (N. S.) 227, which, like the instant case, involved an indemnity insurance contract, and in which, referring to an accident, it is said:

"The word 'accident' is susceptible of and has received many definitions, varying with the connection in which it is used. It is: 'An event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event; chance; contingency; often, an undesigned and unforeseen occurrence of an afflictive or unfortunate character; casualty; mishap; as, to die by an accident.' Webster's New International Dict. In the Century Dictionary, among the definitions given are: '2. Specifically, an undesirable or unfortunate happening; an undesigned harm or injury; a casualty or mishap.' As used in an indemnity policy such as this, we are of opinion that the word 'accident' means an undesigned and unforeseen occurrence of an afflictive or unfortunate character resulting in bodily injury to a person other than the insured."

In an attempt to distinguish the case of *Staffordshire Tramways Co., Limited, v. Sickness & Accident Assurance Ass'n, Limited*, from the one before us, the foregoing opinion argues that the fact that the indemnity contract sued on used the word "accidents" rather than "accident" in a certain context caused the court to hold that there had been two accidents in that case. The provision quoted from the Tramways Company Case is:

"So far as regards claims for personal injury and damage to property made against the assured in respect of accidents caused by vehicles * * * belonging to the assured * * * for which accidents the assured shall be liable, the association shall pay the assured the sum of £250 in respect of any one accident."

The meaning of this statement seems to me to be clearly just this: That as distinguished from the subject-matter of the rest of the policy, upon the point of "accidents caused by vehicles belonging to the assured," the insurer's liability should be especially limited as therein specified. The quoted language merely designates the subject of this particular clause in the contract. No other intention was indicated as intended to be conveyed, nor does the opinion in the Tramways Company Case contain any language signifying that the court rendering it ascribed any different or special meaning to the provision because of the fact that the word "accidents" is used in plural form than would have resulted if the same idea had been expressed by its use in the singular, which of course could just as well have been done. There is nothing in the opinion under discussion, or in the wording of the policy, to even remotely sug-

gest that the word "accidents" in plural form preceding "accident" was intended to denote that the accidents in question should occur at any one time rather than upon disconnected occasions. The Tramways Company Case is one in which the facts are squarely on all fours with those of that before this court. In the former it was definitely held that upon such facts two accidents, and not one, had occurred; and in so holding the court doubtless fully appreciated the significance of the words construed, quite possibly the more fully because of the brevity of the opinion, which will be quoted later. Others may disagree with the conclusion reached, but the facts of that case cannot be distinguished from those of the instant one. And this is of double importance because like the policy being construed here, the other was one in which the insurer bound itself as surety against the results of wrongful acts of the assured causing injuries to others persons. These cases constitute complete parallels in point of fact, and I am convinced that the court's rulings should be the same.

Although there appears no ambiguity in either the provision above discussed nor in the opinion of the court in the Tramways Company Case, my interpretation of both is strengthened by the opinion in *Allen v. London Guarantee & Accident Co., Limited*, 28 T. L. R. 254. My learned associates lay stress upon the fact that in the last-named case it was held that there had been but one occurrence, which to my mind is merely an "incident to" the accidents. They ignore the important part of the decision in so far as the instant case is concerned, namely, that there were two accidents. The facts in the case of *Allen v. London Guarantee & Accident Co., Limited*, *supra*, were: The defendants assured *Allen* against accidents caused by his employees when in charge of his horse-drawn vehicles. Two men, *Turner* and *Ridsdale*, were injured by a cart driven by one of the assured's drivers. It was found as a fact that the cart struck *Turner*, who in turn was thrown against *Ridsdale*, and both men fell and were injured. Each brought suit against the assured for damages. It was held that, although there were two accidents, there was only one occurrence, within the meaning of the policy, and that therefore the defendants' limit of £300 liability applied. The policy provided that the total aggregate liability of the company was to be limited to the sum of £300 for all claims for compensation, costs, charges, and expenses, paid or payable either to the insured or to any claimant or any number of claimants, in respect of or arising out of any one accident or occurrence. This decision goes so far as to be a precedent for holding that, even in the supposititious case of one car being towed by another and both being injured, there would be two accidents. It limits the consideration of the question to that of the event of the injury

provided such event was unexpected and unforeseen, and it is so decisive and unequivocal as to preclude the idea of harmonizing it with a holding that there was but one accident in the instant case.

There appears to be no foundation for the idea that the word "accident" is used by business men in a different sense than as defined in the cases whose definitions have been quoted, and others to which reference might be made, containing language of like import. It goes without saying that such cases involved the construction of an insurance contract made in the world of business. In each it was held that the word in question is ordinarily understood to mean an undesigned and unforeseen occurrence resulting in injury. It may well be that in some indemnity contracts the parties expressly or by necessary inference have stipulated that by their use of the word they intended to denote a general catastrophe which might include injury to more than one person. This affords no proof that the word is generally used in the realm of business in that particular sense. It is a matter so generally known as to justify courts in taking judicial knowledge of it that insurance companies write their policies in a great number of forms with the distinct purpose of satisfying the public, who desire insurance against risks of every character. But we need not go beyond cases cited in the opinion of my learned associates, for instances where contracts entered into in ordinary transactions between business men were so worded that courts of last resort held that the word "accident" employed therein denoted not a general catastrophe, but a particular event or occurrence. Such were the cases of *Allen v. London Guarantee & Accident Co., Limited*, 28 T. L. R. 254; *Staffordshire Tramways Co., Limited, v. Sickness & Accident Assurance Ass'n, Limited*, *supra*, and *Chapin v. Ocean Accident & Guaranty Corp., Limited*, *supra*. The first two of the cases last enumerated contained provisions worded similarly to that under consideration in the instant case, whereas this is not true of the policies which formed the basis of the suits in *Klein v. Liability Assurance Corp.*, 9 Ohio App. 241; *McClung v. Penn. Taximeter Cab Co.*, 25 Pa. Dist. R. 583; and *Capelle v. U. S. Fidelity & Guaranty Co.*, 120 A. 556, 80 N. H. 481. Our own Supreme Court has repeatedly stated its view of the meaning popularly assigned to the term "accident" to be the same as that announced in *Fenton v. Thorley, etc., Limited*, *supra*, in which it is said:

"The expression 'accident' is used in the public and ordinary sense of the word as denoting an unlooked for event which is not expected nor intended." *Fidelity & Casualty Co. of New York v. Industrial Accident Commission*, 171 P. 429, 177 Cal. 614, 617, L. R. A. 1918F, 856 [citing *Western Indemnity Co. v. Pillsbury*, 151 P. 398, 170 Cal. 686; *Southwestern Surety Ins. Co. v. Pillsbury*, 158 P. 762, 172 Cal. 769].

Adverting now particularly to the contention of appellant that the single act or omission of the driver of the Marmon could not cause two simultaneous "accidents" within the proper interpretation of the phrase limiting liability to \$1,000 for loss or injury arising "from one accident," if there was a causal connection between the two collisions, the question presented is as to whether or not respondent's assignor was insured against damage to all other persons collectively to the extent of \$1,000 only, if damaged by a single mishap, or against each just and valid claim of one or more persons to whose individual property or person separate and distinct accidents might occur as a direct result of the operation of respondent's automobile.

A pertinent illustration of a case which would exclude liability is *Kangas v. Standard Accident Insurance Co.*, 165 N. W. 268, 138 Minn. 418, L. R. A. 1918B, 504, wherein it was said:

"For instance, if, when the plaintiff was drawn underneath the passing train, a car wheel had passed over his hand thereby severing his four fingers, one at a time, could it be said that the event constituted four accidents and four distinct injuries to his body?"

Had the Cadillac machine had four parts broken by this collision and had a separate claim been made for each, the situation presented would have been similar to that in the case last cited. I am in entire accord with the holding of the Minnesota court that the loss of all the fingers of a man's left hand would in such a case constitute but one accident within the contemplation of the policy of insurance there under consideration. But in the instant case each of two automobiles, in no way interrelated, and owned by different persons, suffered an accident as a consequence of negligence in the management of the Marmon car, which was insured against the liability of its owner for injury to another. True, there was but one incident which superinduced the successive impacts, but as a result of the Marmon leaving its proper course, the Overland was damaged "from one accident" and the Cadillac suffered damage "from one accident." The policy did not stipulate a maximum of liability to the extent of \$1,000 for all damage resulting from one proximate cause; it limited the liability "with respect to claims * * * from one accident."

Mention has been made of *Southern Staffordshire Tramways Co., Limited, v. Sickness & Accident Assurance Association, Limited*, 60 L. J. Q. B. 47, 63 L. T. 807, [1891] 1 Q. B. 402, 55 J. P. 168, in which the English Court of Appeal construed a similar policy of insurance. No clearer exposition of the principle involved and which is applicable in the case at bar can be made then by recounting in some detail the facts of that case, and quoting from the opinions of the justices therein. The Tramways Company was insured against per-

sonal injuries, and damage to property, caused by its vehicles, in the sum of £250 "in respect of any one accident." One of the plaintiff's tramcars overturned, injuring 40 persons, as a result of which the Tramways Company sought to collect insurance under said policy for each of the several casualties up to the full amount for which it was indemnified, and "for which the assured shall be liable." One of the questions presented at the trial was "whether the injury caused to each of the said persons constituted a separate accident within the meaning of the policy." Of the two justices hearing the case, one ruled that "any one accident" should be construed to mean that "apart from any question of the number or amount of the claims made in consequence on the insured, as between them and the insurers, such an event as that which happened on November 24, 1888," constituted ground for liability as to but one claimant. The other justice said:

"As to the second question, the meaning of 'accident' in the phrase 'any one accident,' I regret to say that I differ from him. It is, I think, to be borne in mind that the object of the policy is to provide for the assured an indemnity against claims made upon them for injuries resulting from the negligence of their servants. This being so, I think it more appropriate to hold that the preceding word, 'accidents,' is used from the point of view of the several claimants upon the assured for injuries, each of whom claims in respect of a specific accident to himself, and not from that of the insurers, and that therefore 'any one accident' means any accident to any one claimant upon the insured. 'Any claim' would have been a less ambiguous expression. I think, therefore, that the defendants are liable in the full amount; but, as my learned brother is not of this opinion, I withdraw my judgment."

The case was thereupon taken to the Court of Appeal, wherein Lord Esher, M. R., said:

"I think the construction of the policy tolerably clear. The assurance is expressed to be 'as regards claims for personal injury and damage to property made against the assured in respect of accidents caused by vehicles.' These were claims for personal injury, i. e., injury to the person, and each person injured claimed for injuries in respect of an accident to his person caused by a vehicle. If several persons were injured, I think, upon the true construction of this policy, there were several accidents. I agree with the view expressed by Lawrence, J. For these reasons I think that the plaintiffs are entitled to judgment for the larger amount, and therefore the appeal must be allowed."

The other two justices concurred, each writing an individual opinion to the same effect.

Regarding the matter from the standpoint of the assured in his relation to a particular damaged car, the injury to the car constituted an accident, and a single one. It makes no difference how many other cars might have been damaged at the time by the same

cause; there was one accident which caused the harm to this particular car. Regardless of the number of claims that might exist, all arising from the injury to that car, the greatest amount which the insurance company was obligated to pay for injuries to it would be \$1,000. I think the policy is clearly intended to be viewed in this way, and, in that light, each car injured in the same general accident would, for the purposes of this contract, be regarded as having been the victim of its own accident.

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C. O. BASHAW CO. v. A. U. PINKHAM CO., Inc. (Civ. 5063.)

(District Court of Appeal, First District, Division 1, California. April 28, 1926. Rehearing Denied May 23, 1926. Hearing Denied by Supreme Court June 24, 1926.)

1. Sales — 168(2).

Seller held justified in canceling sale of peanuts, where buyer did not exercise right of inspection and accept or reject goods within reasonable time after tender.

2. Contracts — 176(10)—What is reasonable time may be determined as matter of law, where facts are not disputed or matter can be ascertained from language of contract.

What is reasonable time may be determined as matter of law, where facts are not disputed or matter can be ascertained from language of contract, though such question is usually one of fact to be determined from all circumstances of individual case.

3. Contracts — 211—In mercantile contracts parties are generally held to have intended to make time the essence.

In mercantile contracts, or where value of property is likely to fluctuate, parties are generally held to have intended to make time the essence.

4. Sales — 168(4)—Buyer who delayed eight days held not to exercise right of acceptance of tendered shipment of peanuts within reasonable time.

Buyer who delayed eight days held not to exercise right of acceptance of tendered shipment of peanuts within reasonable time, where market was strong and supply limited, seller repeatedly threatened cancellation, and buyer received two favorable reports as to quality from inspectors.

5. Sales — 271.

Seller who tendered goods at direction of buyer after examination of samples held not to have duty to furnish requested guaranties as to quality, since tender carried implied warranty that quality of bulk was equal to samples, in view of Civ. Code, § 1766.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by the C. O. Bashaw Company against the A. U. Pinkham Company, Inc. Judgment for plaintiff, and defendant appeals. Reversed.

Perry Evans, of San Francisco, for appellant.

Norman A. Eisner, of San Francisco, for respondent.

KNIGHT, J. This is an appeal by defendant from a judgment awarding plaintiff damages in the sum of \$731.50 and costs for an alleged breach of contract for the sale of peanuts.

It appears that on September 7, 1923, C. O. Bashaw Company, the respondent, with offices in San Francisco, agreed to buy from A. U. Pinkham Company, the appellant, which operates in Seattle, 770 bags of Chinese shelled peanuts in bond to be delivered out of a warehouse in Seattle. The sale was negotiated through a brokerage firm in San Francisco named Lillenthal-Williams Company, hereinafter referred to as agents, and it was stipulated during the trial that all communications from said agents to respondent be considered as communications from appellant, and that all communications from said agents to appellant be likewise considered as communications from respondent. Respondent agreed to buy said peanuts after having examined samples drawn by Laucks & Co., public inspectors and industrial chemists in Seattle, from part of the lot sold, a few weeks prior to the date of the sale, while the peanuts lay on the dock at Seattle before being placed in the warehouse. After respondent agreed to buy the peanuts, the agents, on September 8, 1923, acting under authority from respondent, telegraphed appellant to draw on respondent against negotiable warehouse receipt for the agreed price. Pursuant to these instructions, appellant, about a week later, through a San Francisco bank, tendered a warehouse receipt calling for the delivery of the peanuts, accompanied by a draft representing the amount of the purchase price, and demanded payment. Respondent did not pay the draft at that time, however, upon the ground that before accepting delivery it was entitled to make an inspection of the peanuts in bulk in the warehouse at Seattle, to ascertain whether they conformed to the quality of the samples previously examined. After waiting until September 25, 1923, for respondent to make such inspection and to accept or reject the peanuts, during which time much correspondence passed between the interested parties, as will hereinafter appear, appellant canceled the sale. Respondent thereupon commenced this action for damages.

The decision of the trial court in respondent's favor was evidently based upon the proposition that, although respondent had

approved the samples previously submitted and had authorized appellant to draw upon it for the payment of the purchase price, it was entitled, under the law, within a reasonable time thereafter to make an inspection of the bulk of the peanuts in the warehouse before accepting and paying for the same. In this regard the court found that respondent had used reasonable effort to obtain such inspection prior to the cancellation of the sale.

[1] Appellant contends that the transaction constituted a sale by sample, and that the contract was so interpreted by respondent when it authorized appellant to draw upon it on tender of a warehouse receipt; that therefore, under the law pertaining to such sales, respondent was entitled to inspect the goods for comparison either at the time of delivery or within a reasonable time thereafter, but not before, and, as a condition precedent to such inspection, was obliged to pay the draft upon its presentation, receive the goods, and thereafter to reject the same if they proved to be inferior to the samples submitted. The position taken by respondent is that the transaction did not amount to the ordinary sale by sample because representative samples of the subject-matter of the sale were never submitted, those approved being drawn from only part of the lot sold and being taken while the peanuts were on the dock some weeks previous to the sale; that consequently respondent was entitled to inspect the bulk of the goods in the warehouse before paying for the same in order to ascertain if they were of the quality represented by the samples submitted and approved. *Puritas Coffee Co. v. De Martini*, 56 Cal. App. 628, 206 P. 96; *Newmark & Co. v. Smith*, 26 Cal. App. 339, 146 P. 1064; Civ. Code, §§ 1766 and 1785. Respondent concedes, however, that it was required to exercise such right of inspection and to either accept or reject the goods within a reasonable time after the same were tendered. It would therefore appear that, aside from the legal question involved, if it be shown by the evidence that respondent failed to exercise such right within a reasonable time after tender, appellant was justified in canceling the sale and respondent should not recover.

[2, 3] What is a reasonable time is usually a question of fact and must be determined from all the circumstances of the individual case, but where the facts are not disputed or the matter can be ascertained from the language of the contract, it may be determined as a matter of law. 2 *Mechem on Sales*, §§ 1129 and 1132. In mercantile contracts it is generally held that the parties have intended to make time the essence (*Jensen v. Goss*, 39 Cal. App. 427, 179 P. 225; *Coats & Williamson, Inc., v. Moran & Co.*, 67 Cal. App. 46, 227 P. 213; *Condley v. Consolidated Lumber Co.*, 53 Cal. App. 8, 200 P. 69; 13 *Corp. Jur.* 688); and the same is true where the character of

the property is likely to fluctuate in value (6 Cal. Jur. 356).

The evidence without conflict established these essential facts: That respondent approved the samples on September 7, 1923; that on the day following it agreed to purchase the peanuts and authorized appellant to draw on it against negotiable warehouse receipt. It further shows that at the latest the bulk of the peanuts was tendered on September 17, 1923, but that respondent made no effort to obtain an inspection thereof until September 21, 1923, when it telegraphed Laucks & Co. to make such inspection; that notwithstanding respondent received reports from said company after tender and prior to cancellation to the effect that the peanuts tendered compared favorably with the samples approved, it did not up to and including the morning of September 25 indicate to appellant whether it was going to accept or reject said peanuts, but, on the contrary, at that time wired Laucks & Co. instructions to make other and more elaborate tests which necessarily would have required additional delay. In the meantime, the evidence shows, appellant, having acquired the peanuts from the importer thereof, was repeatedly demanding that respondent either accept or reject the peanuts and warning respondent that unless it acted at once in the matter the sale would be canceled, stating in this connection that at that particular time the market was strong and the supply of peanuts limited.

The evidence upon this subject consisted entirely of correspondence, and was as follows: After examining and approving the samples on September 7, 1923, respondent, through said agents, wired appellant that it "definitely confirms and accepts" said peanuts, and on the following day, September 8, 1923, authorized appellant to draw on it against negotiable warehouse receipt. The draft and the warehouse receipt were tendered at the latest on September 17th. The following day, September 18th, appellant, being advised by its bank that respondents had refused to pay the draft unless it received a "weight and quality certificate," wired the agents that it would adjust on basis of "net reweights when loaded out," and demanded immediate payment of the draft. Replying, the agents wired on September 19th that respondent was not refusing the draft, but felt that it should "have Laucks' certificate or sample drawn by Laucks from seven hundred and seventy bag lot," and in a second telegram sent to appellant on the same day stated that respondent wanted a "letter guaranteeing outturn weights and weighing charges * * * also letter from Laucks or certificate guaranteeing lot as sample sent." The telegram concluded: "Please mail eight pounds for samples from eight sacks." Appellant replied immediately by telegraph direct to respondent guaranteeing to "make adjustment basis net reweights when peanuts

loaded out," and to assume weighing charges; and after calling attention to the terms of their contract concluded:

"We insist immediate payment of draft accordance of agreement otherwise will cancel. Will not hold up this lot any longer. Peanuts worth fifty cents more than purchase price turned down many orders last week account no supply available please advise Lilienthal definitely accepting or declining."

Appellant also on the same day advised the agents by wire of the contents of its telegram to respondent and added, "We depend on you to settle this matter definitely today and have draft paid before close of banking hours otherwise will cancel." The next day, September 20th, Laucks & Co., telegraphed the agents that in their opinion the remainder of the lot of peanuts from which the previous samples had been taken were of the "same quality when inspected thirty days ago," which telegram was accompanied by one from appellant stating that the Laucks telegram "should be sufficient guarantee" to protect respondent, and stating further:

"We absolutely demand that Bashaw pay our draft before three o'clock today otherwise we cancel depend on you to see this done. As regards sample drawn Laucks showing inspection pier fourteen this original import dock, but peanuts immediately moved to * * * cold storage which to Bashaw advantage insuring peanuts same condition today as thirty days ago."

Respondent, in answer to appellant's telegram of September 19th, wrote appellant a letter dated September 20th claiming that the sample approved by them was not identified with the lot of peanuts tendered, and requesting appellant to "furnish samples of these 770 bags or Laucks' quality certificate to cover," and the next day, September 21, 1923, respondent took the first definite step toward obtaining an inspection of the peanuts by wiring Laucks & Co. to "inspect entire lot wire if identical with samples you sent per your telegram of September twentieth to Lilienthal Williams." At the same time respondent requested a firm in Seattle named Byrnes & Co. to obtain samples and to turn the same over to one Jensen for the purpose of having Jensen wire his opinion as to quality; but as early as September 4th appellant notified the agents that Jensen, being a competitor of theirs with whom they had had some previous difficulty, would not be allowed to pass on the quality of any of its goods. On this same day, September 21st, appellant for a third time wired and also wrote to the agents, complaining of the delay, declaring that they were "disgusted with the whole matter," and that unless payment was made that day the bank would be instructed to return the draft and "forget the matter." On September 22d, Laucks & Co., in response to respondent's request made on

the previous day, again assured respondent as to the quality of the peanuts, stating in their telegram:

"Pinkham peanuts total seven hundred forty-seven bags samples taken today compare favorable with samples sent September fourth. * * *"

Regarding the additional 23 bags necessary to complete the order, appellant wired the agents on that same day:

"In order avoid necessity returning invoice and draft advise Bashaw we guarantee excess twenty three bags same seven forty seven. Warehouse receipt attached to draft covers seven hundred seventy bags and quality is uniform. Now after all this trouble see that our draft is paid Monday without fail. * * *"

Even then respondent did not indicate whether it would or would not accept the peanuts, and instead of paying the draft, telegraphed Laucks & Co. two days later, September 24th, as follows:

"Wire us correct percentage of splits and spots and if sound merchantable quality free from vermin mold and rancidity. Mail certificate confirming wire guaranteeing contents."

On the following morning, September 25th, appellant evidently believing, as it had stated in one of its previous communications, that respondent was "stalling," canceled the sale, saying in its letter of cancellation to respondent that, "when Laucks called on us this morning for a permit to reinspect so that they could make five or six different tests, draw samples, etc., we were through." Following the cancellation of the sale, Laucks & Co. wired respondent on September 25th the result of its inspection, and the next day wrote respondent a letter confirming its report. The samples taken were sent to respondent by parcel post. Nothing further transpired until October 1, 1923, at which time respondent sent appellant a telegram as follows:

"Have now had opportunity inspect and compare peanuts same don't equal Laucks first sample but to avoid further trouble will dismiss action and pay draft. Please wire bank authorization deliver merchandise receipt on payment of draft."

In addition to the evidence above set forth it was shown that C. O. Bashaw, the president of the respondent company, with whom this business was transacted, was an experienced trader, having been engaged in the business of importing and exporting of peanuts for about 14 years.

[4] It therefore appears from the evidence without dispute that respondent, after tender of the peanuts, delayed four days before making any effort to obtain an inspection of the same, and, although it received two favorable reports afterwards from its inspectors as to the quality of the goods, did not indicate up to the morning of September

25th, which was eight days after the tender, whether it would accept or reject the goods, but at that time made arrangements for the taking of other samples and the making of further tests which would of necessity consume additional time. In view of these facts and considering the subject-matter of the sale in connection with the circumstances relating to the condition of the market, we think the conclusion inevitable that respondent did not exercise its right of acceptance of the goods within a reasonable time, and that therefore appellant was justified in canceling the sale. It follows that the finding of the trial court upon this issue cannot be sustained.

[5] True, after tender of the goods on September 17th, respondent requested certain certificates or guaranties as to quality, but, construing the contract most strongly against appellant, there was no duty imposed upon the latter to furnish them. After having tendered the goods in accordance with respondent's directions, which tender carried with it an implied warranty that the bulk was equal in quality to the samples (Civ. Code, § 1766), appellant was relieved of any further duty in the matter.

The judgment is reversed.

We concur: TYLER, P. J.; CASHIN, J.

77 Cal. App. 417

RAPP v. FRED W. HAUGER MOTORS CO.
et al. (Civ. 5044.)

(District Court of Appeal, First District, Division 1, California. April 12, 1926.)

1. Estoppel ⇨119.

Estoppel is a fact question.

2. Estoppel ⇨75—When true owner holds out or allows another to appear as owner or as having full power to dispose of automobile, innocent person thus led into dealing with such other will be protected (Civ. Code, §§ 1142, 2991).

Under Civ. Code, §§ 1142, 2991, where true owner holds out or allows another to appear as owner or as having full power to dispose of automobile, innocent third party thus led into dealing with such other will be protected, and his rights do not depend on actual title or authority of party with whom he deals.

3. Estoppel ⇨75—Owner delivering automobile with indorsed certificate of registration, to automobile sales company for purpose of sale estopped to dispute its title and power as against pledgee to whom it exhibited indorsed certificate.

Where automobile sales company, at time of pledging car as security for note, had possession thereof with certificate of registration, on which true owner had indorsed transfer of title to enable company to dispose of it,

and there was substantial evidence that indorsed certificate was exhibited to pledgee and was instrumental in inducing him to believe that company was owner, finding that owner was estopped to dispute company's title or power of disposition as against pledgee was justified.

4. Estoppel ⇨117—Whether automobile sales company in possession of car and certificate of registration indorsed by owner at time of pledging it obtained or had possession thereof on prior dates held immaterial on issue of owner's estoppel to dispute its title and power of disposition.

Where automobile sales company had possession of automobile with certificate of registration, on which owner had indorsed transfer of title, when it pledged car as security for note, it was immaterial, on issue of owner's estoppel to dispute company's title and power of disposition as against pledgee, whether it obtained or had possession thereof on dates of bill of sale and subsequent conditional contract of sale to it.

5. Pledges ⇨9, 24.

Pre-existing debt constituted valid consideration for pledge of automobile as security for note, and pledgee's rights were superior to those of owner intrusting car to pledgor under circumstances showing apparent ownership in latter.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Francis T. Rapp against the Fred W. Hauger Motors Company and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Eugene F. Conlin, of San Francisco (Fred C. Hutchinson, of Oakland, of counsel), for appellant.

P. A. Bergerot and A. P. Dessouslavy, both of San Francisco, for respondents.

KNIGHT, J. Plaintiff, Francis T. Rapp, brought this action in claim and delivery to recover possession of an automobile or its value. He was denied the relief prayed for in his complaint, and a judgment for damages in the sum of \$1,500 was awarded against him and in favor of defendant J. A. Nougue, from whose possession the automobile in question was taken and subsequently sold subject to the replevin proceedings. Plaintiff has appealed, and urges as principal ground for reversal that the evidence is insufficient to support the findings or the judgment.

At the time the transactions hereinafter mentioned occurred the corporate defendant Fred W. Hauger Motors Company, was handling the San Francisco sales agency for Stearns-Knight automobiles, Fred W. Hauger being the president of said company and conducting the negotiations between the interested parties. Rapp was the owner of a

1920 model touring automobile of the manufacture mentioned, and on March 17, 1921, entered into a written contract with the defendant motors company for the purchase of a new automobile, a 1921 model of said manufacture, for the sum of \$3,125, the motors company agreeing to accept Rapp's old model as a payment of \$2,450 on the purchase price. Pursuant to this contract Rapp executed and delivered to the motors company a bill of sale of the old model, but, pending the arrival and delivery to him of the new one, was allowed to use the old model after certain repairs had been made thereto and new tires supplied by the motors company. On July 26, 1921, at Hauger's suggestion, a new arrangement was made whereby title to the old model was retransferred by said company to Rapp by means of a bill of sale, and thereupon two conditional sales contracts were entered into between the parties. One of them was for the purchase of the old automobile by the motors company for the sum of \$2,450, the receipt of \$1,000 being acknowledged, and the balance of \$1,450 made payable in monthly installments of \$145 each; the other was for the purchase of the new automobile by Rapp for the sum of \$3,125, the receipt of \$1,000 being acknowledged and the balance made payable in equal monthly installments of \$212.50. The new car was delivered to Rapp about September 1, 1921, at which time he surrendered the old one to the motors company with the admitted understanding that it was to be sold by said company. In this connection the conditional sales contract provided that "if the above car is sold by purchaser (motors company), balance of purchase price to be due and payable forthwith." Up to the time the automobiles were exchanged the motors company had paid two installments of \$145 each on the purchase price of the old one. On September 12, 1921, at Hauger's request, and in order to facilitate the sale of the old car, Rapp signed the printed indorsement of transfer of title appearing on the reverse side of the certificate of registration issued by the state motor vehicle department and delivered said certificate to the motors company. Said indorsement was in the following form: "Indorsement of transfer with application for re-registration. The undersigned registered owner of this automobile has transferred to the undersigned buyer, with the consent of the legal owner, his interest therein." Rapp, also as legal owner, signed the written consent to said transfer. The automobile in question continued to remain in the possession of the motors company until October 28, 1921, at which time said company executed a bill of sale and transferred the possession thereof to the defendant Nougue to secure the payment of a promissory note executed by the motors company on September 16, 1921, said note having been secured

previously by the pledge of another automobile which the motors company had disposed of. During the negotiations between the motors company and Nougue, the motors company exhibited to Nougue, as evidence of ownership, the indorsed certificate of registration showing the transfer of title to said company; also the bill of sale of March 17, 1921, from Rapp to said company. During the following month, November, 1921, Nougue obtained possession of said indorsed certificates and attached his name thereto as second buyer. Upon the delivery of the car to Nougue on September 16, 1921, it was removed by him to his private garage, where it was kept until about December 10, 1921. It was then seized under process issued in this action and subsequently sold by the sheriff for the sum of \$1,000. The value of the car when seized, according to the allegations of the complaint and as found by the court, was \$1,500, for which amount Nougue was given judgment.

The defendant Nougue pleaded an estoppel, and the trial court based its judgment in his favor on the issue raised by that defense, having found with respect thereto that "said plaintiff is estopped as against defendant J. A. Nougue from claiming the title to or the right to possession of said automobile."

[1] The question of the existence of an estoppel is one of fact. *Parke v. Francis*, 228 P. 435, 194 Cal 284; *Di Nola v. Allison*, 76 P. 976, 143 Cal. 106, 65 L. R. A. 419, 101 Am. St. Rep. 84. The important question presented for determination therefore is whether the evidence is sufficient to support the trial court's finding as to the estoppel. We are of the opinion that it is.

[2] Section 2991 of the Civil Code provides that "one who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it, cannot set up his own title, to defeat a pledge of the property, made by the other, to a pledgee who received the property in good faith, in the ordinary course of business, and for value"; and section 1142 of the same Code declares that "Where the possession of personal property, together with a power to dispose thereof, is transferred by its owner to another person, an executed sale by the latter, while in possession, to a buyer in good faith and in the ordinary course of business, for value, transfers to such buyer the title of the former owner, though he may be entitled to rescind, and does rescind the transfer made by him." Agreeable to the legal principles stated in these Code sections, it has been held in a number of cases involving sales or pledges of automobiles by persons clothed with indicia of ownership that, where the true owner holds out another or allows him to appear as the owner of or as having full power of disposition over the property, and an innocent third person is thus led into dealing with him, the rights of the

innocent person will be protected; that under such circumstances the true owner can neither legally nor equitably complain or maintain a cause of action against the innocent party for the obvious reason that he himself has put it within the power of the apparent owner to dispose of the property. *Anglo-California Trust Co. v. Pacific Acceptance Corp.* (Cal. App.) 232 P. 489; *Chucovich v. S. F. Securities Corp.*, 214 P. 263, 60 Cal. App. 700; *Parke v. Franciscus*, supra; *Carter v. Rowley*, 211 P. 267, 59 Cal. App. 486; *Stukey v. Mihara* (Cal. App.) 234 P. 919; *Sidney v. Wilson*, 227 P. 672, 67 Cal. App. 282. It is furthermore held that the rights of the innocent party do not depend upon the actual title or authority of the party with whom he deals directly, but are derived from the act of the real owner, which precludes him from disputing, as against the innocent party, the existence of the title or power which, through negligence or mistaken confidence, he has caused or allowed to be vested in the party making the sale. *Sidney v. Wilson*, supra; *Carpy v. Dowdell*, 47 P. 695, 115 Cal. 677; *Fowles v. National Bank of California*, 140 P. 271, 167 Cal. 653; *Brewster v. Sime*, 42 Cal. 139; 10 Cal. Jur. 641.

[3] We believe that the facts of the instant case have been brought clearly within the legal principles above stated, and that the cases cited are decisive herein upon the question of estoppel. Even assuming, as appellant contends, that the motors company wrongfully exhibited to Nougue as evidence of ownership the bill of sale dated March 17, 1921, which appellant claims was superseded by the later transaction of July 26, 1921, the legal situation is not changed for the reason that, aside from the matter of said bill of sale, the motors company, at the time it pledged the car with Nougue, was clothed with indicia of ownership by having possession of said automobile along with the certificate of registration upon which appellant had duly indorsed a transfer of title. Appellant admitted while testifying that the purpose of the delivery of the automobile and of the indorsed certificate of registration to the motors company was to vest in said company the power to dispose of the automobile; and there is substantial evidence to show that the indorsed certificate was exhibited to Nougue by the motors company at the time he accepted the automobile as a pledge, and was instrumental in inducing him to believe that the motors company was the owner of the property about to be pledged. This evidence, when considered along with the other circumstances mentioned, was sufficient to justify the application of the doctrine of estoppel.

[4] Appellant also attacks the findings of the trial court to the effect that said automobile was delivered to the motors company on March 17, 1921, and was in its possession on

July 26, 1921, upon the ground that neither finding is supported by the evidence. As already pointed out, the rights of an innocent party do not depend upon the actual title of the party with whom they deal directly, but are grounded upon the acts and conduct of the real owner in clothing such party with apparent ownership. *Sidney v. Wilson*, supra. The evidence proves without conflict that on October 28, 1921, at the time of the Nougue transaction, the motors company had possession of said car under circumstances showing apparent ownership, and therefore it would seem to be immaterial whether or not the motors company obtained or had possession of the automobile on either of the prior dates mentioned.

[5] The pre-existing debt from the motors company to Nougue constituted a valid consideration for the pledge, and it follows that by reason of the validity thereof Nougue became a pledgee for value, with rights superior to those of appellant, who had intrusted the property to the pledgor. *Fowles v. National Bank of California*, supra; *Smitton v. McCullough*, 189 P. 686, 182 Cal. 530; *Grange v. Judah Boas Co.*, 213 P. 712, 60 Cal. App. 484, 492.

The remaining points urged by appellant relate merely to the main ones already disposed of, and therefore do not require discussion.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

77 Cal. App. 399

PAYNE v. DE VAUGHN et al. (Civ. 4140.)

(District Court of Appeal, Second District, Division 2, California. April 10, 1926.)

1. Licenses 40—Practice of architecture without certificate by person holding himself out as "architectural engineer" and not "architect" held violative of statute requiring certificate for practice of architecture (St. 1901, p. 641).

Under Act to Regulate the Practice of Architecture (St. 1901, p. 641), practice of architecture without certificate is a misdemeanor, regardless of whether one holds himself out as architect, unless he informs person for whom plans or data are furnished that he is not a certified architect, and that person rendering architectural services held himself out as "architectural engineer" and not as "architect" was immaterial.

2. Licenses 39—Burden is on person practicing architecture without certificate to prove that he is within exception permitting such practice, if he informs person to whom services are rendered that he is not certified architect (St. 1901, p. 641).

Burden is on person practicing architecture without certificate to prove that he has brought

himself within exception of Act to Regulate Practice of Architecture (St. 1901, p. 641), permitting such practice without certificate, if person to whom services are furnished is informed that he is not certified architect.

3. Licenses 11(4).

"Architect" within St. 1901, p. 641, prohibiting practice of architecture without certificate is one who makes plans and specifications for a building and superintends its construction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Architect.]

4. Licenses 39—Contract for architectural services by one not having certificate held void, and not to authorize recovery for services, notwithstanding person executing contract was not principal architect; principal not being party to contract (St. 1901, p. 641).

Contract for architectural services by one not having certificate required by St. 1901, p. 641, was void, and recovery for such services was not authorized, even if person who made contract to render such services was not principal architect, where alleged principal was not a party to contract.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by J. T. Payne against Thomas T. De Vaughn and another to recover architect's commissions. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Appeal from the order dismissed, and judgment reversed.

John C. Miles, of Los Angeles, for appellants.

Schweitzer & Hutton, of Los Angeles, for respondent.

CRAIG, J. On or about April 14, 1921, it was agreed by a contract in writing "between Dr. Thos. T. De Vaughn, * * * and J. V. Spaugh, * * * hereinafter designated as party of the first part, and J. T. Payne, architectural engineer, * * * as party of the second part," that the latter should "make all necessary plans and specifications, supervise the bids from subcontractors, and supervise the construction of the proposed new class C theatre and office building," which the parties of the first part, appellants herein, contemplated having erected. It was also stipulated that respondent's compensation for such services should be 4 per centum of the total cost of the building, but that, should the owners fail to negotiate a loan for the purpose of constructing the building, or decide not to build, they should pay respondent \$200 "for his sketches and services."

Respondent prepared and furnished to appellants an original sketch and plans and specifications for a building, and received from them on account of such services the sum of \$100. Thereafter appellants entered into a contract with one Zeller, who procured

a loan for them, and prepared other and different plans and specifications, and a theater building was erected in accordance therewith. Respondent was not permitted to fulfill his part of the contract in suit—the reasons for which we need not recite—and he instituted this action for the sum of \$1,072, alleged balance of commissions due under the terms of the contract.

Respondent testified at the trial that, although he had been preparing plans and specifications and supervising construction work for about ten years, and was "doing it every day," he did not have, and had never had, a license from the state board of architecture, as required by the Act of 1903, p. 522. From his testimony it is clear that he not only did not have such license, but that he did not intend to obtain one.

The trial court found that the building was erected at a total cost of \$23,000; that the defendants refused to permit the plaintiff to supervise the bids or the erection of the building; that the reasonable value of the services performed by the plaintiff was \$575, \$475 of which remained unpaid, and gave judgment for the latter amount.

The defendants appealed from the judgment and order denying their motion for a new trial. The principal ground of attack upon the judgment is that, since respondent had no license, and did not inform the appellants that he was not an architect within the meaning of the statute, the contract was illegal and void.

The act in question (Act to Regulate the Practice of Architecture, March 23, 1901, p. 641, Amended Stats. 1903, p. 522), provides, in part, as follows:

"After the expiration of six months from the passage of this act, it shall be unlawful, and it shall be a misdemeanor, punishable by fine of not less than fifty dollars nor more than five hundred dollars, for any person to practice architecture without a certificate in this state, or to advertise, or put out any sign or card, or other device which might indicate to the public that he was an architect; provided, that nothing in this act shall prevent any person from making plans for his own buildings, nor furnishing plans or other data for buildings for other persons, provided the person so furnishing such plans or data shall fully inform the person for whom such plans or data are furnished, that he, the person furnishing such plans, is not a certified architect." Section 5, St. 1901, p. 644.

[1-3] It is urged on behalf of the respondent that, since he at no time represented himself to be an architect, but only an architectural engineer, he did not violate the statute above quoted. The idea seems to be that, unless it appears that he violated every provision of the law in question, the mere fact that he transgressed one of its inhibitions is of no consequence. But for any person to practice architecture in this state

without a certificate is made a misdemeanor, and this regardless of whether or not he may also have held himself out to the public or to any person as an architect. Under this statute there is but one way in which a person who has no certificate can legally render such architectural services as were to be performed by respondent. Such person can "inform the person for whom such plans or data are furnished that he, the person furnishing such plans, is not a certified architect." Therefore, if it be shown that the respondent practiced architecture, the burden is clearly upon him to prove that he brought himself within the exception just quoted by giving the appellant the required information. It is not contended that the respondent did this. Under such circumstances the task of the court is a simple one. It is merely to decide whether or not the work contracted to be performed constituted practicing architecture. The rule which brings one within the classification of "architect" has been declared in various jurisdictions. In every instance where the term has arisen for interpretation, so far as we are able to ascertain, it has been held that one who makes plans and specifications for a building, and superintends its construction, is an "architect." In fact, the rule most commonly applied does not embrace the duty of supervision. *Wilson & Edwards v. City Council of Greenville*, 43 S. E. 966, 65 S. C. 426; *Turner v. Haar*, 21 S. W. 737, 114 Mo. 335; *People v. Lower*, 96 N. E. 346, 251 Ill. 527, 36 L. R. A. (N. S.) 1203; *Young v. Bohn* (C. C.) 141 F. 471; *Louisiana Molasses Co. v. Le Sassier*, 28 So. 217, 52 La. Ann. 2070. In *Bacigalupi v. Phoenix Bldg. & Constr. Co.*, 112 P. 892, 14 Cal. App. 632, it was held that, although a person who prepared the plans and specifications was not a professional architect, but was a contractor and builder, yet, having performed such services, he was in that instance the architect. Clearly, the services contracted to be rendered by Payne were those of an architect.

[4] But respondent attempts to avoid the effect of this upon the theory that, although he was the contracting party, prepared the plans and specifications, and agreed to supervise the construction, the contract was legal because he was in reality not the principal architect. However, the latter was not a party to the contract. In *Wedgevood v. Jorgens*, 157 N. W. 360, 190 Mich. 620, a city ordinance was involved which embodied provisions similar to those contained in the statute here under consideration. It was there said:

"An architect, as defined by the ordinance, employs an unlicensed architect to prepare plans and specifications for one of his clients. Does the rule apply in such a case? We think it does. Plaintiff must have known that, as a builder, contractor, and overseer of construc-

tion, he was an architect within the meaning of the ordinance. He knew that he had no license, and he admits that he knew that Krieger, the architect who actually prepared the plans, had no license. Whether plaintiff be regarded as an unlicensed architect, or whether he be regarded as a mere contractor and builder, who knowingly employed an unlicensed architect to do the work, he is barred under the rule from recovering on the contract."

The act here in controversy forbids the practice of architecture by an unlicensed person, and makes it a misdemeanor, although it does not prevent him from furnishing plans or data if he shall first have fully informed the person for whom they are intended that he has not been certified. This latter duty the respondent did not observe.

It has frequently been held that a statute or ordinance requiring the payment of a license and procurement of a certificate to perform the services of an insurance agent, attorney, contractor and builder, freight solicitor, insurance broker, peddler, architect, plumber, real estate agent, or stock breeder, is not to be construed as a revenue law alone, but as a police measure, for the protection of the public, and that a contract of an unlicensed person for the furnishing of such services will not be upheld. *Pride v. Commercial Union Ins. Co.*, 63 So. 803, 9 Ala. App. 334; *Hittson v. Browne*, 3 Colo. 304; *Zimmerman v. Brown*, 166 P. 924, 30 Idaho, 640; *Hughes v. Dougherty*, 62 Ill. App. 464; *Draper v. Miller*, 140 P. 890, 92 Kan. 275; *Harding v. Hagar*, 60 Me. 340; *Goldsmith v. Mfg. L. Ins. Co.*, 103 A. 627, 132 Md. 283; *Stewartson v. Lothrop*, 78 Mass. (12 Gray) 52; *Wedgevood v. Jorgens*, 157 N. W. 360, 190 Mich. 620; *McIver v. Clarke*, 10 So. 581, 69 Miss. 408; *Johnston v. Dahlgren*, 59 N. E. 897, 166 N. Y. 354; *Johnson v. Hulings*, 103 Pa. 498, 49 Am. Rep. 131. In *Levinson v. Boas*, 88 P. 825, 150 Cal. 185, 12 L. R. A. (N. S.) 575, 11 Ann. Cas. 661, our own Supreme Court said:

"It is to be noticed that every case from every court recognizes that when a statute has been made for the protection of the public a contract in violation of its provisions is void."

We conclude that respondent practiced architecture in contravention of the provisions of the act regulating the practice of architecture, and that, therefore, the contract upon which recovery is sought was illegal and void.

The sufficiency of the pleadings and of the evidence adduced upon the trial are questioned, but from the conclusion reached herein it becomes unnecessary to consider them.

The appeal from the order denying the motion for a new trial is dismissed. The judgment is reversed.

We concur: FINLAYSON, P. J.; WORKS, J.

77 Cal. App. 438

PEOPLE v. CONNORS. (Cr. 882.)

(District Court of Appeal, Third District, California. April 14, 1926. Hearing Denied by Supreme Court June 9, 1926.)

1. Indictment and information $\S$ 171—Instrument constituting essential element of crime must be proved substantially, or frequently precisely, as pleaded.

Where an instrument in writing constitutes gravamen of a cause of action, or an essential element of body of crime, or is alleged to have been specific means by which crime has been committed, such instrument must be proved substantially, or, in many cases, precisely, as it is pleaded.

2. Embracery $\S$ 5½, New, 1926 Current Digest—In prosecution for attempting to influence juror by letter, whether juror received identical letter pleaded held for jury (Pen. Code, $\S$ 1093).

In prosecution for corruptly attempting to influence juror in pending case by sending letter to him, whether juror in question received identical letter pleaded in the indictment held a question for the jury, under Pen. Code, $\S$ 1093.

3. Witnesses $\S$ 71—Judge, testifying in case tried before him, abused discretion if his testimony discloses facts without proof of which issue such testimony is designed to support cannot be sustained (Code Civ. Proc. $\S$ 1833).

Generally, a judge is not a competent witness in a case being tried before him, and notwithstanding Code Civ. Proc. $\S$ 1833, leaving it to discretion of judge, it will be deemed an abuse of such discretion if judge's testimony discloses facts without proof of which the issue such testimony is designed to support cannot be sustained.

4. Criminal law $\S$ 1186(4)—Action of judge in testifying as to lost document held not miscarriage of justice, in view of trifling importance of his testimony and conclusive evidence of defendant's guilt (Code Civ. Proc. $\S$ 1833; Const. art. 6, $\S$ 4½).

Action of judge in voluntarily testifying as a witness merely for purpose of proving by secondary evidence a lost document similar to one set forth in indictment held not, in view of Code Civ. Proc. $\S$ 1833, authorizing judge to testify, and Const. art. 6, $\S$ 4½, to have resulted in miscarriage of justice, in view of trifling importance to people of judge's testimony, and fact that jury would not have reached any other verdict, though judge had not testified.

5. Criminal law $\S$ 655(5)—Judge's remark to accused's counsel, "Make your objection; don't take up so much time in statements," and similar remarks, held not prejudicial misconduct.

Remark of judge to accused's counsel, "Make your objection; don't take up so much time in statements," and acts of similar general character, held not misconduct prejudicial to rights of accused.

6. Criminal law $\S$ 1171(1)—District attorney's reply to accused's attorney that "I want to characterize that statement as absolutely malicious and mendacious," though improper, held not prejudicial to defendant, in view of admissions and evidence.

Where district attorney in presenting case stated that accused had admitted on appeal to appellate court that document he offered was a true and correct copy, to which accused's counsel stated that district attorney's statement was made for deliberate purpose of prejudicing this case before jury, district attorney's reply that "I want to characterize that statement as absolutely malicious and mendacious," though improper, held not to have prejudiced defendant, in view of evidence and defendant's admissions that he caused such documents to be distributed and mailed.

7. Criminal law $\S$ 1171(1)—In prosecution for attempting to influence jury in criminal syndicalism case, district attorney's characterization of I. W. W. as an outlaw organization held not prejudicial.

In prosecution for corruptly attempting to influence juror in pending prosecution under Criminal Syndicalism Law, characterization by district attorney of the I. W. W. as an "outlaw organization" held not to have prejudiced defendant, or contributed to the result arrived at by jury.

8. Criminal law $\S$ 720(6)—Attorney's argument may give his interpretation to any act to which there is substantial evidence, and assign to it any motive consistent with nature thereof and circumstances.

Though an attorney in argument to jury must not import any opinion into case which is not fairly within legitimate bounds of record, he may give his own analysis of and interpretation to any act or fact to which there is substantial evidence, and assign any motive which is consistent with nature thereof and circumstances under or by which it was produced.

9. Embracery $\S$ 5—In prosecution for corruptly attempting to influence juror in pending prosecution under Criminal Syndicalism Law, preamble of platform and other literature of I. W. W., of which accused was member, held properly admitted.

In prosecution for corruptly attempting to influence a juror in pending prosecution under Criminal Syndicalism Law by sending letter to him, preamble of political platform and other literature of the I. W. W., offered on theory that they would tend to show that, defendant being in accord with views set forth in them, circulation of letter was to influence a verdict of acquittal, held properly admitted.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Tom Connors was convicted of attempting corruptly to influence a trial juror, and he appeals. Affirmed.

R. W. Henderson, of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was charged by indictment found and returned by the grand jury of Sacramento county with the crime of attempting corruptly to influence one H. D. Arnold, a trial juror, in the determination of his verdict in a specifically named criminal case then pending in the superior court of said county. Upon his trial for said offense he was convicted, and he brings his case to this court by an appeal from the judgment of conviction and the order denying him a new trial.

The present is the second trial of the defendant upon the charge preferred against him in the indictment. He was convicted by the jury of the offense charged by the indictment, but the judgment and the order denying him a new trial were reversed because of the giving of an instruction which this court held involved an erroneous and a prejudicial statement of the rule of law thereby sought to be declared. *People v. Connors*, 233 P. 362. The opinion disposing of said appeal in the case sets forth, in substance, the following part of the indictment:

"The indictment charges that on the — day of March, 1923, there was pending and set for trial and undecided 'an action entitled the *People of the State of California v. Barney Brooks et al.*,' that the defendants therein were charged with the crime of criminal syndicalism; that the trial of said action had been set for March 26, 1923; that a regular panel of jurors had been 'duly summoned and drawn'; that one of such jurors was H. D. Arnold; that defendant knew that Arnold had been so drawn and summoned, and that he 'would continue as said summoned and drawn juror during the trial of' said criminal action; and that defendant corruptly attempted to influence said juror 'in respect to his verdict to be thereafter rendered in said action of the *People of the State of California v. Barney Brooks et al.*, * * * by means of a written communication then and there had by said' defendant 'with said juror, H. D. Arnold.'"

The written communication in its entirety follows in said opinion the above excerpt, but, for the purposes of the present opinion, it will be sufficient to present herein so much of the communication only as is set forth in the indictment, as follows:

"The law which makes such gross injustice possible was introduced before your state Legislature by a representative who admits never having read it previous to that time. A trio of degenerates will be on hand when the prosecution offers its evidence, and these three persons will offer, as testimony, some weird tales of crimes committed by themselves. These men who go continually from place to place trading for a few pieces of gold the liberty of honest workmen by claiming that while members of a certain labor organization they themselves had committed certain crimes, at the same time admitting that no punishment has ever been meted out to them for having done so. To the intelligent this should prove a fair example of what extremities men will go to for the sake of \$10 per day and expenses.

"Did you ever stop to consider that, with a sometime membership of several hundred thousand members, only three persons are to be found who knew of these acts having been committed. Think again that these three are employed continually for this purpose, and besides being of a very low moral type they admit having remained members of this organization to further the interests of some certain corporate interests who have at all times shown bitter enmity toward all labor organizations.

"There is another matter we would like to mention. In your city there is a wife, a mother, and she is waiting for some one who does not come home. This woman is Mrs. Barney Brooks, who is alone with two very small children because of a certain law which states that a man must answer for the thoughts and ideas of others who may now be dead and forgotten, if ever they lived at all.

"This young man, who led a good, clean life among you for years, made an apparent mistake, but a mistake only from a very narrow and selfish point of view. He wishes to improve working conditions for his own and other people's children when they arrive at the proper age. His wife and kiddies await him at home, and he cannot go to them because three perverted minds have contrived to turn lies into dollars, and laws are enacted which corporations can twist and turn to their financial benefit. This young man is being held under bonds of \$2,500; and others already convicted of the same charge are out awaiting appeal under bonds of \$250 each.

"We leave these facts for your consideration, and trust that you will investigate them. Then write to your newspaper and responsible officials and, in the name of fairness and justice, demand the repeal of this extremely vicious and inhuman piece of legislation.

"Yours for fair play and justice to all."

Upon proceeding with the trial with which we are now concerned it transpired that the written document upon which this prosecution is founded, and of which in part the above as taken from the indictment is a copy, was missing and could not be found by the prosecuting officers. Other written documents of a like nature, which, as was true of the letter or document referred to in the indictment, were introduced in evidence at the first trial of the accused and marked as exhibits in the case, were also missing, and consequently were not themselves available for use at the trial from which the present appeals arise. Upon laying the requisite foundation, the people introduced secondary evidence of the contents of said missing writings or documents.

At the former trial the defendant testified in his own behalf, but was not a witness in the second trial; that is, the trial the record of which, in certain designated particulars, we are now called upon to review upon his appeal from the judgment of conviction and the order disallowing his motion for a new trial. The people, however, introduced in evidence the testimony given by him at the former trial.

The same witnesses, with the exception of one (Carl E. Scheunert), who testified at the first trial, testified at the trial eventuating in the present appeals, and the oral testimony given at the second or the last-mentioned trial was substantially the same as that given at the first trial. Scheunert, above referred to, was one of the panel of jurors summoned early in March, 1922, to appear for jury duty in the superior court of Sacramento county. Several other jurors of the same panel other than juror Arnold testified at the second trial, as they did at the former trial, that they received through the United States mail a copy of the communication set forth in the indictment. Counsel for the defendant, however, frankly makes the following statement in his opening brief:

"As this court has had occasion to review the evidence in the case upon the former appeal, it will not be necessary to present it in detail in this brief. Except for the fact that the foundation for secondary evidence had to be laid in connection with practically every document, the statement contained in the appellant's opening brief in the former appeal will be found fairly accurate."

The statement of the general facts in the former opinion herein is not only in accord with the evidence as disclosed by the record on the former appeal, but is in full harmony with the evidence as revealed by the record on this appeal and the statement of the facts in the opening brief of appellant filed in support of the former appeal. We, therefore, adopt as a part of this opinion the statement by the presiding justice in the opinion disposing of the former appeal of the facts disclosed by the evidence introduced by both the people and the defendant as follows:

"March 2, 1923, an indictment was duly filed charging Barney Brooks, Joe Wagner, and R. C. Russell with the crime of criminal syndicalism. March 6th the defendants entered pleas of not guilty. The case was set to be tried on the 26th of the same month. The record does not show on what day the order was made setting the case for trial, or whether it was before or after the mailing of the foregoing communication. March 22d, Brooks withdrew his plea of not guilty and entered a plea of guilty. He was thereupon placed on probation. The trial of the other defendants was commenced March 26th. During the month of March three other actions were pending, in which the defendants therein were charged with criminal syndicalism. The trial dates of these cases were set and successively continued as follows: *People v. Vargo et al.*, November 2, 1922, and January 2, January 15, February 21, March 5, March 6, and March 26, 1923; *People v. Flanagan et al.*, February 5, February 6, March 13, and April 27, 1923; *People v. Stewart et al.*, February 5, February 6, March 19, and May 5, 1923. In addition to the foregoing cases, there was pending another criminal syndicalism case against eight defendants. The trial of that action was commenced March 5, 1923, and was still in progress as late as March 18th.

"March 2, 1923, a regular panel of jurors was drawn for service commencing the 12th day of March. Arnold's name was one of those so drawn. From this panel the jury was selected to try Wagner and Russell. Arnold was called in the jury box, examined as to his qualifications, and excused from service in that case.

"The Legislature was in session at the time the alleged communication was mailed. A movement was then in progress to bring about the repeal of the Criminal Syndicalism Law. * * * The defendant contended at the trial and now urges that the communication was not sent for the purpose of influencing any juror, but that it was merely a part of a general agitation to influence public opinion in favor of the repeal of the law. Appellant says that 'the evidence in this case is practically without conflict.' This may be conceded, but conflicting inferences may be rationally drawn from the evidence as to the purpose or intent with which the communication was sent.

"The general defense committee of the I. W. W., with headquarters in Chicago, had charge of the defense of persons arrested under criminal syndicalism statutes. The defendant was secretary of the California branch of the committee, with offices in San Francisco. He was in charge of the defense of criminal syndicalism cases in this state. The alleged communication was mailed in San Francisco March 17, 1923, and the envelope containing it was addressed to H. D. Arnold, Sacramento. The defendant testified that it was a multigraph letter, and that he caused 20,000 copies thereof to be mailed to residents of Sacramento county between the 5th and the 25th of March, 1923; that he knew there were several criminal syndicalism cases then pending in that county; that a part of his work was 'to keep a record of all cases pending'; that he knew Brooks, Wagner, and Russell were 'in jail in Sacramento at that time, and 12 other men throughout the state, which were not listed as cases, they were individuals, they were in jail—no indictment returned, to my knowledge—no record of it in our office at that time'; that he had no information that a jury had been drawn in Sacramento county; that he had never heard of the name H. D. Arnold or of any of the 4 other jurors who, the evidence shows, received copies of the letter; that the thought that any of the letters might reach jurors or prospective jurors never crossed his mind, was never thought of or mentioned; that similar letters were sent to residents of 9 counties prior to his arrest; that 25,000 were sent to Lassen county; that his intention in sending copies of the letter to residents of Sacramento county 'was to make the public acquainted with these facts, to create public opinion which we believed would cause the repeal of this act, and to raise funds to defend these cases'; that there were two Sacramento county telephone directories in his office from which names and addresses of residents of that county were taken in mailing out literature. There were inclosed in the envelopes containing these letters two printed leaflets attacking the Syndicalism Law and prosecutions had thereunder. The defendant's office was searched at the time of his arrest and packages of letters were found therein addressed to the residents of several counties, including Lassen and Siskiyou. The evidence shows that there was a criminal syn-

dicalism case pending in each of those counties at that time."

Counsel for the defendant admits that the foundation for the introduction of secondary evidence of the documentary evidence, including the letter upon which the indictment is founded, was sufficiently laid. Among the copies of the documents received into the record of the case at the former trial which were introduced in the trial involved in the present appeals was that of said letter. It is claimed, though, that the evidence introduced herein is insufficient to show that juror Arnold received the identical letter pleaded or set forth in the indictment. This presents the most important of the several points upon which the defendant relies here for a reversal. The several other assignments involve the claim that the judge of the trial court was, in several instances, guilty of misconduct in the trial of the case which prejudiced the rights of the accused in the trial of the issues; that the district attorney, in his presentation of the case to the jury, was, in a number of instances during the progress of the trial, guilty of misconduct of a character calculated to deny to the accused a fair and impartial trial; that there was prejudicial error in the action of the court in the giving and the refusal to allow certain instructions.

[1, 2] 1. The witness H. D. Arnold, who, as seen, was summoned as a juror early in March, 1923, and by whom the communication or address set forth in the indictment was received prior to the date fixed for the trial of the criminal syndicalism case against Barney Brooks and others, was shown a copy of the said communication or address, and, upon his examination thereof, was asked by the district attorney whether or not he (the witness) "recognized it as being a copy of the letter you received at that time," referring to the date of the witness' receipt of the communication through the mail. To that question Arnold replied, "I did receive a letter at that time addressed 'to the citizens of Sacramento county, of this character,'" referring to the copy of the communication which he had just inspected or read. The witness was not further questioned by the district attorney along that line, and the answer so returned was the only direct testimony presented to the jury tending to show that such a letter or communication as is set forth in the indictment was received by said Arnold at the time mentioned by him and alleged in the accusatory pleading.

It is the settled law that, where an instrument in writing constitutes the gravamen of a cause of action or an essential element of the body of a crime or is alleged to have been the specific means by which a crime has been committed, such instrument must be proved substantially, or, perhaps, in many cases, precisely as it is pleaded. But there is no question here that the letter pleaded

in the indictment which is the groundwork of the crime therein charged was the letter or a copy thereof which was sent out by defendant or under his immediate direction to many thousands of the citizens of Sacramento county at the time mentioned in the indictment. That fact was admitted by the defendant at the trial and is not, of course, controverted on these appeals. The only question at the trial was whether the evidence was such as to justify the jury in concluding therefrom whether the letter received by H. D. Arnold, summoned to serve as a juror in the superior court of Sacramento county shortly prior to the trial of the criminal syndicalism cases referred to above, was a copy of the letter set forth in the indictment. The question here is whether we can say, as a matter of law, that such finding is not supported. Of course, the fact of the receipt of the letter or a copy thereof by Arnold at the time mentioned had to be proved to establish the fact of the commission of the crime charged and proved by evidence which would justify the conviction, beyond a reasonable doubt, that the very letter pleaded was actually received by Arnold at the time mentioned. But we can conceive of no just reason for holding that such fact may not be proved as well by circumstantial as by direct evidence. It may first be observed that it was for the jury to determine, from all the facts and circumstances before them bearing upon the charge alleged in the indictment, the meaning intended to be conveyed by Arnold when, upon examining an admitted copy of the letter set out in part in the indictment, he stated, referring to said copy: "I did receive a letter of this character." These facts and circumstances are: That, as a necessary part of the trial, the clerk of the court, upon the swearing of the jury selected to try the case, read to the jury the indictment, which consisted in part of the letter in question or a copy thereof, and stated the defendant's previously entered plea thereto (Pen. Code, § 1093, subd. 1), and thus the letter and its contents were before them in an unquestionably legal form; that defendant admitted that, prior to the date fixed for the trial of the criminal syndicalism cases pending in the superior court of Sacramento county, many thousands of the copies of the letter set out in the indictment were, by his authority and under his direction, addressed and sent through the mails to as many citizens of Sacramento county; that, among the citizens of said county to whom copies of said letter thus were sent, were several citizens, other than said Arnold, who had also been summoned early in March, 1922, on the jury panel for said superior court, and who received said letter or a copy thereof a short time prior to the date fixed for the trial of the criminal syndicalism cases above referred to; that said H. D. Arnold, at the time that he received a letter of the "char-

acter" of the one set out in the indictment, was still a member of said jury panel, from which it was the purpose and intention to select a jury to try said syndicalism cases. Interpreting the statement of Arnold that he received a letter or communication at the time mentioned in the indictment of the "character" of the one shown to and inspected by him when testifying by the light of the foregoing facts and circumstances, and the further fact that the letter or communication shown to and examined by him was a copy of the letter or communication set forth in the indictment, the conclusion is fair and reasonable that what he intended to say when he made the statement referred to was that he had received at the time mentioned a letter or communication which in its language and subject-matter was the same as the copy submitted to his examination when on the witness stand and giving his testimony, and justly the jury could have so viewed it. Indeed, it is to be assumed, from the fact that the verdict was that the accused was guilty of the crime as charged, that the jury did so construe the testimony of Arnold in that particular. Certainly, it could not reasonably be expected that the average person could, from the examination alone of a copy of a lengthy written document which, as was true of the witness in this case, had not for a long period of time been in his possession or examined or read by him, readily or at all recall the precise language of such document. Under such circumstances, the most that could be expected from the average witness testifying to the contents of the original document would be to say, if it was true, and as the witness in this case in effect did say, that the original document was of the character, in language and substance or subject-matter, of the purported copy. It is with readiness to be conceded that the conviction of a person of a public offense should not be permitted to rest alone upon such an identification of a document constituting an essential part of the crime charged, the proof of which was, consequently, indispensable to the establishment of the crime against him, yet, where, as has been shown to be true in this case, there are proved facts and circumstances extrinsic to or independent of such testimony which strongly support the probative import and purpose thereof, then the case presented upon the evidence is wholly for the jury and not for this court to decide. In this connection it may be suggested as a matter worthy of note that defendant's counsel did not cross-examine Arnold with the view of testing his memory relative to the contents of the original document or whether he could specifically point out or state definitely, from his examination of the copy, the language or any part thereof contained in the original.

In 10 different instances during the prog-

ress of the trial and presented here under as many different and distinct assignments, counsel for defendant charges that the court, in certain of these instances, and the district attorney in others, were guilty of misconduct which prejudicially affected the rights of the accused at the trial. Some of these assignments grow out of those exchanges of sharp words which too frequently occur between attorneys representing adverse interests in the trial of causes in courts of justice, and sometimes, be it deprecatingly said, between court and counsel, which always have the effect of derogating more or less from the dignity with which proceedings in judicial tribunals should uniformly be managed. The first of these assignments to which attention should be given is the outgrowth of the fact that the trial judge himself voluntarily became a witness for the people and testified to a material circumstance. As pointed out above, several citizens of Sacramento county other than Arnold who were summoned on the jury panel for the superior court of said county at the time Arnold was so summoned received copies of the letter or communication described in the indictment. As bearing upon the question of the motive and intent with which said documents were mailed to many residents of the county of Sacramento, three persons were called as witnesses and gave testimony supporting the people's theory of the motive for circulating the literature described in the indictment. Among the parties so called and testifying was juror T. J. Bennetts. He testified that he received such a letter as is referred to in the indictment between the time at which the order was made fixing the date for the trial of Barney Brooks et al., and the date so fixed, and that he delivered the envelope containing the document to the judge presiding at the former, as well as at the present, trial of the defendant. This was one of the missing documents, proof of which the district attorney was required to make by means of secondary evidence, and, to trace and so identify the document, the prosecution deemed it necessary (and obviously for that purpose it was necessary) to show what disposition the judge made of it. Upon the disclosure of this situation the judge voluntarily stated: "I will be sworn, if the clerk will swear me." Thereupon the judge was sworn by the clerk, and, over repeated objections by counsel for defendant, testified that, during the trial of Brooks et al., Bennetts handed him (the judge) the envelope referred to and that he (the judge) delivered it to Mr. Cowan, an assistant district attorney, then in personal charge of the prosecution of the case against said Brooks et al. After Judge Busick so testified and before proceeding to the cross-examination, counsel for defendant moved to dismiss the action on the ground "of a mistrial—on the ground that we are not

having a trial before a judge who stands indifferent as between the people and the defendant"; the motion being denied.

Section 1883 of the Code of Civil Procedure provides:

"The judge himself, or any juror, may be called as a witness by either party; but in such case it is in the discretion of the court or judge to order the trial to be postponed or suspended, and to take place before another judge or jury."

[3] Counsel for defendant vigorously contends that neither a judge nor a juror is competent as witness to give testimony in a cause being tried before and by him, and that, notwithstanding the foregoing section of our Code of Civil Procedure, the trial judge in the present instance was guilty of a flagrant violation of the rights of the accused by taking the witness stand and giving testimony for the people, and that by so doing wrongfully prejudiced the case of the defendant in the minds of the jury; in other words, the position of counsel is that the act of the trial judge, in testifying for the people in the case, was error per se and worked serious detriment to the rights of the accused. Necessarily, this contention assumes the hypothesis that it is not within the constitutional power or province of the Legislature to declare a judge or juror to be a competent witness and to give testimony in a case being tried before him. But whether said section, in at least impliedly giving a judge the right to testify as a witness to a material fact in a case over which he is the judge presiding, is or is not out of plumb with any provision of the Constitution, or, when given practical application, will be deemed to deny to the party against whom he testified the fair and impartial trial guaranteed by the Constitution to all litigants in civil actions and all defendants in criminal prosecutions, the situation presented here does not require us to consider. One suggestion of uncertain force, however, may be made in this connection, and that is that, conceding that the Legislature has the constitutional right to authorize a trial judge to preside over the trial of a cause and at the same time testify as a witness in the case, the practice is not to be commended and should never be resorted to except in cases where the circumstances imperatively require it, and not even in such a case in public prosecutions where the judge's testimony directly bears upon or involves a fact or facts without the proof of which a conviction cannot be had. Some of the cases and other authorities cited by counsel condemn the practice in any case under any circumstances. Some of these authorities hold that the judge is per se incompetent to testify as a witness in a case pending or being tried before him. Others hold that, where the matter to which the judge is asked to testify unexpectedly arises during the progress of the trial—a situation as to which, in the na-

ture of the case, the necessity of the judge's testimony could not reasonably have been anticipated before the occasion calling for it arose—and the testimony was not of that character that, without it, an important and necessary issue of fact could not be proved, or where it did not directly bear upon or tend to prove an issue or the issues in the case, the judge would not be deemed to be an incompetent witness. Several of the cited cases presented a situation where the judge, before the trial was started, was fully cognizant of the fact that he would or might be called as a witness to testify to facts bearing directly upon one or more of the issues of the case. Of course, in such a case the fact of the judge's knowledge of facts which would, if testified to by him, support one side or the other of the issue to be by him decided, should itself be sufficient to disqualify him from trying the case, regardless of whether he was or was not called as a witness, particularly where the court was to try the questions of fact. In an Oklahoma case (*Powers v. Cook et al.*, 149 P. 1121, 48 Okl. 43, L. R. A. 1915F, 766), it is intimated that, if there existed (as did not then exist in that state) a statute authorizing or permitting a judge to testify in a case tried before him, it would not be improper for the judge so to testify. But it may now be laid down as the generally accepted rule that a judge is not a competent witness in a case being tried before him, and that even where, as in this state, there is a statute which in effect commits the question whether a judge may so testify to the discretion of the court or the judge himself, it will be deemed an abuse of the discretion so vested in the court or judge if the latter's testimony discloses facts without the proof of which the issue such testimony is designed to support cannot be sustained. To illustrate: If the judge was an eyewitness to the commission of an act constituting, as is true of all crimes, one of the basic elements or ingredients of a public offense, or, where a crime was required to be proved wholly by circumstantial evidence, the judge had personal knowledge of a circumstance which constituted an essential link in the concatenation of circumstances absolutely necessary to the establishment of the guilt of the accused, then, in either case, it would be highly improper and, indeed, a flagrant abuse of the discretion vested by law in him or the court for the judge to testify to such fact or facts and at the same time act as the judge in the case. And the same principle would prevail where an analogous situation should arise in the trial of a civil action. The following authorities are interesting and illuminating upon this subject: *Greenleaf on Evidence* (16th Ed.) 305; 3 *Ency. of Evidence*, p. 215; *Jones on Evidence* (Civil Cases) 958; 3 *Wigmore on Evidence*, 25, 26; 1 *Chamberlain on Evidence*, 745; *Maitland v. Zanga*, 44 P. 117, 14 Wash. 92; *Rogers v. State*, 29 S. W. 894,

60 Ark. 76, 31 L. R. A. 465, 46 Am. St. Rep. 154; *People v. Dohring*, 59 N. Y. 374, 17 Am. Rep. 349; *Gray v. Crockett*, 10 P. 452, 35 Kan. 66; *Estes et al. v. Bridgforth*, 21 So 512, 114 Ala. 221; *Shockley v. Morgan*, 29 S. E. 694, 103 Ga. 156; *Baker v. Thompson*, 15 S. E. 644, 89 Ga. 486; *Dabney v. Mitchell*, 66 Ala. 495; *Morss v. Morss*, 11 Barb. (N. Y.) 510; *McMillen v. Andrews*, 10 Ohio St. 112.

[4] In the present case the more serious aspect in which the circumstance here complained of is to be viewed is in the fact that the judge, without first having been requested by the district attorney to testify, voluntarily offered to testify, thus affording some ground for the formation by the jury of the impression that he was throwing the force of his influence, as the presiding judge, against the accused, and thereby indicating that he was of the conviction that the defendant was guilty of the crime charged. But, even with that suggestion in our minds, when we bear in mind the nature of the testimony so given and other significant considerations of which we shall later take notice, we still are unable to persuade ourselves to the conviction that the fact that the judge did voluntarily become a witness and testify in the case itself contributed to the result arrived at by the jury. The present case, in so far as the nature in probative importance of the testimony of the judge is concerned, as well as are also concerned the circumstances which are to be considered in determining its effect upon the rights of the accused, is different in several material respects from most of the cases above referred to and is also such as to remove it from the strict ban of the general rule announced by the text-writers whose volumes on evidence are likewise mentioned. Disregarding the fact that in this state we have statutory authority for the act of a judge in testifying in a case on trial before him, the consideration which may first be suggested as distinguishing this case from those heretofore mentioned is the fact that the judge's testimony, while material, was collateral to the main issue. Its purpose was merely to prove by means of secondary evidence a lost document similar to the one set forth in the indictment, and which, it was claimed, had been addressed to and received by juror Bennetts at the time that Arnold and other citizens of Sacramento county who were on the jury panel referred to received copies of such document, the purpose of proving that Bennetts and other jurors, other than Arnold, each received a copy of said document at the time indicated, being designed to show that the motive of the defendant in causing at that time said literature thus to be generally circulated in Sacramento county was to influence those citizens who might be selected from the jury panel to sit in the cases of Barney Brooks et al., to sympathize with and support the defense set up in those cases, regardless of

what the character of the evidence therein might be. In fact, the judge's testimony merely amounted to this: That it tended to prove one circumstance only which, with others, would tend to prove another circumstance which, with others, would tend to show that the defendant, with the intent wrongfully to influence jurors who might be called to sit in the cases of Barney Brooks et al. to favor the defendants in said cases, caused to be addressed and sent to many citizens of Sacramento county the literature in question just prior to the date fixed for the trial of said cases. Furthermore, the fact sought to be proved by the fact of the receipt by Bennetts of a copy of the document in question, to wit, that other jurors besides Arnold had each received a copy of said document at or about the time mentioned, was not dependent solely on the testimony that Bennetts had received said document, since there was testimony to the effect that jurors other than Bennetts and Arnold had received, at the time indicated, a copy of the document pleaded in the indictment and that testimony was, obviously, offered and received for the identical purpose for which the testimony relative to the receipt by Bennetts of a copy of the document was offered and allowed. Thus it is perfectly clear that the judge's testimony was not of overruling, even if more than trifling, importance to the people in the proof of the charge against the defendant. In fact, the testimony relative to the receipt by Bennetts of the literature could have been entirely eliminated from the case or not have been offered, and still there would have been left before the jury ample testimony which, if believed by the jury, would justly warrant them in concluding that the motive or intent with which the literature in question was sent out, at the particular time mentioned, to nearly every juror and citizen eligible to jury duty in Sacramento county, was to influence them against any case the people might develop at the trial of Barney Brooks et al. Indeed, the very literature itself thus sent out and which constitutes the foundation of the indictment here affords evidence of a convincing character that such was the motive or purpose of circulating it generally in a county in which there were then pending certain criminal cases growing out of acts denounced by a law which said literature bitterly attacked and condemned. If that was not the motive, why the importunate request (contained in said letter) to those to whom the literature was sent that they pay a visit to the Sacramento county courthouse and gaze upon the harrowing picture, so vividly drawn, representing several men upon whom the relentless instrument of persecution was to be turned loose, when, on the day set for their trial on a charge of committing an offense against society, they were to face the bar of justice? Why in the same picture is inserted, in perfervid and pathetic

coloring, the deplorable condition of sorrow and want into which the family of one of these defendants had been cast by a prosecution growing out of an alleged violation of a law which, the document in effect declares, authorizes a tyrannical invasion of the political and civil rights and personal liberty of the citizens? Why the attempted impeachment in advance of the trial of three witnesses upon whose testimony, mainly, so the document declared, the people were to be required to rely for the proof of the charge against those defendants? These questions, being so plainly self-suggestive from the very character of the literature itself, present evidentiary considerations as to the motive directly actuating its circulation, as explained, which, it may well be assumed, constituted the controlling factors in persuading the jury to the result arrived at by them. At all events, considering the record as a whole, as it has been reviewed herein, we cannot with legal propriety hold that the fact that the judge voluntarily testified as a witness or the character of the testimony given by him has had the effect of producing a miscarriage of justice in this case. In thus concluding, we are not unmindful of the real meaning, scope, and effect which the case of *People v. Adams* (Cal. App.) 244 P. 106, and the cases therein cited, have ascribed to section 4½ of article 6 of the Constitution. The construction of said provision of the Constitution by this court, speaking through Presiding Justice Finch, in the *Adams* Case, is obviously sound and means that, in adopting it into their organic law, the people did not intend that it should be employed to cover up or excuse every disregard of any of the just rights of a citizen in the trial of a case in which his liberty, or, it may be, his life, is at stake. In the present instance, though, it is plainly apparent, from all the considerations to which special notice has above been given, that the jury would not have reached any other verdict than that returned, had the judge not offered to testify voluntarily or not testified at all. Assuming that section 1883 of the Code of Civil Procedure represents a valid exercise of legislative power (we do not say that it does not), then certainly the fact that the judge testified under the circumstances indicated cannot justly be held to have been an act involving an abuse of discretion by the court.

[5] We can perceive nothing of a serious nature in their effect on the rights of the defendant in the several other specifications of misconduct on the part of the judge. In fact, in none of the instances here referred to is there any substantial ground for complaint, unless it was the manner of the judge when making the remarks which counsel conceived to be offensive and injurious to his client and of which we have not and in the nature of things could not have the benefit of a reproduction. On one of the occasions complained of the court said to counsel for defendant: "Make your objection; don't take

up so much time in statements." The court, of course, had the right to compel the attorney to make his objection before arguing the point thus intended to be raised. Indeed, the orderly way to proceed was as the court suggested. The attorney, however, was not precluded from making his objection, for he did make it after the court interrupted him, as explained. This circumstance is a fair exemplification of the general character of the several acts of the court during the trial upon which the defendant predicates his complaints that the court was guilty of misconduct prejudicial to the rights of the accused, and therefore further special notice of the other assignments in that particular need not be herein given.

[6] The next assignments involve charges of misconduct on the part of the district attorney in the presentation of the case for the people. Two of these only require special consideration herein. The district attorney, J. J. Henderson, offered to prove by the stenographic reporter of the court that a certain document was a copy of the original introduced at the former trial of this case. The attorney for defendant, R. W. Henderson, objected to the proposed testimony on numerous specific grounds. Replying to said objections, the district attorney stated, among other things, that counsel for defendant had admitted in his appeal to the appellate court in the former case that the document he offered in the present case "was a true and correct copy." To which remark counsel for defendant retorted:

"Now. I want to characterize that statement of the district attorney and the repetition of it, that I have admitted anything with reference to the former case, as incompetent, irrelevant, and immaterial, and made for the deliberate purpose of prejudicing this case before the jury."

To that statement the district attorney replied:

"If the court will permit me, I want to characterize that statement as absolutely malicious and mendacious."

The document then under discussion, which was introduced in evidence at the first trial of the defendant, and which, the original having been lost, the district attorney was endeavoring to prove by means of secondary evidence or a copy thereof, was entitled "Ten I. W. W.'s Going to Jail in Sacramento, Singing," referring to the conviction and sentence of 10 members of the organization named in the superior court of Sacramento county some time prior to the trial of the instant case. The particular document, or a copy thereof, was mailed, with the document described in the indictment, to juror Arnold and other jurors and citizens of Sacramento county at the time mentioned, and copies of the same, with other I. W. W. literature, were found at the headquarters of said organization in San Francisco, and it was from said headquarters that the defendant caused to be mailed to

the citizens of Sacramento county the literature set out in the indictment, together with the document entitled "Ten I. W. W.'s Going to Jail," etc. The theory of the people in introducing the last-mentioned document at the first as well as at the present trial, was that the fact that said document, with other I. W. W. literature, was found at the San Francisco headquarters of the I. W. W., from which the said document and the document referred to in the indictment were mailed to the citizens of Sacramento county, would tend to prove the defendant's connection with the I. W. W. and consequent interest in the cases of Barney Brooks et al., and that that fact would in turn tend to show that the motive or purpose of sending out said literature to said citizens was to create a sentiment of sympathy for Brooks et al. which might have the effect of so affecting the minds of jurors called to sit in those cases as to prevent them from giving a fair and proper consideration to any case which might be made by the people against said defendants. The district attorney was clearly wrong in making the statement exception to which by defendant's counsel we are now considering; but it is not believed that the statement prejudiced the defendant. This conclusion is founded upon the consideration, above fully gone into, that the defendant admitted that he caused both documents to be distributed in Sacramento county and that they were mailed from the place in San Francisco above referred to; that, furthermore, his membership of the I. W. W. was proved by his membership card, which was introduced in evidence. In fact, he did not deny his membership of the organization, and the fact of his membership of the organization is itself a circumstance of singular significance as in proof of an unswerving sympathy for Brooks et al. in their predicament as accused violators of public law and, consequently, a motive to extricate them from such predicament by any available means, since the prosecution of those individuals for the violation of the mandates of the Criminal Syndicalism Law involved, as is known as a matter of common notoriety, an attack upon the organization of which he was a member.

[7, 8] The second assignment under the present head to which special notice should be given is the outgrowth of the characterization by the district attorney, in his argument to the jury, of the I. W. W.'s as "an outlaw organization." Introduced into this case was a large quantity of I. W. W. literature, in which the principles and purposes of the organization are promulgated. The effect of these principles and purposes, if crystallized into an actuality, would be to destroy all government formed on rational lines. Indeed, well may it be suggested that a government, if properly it could be called such, established in accord with those principles, would be comparable, politically, to the situation, as astronomically described, in that

space of incomprehensible immensity in the Southern heavens, near the Southern Cross, where (old astronomers have said) "the Great Author of celestial mechanism has left the chaos that was in the beginning," and in which "the eye of man, with the aid of the powers of the telescope, has been unable to discover nebulae, or asteroid, or comet, or planet, or star, or sun." Thus viewing the proclaimed principles and avowed purposes of the said organization, an American citizen, wedded to the political principles upon which our government is founded and has firmly rested for nearly a century and a half, would not be accused of going far afield in denouncing as an "outlaw organization" an organization which stands for principles and policies which, as may well be said of the political principles of the I. W. W., would inevitably lead to political chaos if ever put into practical operation. But, beyond all this, there can be no doubt that, as a matter of common knowledge, every juror sitting in this case knew that many members of the I. W. W. prior to the trial of the instant case, had been convicted in the courts of this state of the crime of criminal syndicalism, the gist of said crime being in the unlawful methods resorted to for the carrying out of the general political principles of said organization rather than in those principles themselves. It would be idle to argue that the jurors as well as every other citizen of Sacramento county, where, as is also known as a matter of common knowledge, many of such convictions were obtained, did not and do not, in point of fact, know of such convictions. While it is not necessarily to be assumed as true that, from the knowledge of the fact of such convictions, the jurors were of the unqualified opinion that the organization was per se an "outlaw organization" or abstractly is justly to be called such an organization, still they may be assumed to have known from such knowledge of such convictions that the district attorney's characterization of the organization, as indicated, was based upon facts with which they (the jurors) were themselves perfectly familiar and that from those facts the conclusion expressed by that officer as to the general character of the organization might reasonably be deduced. Bearing in mind all the considerations thus adverted to and also the convincing character of the evidence presented by the people to support the indictment, as well as certain admissions of the accused, which, when considered with the general circumstances developed, are of an inculpatory nature, it would, in our opinion, involve a clear transgression of the legitimate power of this court as one of review only to declare, as a matter of law, that the district attorney's characterization in his argument to the jury of the I. W. W. as an "outlaw organization" contributed to the result arrived at by the jury as indicated by the verdict. It is true that an attorney, in his argument to the jury, must be certain not to

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(District Court of Appeal, First District, Division 1, California. April 10, 1926.)

import any opinion or suggestion into the case which is not fairly and reasonably within the legitimate bounds of the record as made, yet it is equally true that in the exercise of this right of argument an attorney may give his own analysis of and interpretation to any act or fact of which there is substantial evidence in the case and assign to such act or fact any motive or intent which is consistent with the nature thereof and the circumstances under or by which it was produced. See 8 Cal. Jur. § 602, p. 621, and cases named in the footnotes.

The other specifications of misconduct by the prosecuting officer demand no special notice herein. They involved mere harmless exchanges of asperities by and between counsel—the one as often the aggressor as the other—and, as to the effect of the verbal brickbatting, in the parlance of the gladiatorial arena, it truly may be said that each “round” was a “draw,” and so throughout the trial at frequent intervals did the Hendersons, pro and con, continue (in a figurative sense) to

“Fence and push, and, pushing, loudly roar,”
But “their dewlaps and their sides” still free from gore!

Or, in other words, the verbal tilts spent their fury without hurting anybody.

[9] The complaint that the court erred in allowing the preamble of the political platform and other literature of the I. W. W. organization to be introduced in evidence by the people is devoid of legal force. As suggested above, the documents here referred to were offered and received in evidence not only to prove the character of said organization, of which defendant was a member, but upon the theory that they would further tend to show that defendant, being in full accord with all that is set forth in said preamble and other literature, was of the view that Brooks et al. were being persecuted for having exercised their constitutional right to stand for and advocate a drastic change in political and industrial control in our country, and that, therefore, the circulation of the document mentioned in the indictment and other literature in Sacramento county was to influence a verdict of acquittal in those cases.

Nor is there merit in the criticism directed against certain instructions given and of the action of the court in disallowing certain instructions requested by defendant. The charge of the court involved a full, fair, and correct statement of every rule or principle of law pertinent to the case as made by the indictment and the proofs.

The judgment and the order denying a new trial are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

1. Agriculture ⇐6—Co-operative marketing association's payment, promised on resale of crop, held not condition precedent to grower's obligation to deliver crops of subsequent years.

Where co-operative marketing association contracted to use its best efforts to resell prunes for net price higher than paid to growers and to pay grower the excess less certain charges, payment to be made before September 1 of year following delivery of prunes, held that promise to pay additional sum was conditional, and payment was not a condition precedent to grower's obligation to deliver crops of subsequent years.

2. Agriculture ⇐6—Co-operative association's performance of contract to resell crop and pay additional sum to grower presumed, and payment made held prima facie proof of performance imposing burden on grower to excuse breach (Code Civ. Proc. § 1963, subd. 19).

Where co-operative marketing association agreed to use its best efforts to resell prunes for net price higher than paid to growers and to pay excess to growers before September 1 of following year, presumption under Code Civ. Proc. § 1963, subd. 19, was that association fairly performed contract, and, having rendered account on resale and made payment of excess during December of following year, evidence was sufficient prima facie to support allegation of full performance, and burden of proving facts excusing growers' failure to deliver crop for following year to association was on growers.

3. Contracts ⇐322(1).

Where a promise is to be performed in a certain event, promisee who asserts nonperformance as cause of action or as an excuse for his own failure to perform must prove facts on which obligation of promisor depends.

4. Contracts ⇐173—Where time for performance by one party arrives before time for performance by the other, latter promise is an independent obligation, and its nonperformance is no bar to action by party making it.

In construing contract containing mutual provisions, where time for performance by one party is to arrive or may arrive before time for performance by the other, latter promise is independent obligation, nonperformance of which creates a cause of action merely, and is not a bar to right of party making it to recover for breach of promise made to him.

5. Contracts ⇐303(4).

Breach of contract cannot be justified by anything the other party thereto may have done or omitted to do thereafter, and where plaintiff's breach does not defeat right of action, defendant cannot plead it in bar but only in recoupment of damages.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by the California Prune & Apricot Growers, Inc., against R. D. Baker and another. Judgment for plaintiff, and defendants appeal. Affirmed.

S. G. Tompkins, of San Jose, for appellants.
Sapiro & Hayes, of San Francisco, for respondent.

CASHIN, J. An action by a co-operative marketing association to recover liquidated damages for the breach of contracts providing for the sale and delivery to the plaintiff of certain crops of prunes by defendants, who were members of the association.

The association therein agreed to pay therefor a fixed minimum price per pound upon delivery, the contracts further providing as follows:

"The buyer (plaintiff) agrees to use its best efforts to resell said prunes, together with similar prunes from other sellers, at net prices higher than those paid to the sellers (defendants) upon delivery thereof, and if it shall be able to obtain such higher net prices it will pay the excess above 4 cents bulk basis per pound over to the sellers after deducting from such excess of the net price over 4 cents bulk basis per pound 5 per cent. of all sums payable to the sellers by virtue of this agreement and the sellers' prorated share of the cost of taxes and insurance on prunes purchased by the buyer under such contracts and carried over by the buyer beyond January 1st of each year during the existence of this contract, such additional payment to be made on or before September 1st in the year following the delivery of the prunes hereunder.

"But if the buyer be unable to obtain such basic prices and can obtain only a price lower than the said 4 cents bulk basis per pound, then the seller shall be liable and shall pay to the buyer the difference between the said basic price of 4 cents and the actual selling price, less the sellers' prorated share of expense as hereinbefore set forth."

It was further agreed that it would be impractical and extremely difficult to determine the actual damage resulting to the association should the growers fail to deliver the crops, and the contracts fixed a sum per pound as liquidated damages to be paid to the former in the event of a default in delivery.

It is admitted that defendants failed to deliver to plaintiff 19,400 pounds of the prunes produced by them during the year 1921. Plaintiff alleged its full performance of the contracts and its readiness and ability to receive and pay for the prunes in accordance therewith, which allegations were denied. As a special defense (other defenses being pleaded in support of which no evidence was offered) it was alleged that the association had deducted from the total sums received by it upon resales of the crops delivered by the various growers during the year 1920 charges in excess of those provided by the contracts.

This defense was not pleaded as a counterclaim, but it was urged at the trial, and it is contended here, that the facts alleged constitute a bar to the maintenance of the action by plaintiff. The action was tried by a jury, and, a verdict for plaintiff having been directed by the court, judgment thereon was entered, from which defendants appeal.

The evidence shows without contradiction that defendants produced during the year 1921, 35,605 pounds of prunes; that on or about September 8, 1921, they requested payment by the association of the sum of \$200 on account of the crop of 1920, which request was refused; that on September 13, 1921, without notice to the association of their intention or of an election to terminate the contracts, they sold and delivered elsewhere a portion of the crop, thereafter on October 18, 1921, delivering to the association the remainder, which amounted to 16,205 pounds. It further appears that the association during the month of December, 1921, rendered to defendants an account of the resales of the crop of 1920, together with a check for the balance shown by the account to be due the latter, which check was received and indorsed by defendant R. D. Baker and thereafter paid. Above this indorsement was printed the following: "Indorsement of this voucher by payee constitutes receipt in full, no other acknowledgment being required."

An objection to an offer by defendants to prove the facts alleged in the special defense mentioned above was sustained, and it is contended by the latter as grounds for reversal that, the association having failed to pay on September 1, 1921, or on the date of the request mentioned, the proceeds from the resales of the crop of 1920 it was consequently in default under the contracts; that defendants were therefore justified in selling the crop of 1921 elsewhere; that the plaintiff, having alleged full performance, could not recover by showing an excuse for nonperformance, and that the court erred in excluding proof under defendants' special defense. The record does not show when the resales of the crop of 1920 were made or completed by the association, but it is contended by defendants that, according to the contracts, such resales and the payment of the excess therefrom were to be made on or before September 1st, and that the failure to pay on the date of the demand excused performance by them.

[1] As shown by the provisions of the contracts quoted above, the association agreed to use its best efforts to resell the prunes delivered each year for net prices higher than those paid the grower at the time of delivery, and, if successful, to pay to the latter the excess above 4 cents bulk basis per pound less the charges as provided therein, such additional payment to be made on or before September 1st in the year following delivery of the prunes. This promise was conditional, the obligation to pay by the date mentioned

or at all being dependent upon the fact of resales for prices higher than the basic price. Success in this particular was not expressly made a condition precedent to the obligation of the grower to deliver the crops of subsequent years; nor, in view of the character and magnitude of the business conducted by the association, and the nature of the services rendered, could such intention reasonably be implied.

[2, 3] It is to be presumed that plaintiff's duty under the contracts was fairly and regularly performed (section 1963, subd. 19, Code Civ. Proc.; *Lattin v. Hazard*, 24 P. 611, 85 Cal. 58); and, it appearing that an account of the resales of the crop of 1920 was rendered, and that payment of the return shown thereby was made during the month of December, 1921, the evidence was sufficient *prima facie* to support the allegation of full performance, and placed the burden of proving facts excusing their nonperformance upon defendants. Where a promise is to be performed in a certain event, it is incumbent upon the promisee who asserts its nonperformance, either as a cause of action or as an excuse for his own failure to perform, to prove the facts upon which the obligation of the promisor depended. *Rodgers v. Byers*, 60 P. 42, 127 Cal. 528; *Van Buskirk v. Kuhns*, 129 P. 587, 164 Cal. 472, 44 L. R. A. (N. S.) 710, Ann. Cas. 1914B, 932.

Aside from the effect upon defendants' right to assert a previous default by the association as an excuse for their partial nonperformance, it appearing, as here, that defendants, notwithstanding such alleged default, continued to perform the contracts (*Williston on Contracts*, §§ 684, 688; *Robinson v. Lake Shore & M. S. Ry. Co.*, 61 N. W. 1014, 103 Mich. 607; *Farrelly v. U. S.*, 159 F. 671, 86 C. C. A. 539, no default by the association previous to the acts of defendants here complained of was shown, and the only question which remains for decision is the effect of a subsequent violation of the contracts by the association in failing to render a true account of the resales of the crop of 1920 upon its right to maintain the action.

[4, 5] In construing contracts containing mutual provisions, where the time for performance of the promise by one party is to arrive or may arrive before the time for performance by the other, the latter promise is held to be an independent obligation, the nonperformance of which creates a cause of action merely and does not constitute a bar to the right of the party making it to recover for a breach of the promise made to him. *Kinney v. Fed. Laundry Co.*, 68 A. 111, 75 N. J. Law 497; *Front Street, etc., R. R. Co. v. Butler*, 50 Cal. 574; *Southern Pacific R. R. Co. v. Allen*, 44 P. 796, 112 Cal. 455, 461; *Fresno Canal & Irrigation Co. v. Perrin*, 149 P. 805, 170 Cal. 411. 416. A

breach of contract cannot be justified by anything the other party to the contract may have done or omitted to do afterwards; and where a breach of contract is not such as to defeat a right of action the defendant cannot plead it in bar, but must take advantage of it by proper pleading in recoupment of damages. *Harris Lumber Co. v. Wheeler Lumber Co.*, 115 S. W. 168, 88 Ark. 491; *Barrett v. Verdery*, 21 S. E. 64, 93 Ga. 526, 13 Corp. Jur. (Contracts) 739.

While it is urged by respondent that the effect of the rendition of the account, and the acceptance, indorsement, and payment of the check for the balance shown under the conditions printed thereon, was to estop defendants in any event from questioning the correctness of the account, a determination of this question is unnecessary, it being our conclusion that the evidence, which was undisputed, sustained the allegations of the complaint, and that the special defense mentioned was insufficient to bar a recovery.

No error being shown, and it appearing that the court in view of the evidence properly directed a verdict for the plaintiff, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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PEOPLE v. CASE et al. (Cr. 1301.)

(District Court of Appeal, Second District, Division 1, California. April 15, 1926.)

1. Robbery $\S$ 24(5).

Evidence held to show that robbery was committed by force and fear.

2. Robbery $\S$ 24(1).

Evidence held sufficient to sustain conviction of robbery in first degree, under Pen. Code, § 211a, as against contention that there was no evidence that revolvers used by defendant and others were loaded.

3. Criminal law $\S$ 200(1)—Separate convictions for burglary and robbery, constituting parts of a single continuing transaction, held not violation of Constitution against putting person twice in jeopardy for same offense.

Separate convictions for robbery and burglary, which were parts of a single continuing transaction, held not violation of Constitution as placing defendant twice in jeopardy for same offense, where defendant entered house with intent to commit robbery and after entry was completed did commit robbery.

4. Criminal law $\S$ 569—Evidence held to sustain conviction for robbery as against contention that defendant was acting under threats.

Evidence held to sustain conviction for robbery as against contention that there was no joint operation of act and intent by defendant, and that when crime was committed he was under threats sufficient to show that he had rea-

sonable cause and did believe his life was endangered if he refused.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Newton R. Case and others were charged with robbery and burglary, and defendant Case, being tried separately, was convicted on both counts, and appeals. Affirmed.

John F. Groene, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

CONREY, P. J. Appellant Case and Frank Brown and William F. Nelson were by information charged with the crime of robbery whereby they did by means of force and fear, etc., take from one A. Sanchez certain described personal property. By a second count of the information it was charged that the same defendants, on the same date, committed the crime of burglary, in that at said time they did willfully, unlawfully, etc., enter the dwelling house of one J. Y. Logan with the intent then and there to commit the crime of larceny. Appellant, tried separately, was convicted on both counts.

[1] At about midnight of March 29, 1925, a number of persons, including Mr. Sanchez, were assembled in a room at the home of Mr. Logan in the city of Los Angeles. In response to a ring of the doorbell, Mr. Logan unlocked the door, but did not open it. Immediately three men "rushed right in" and proceeded to rob the persons present, including Sanchez. The intruders were the defendants Brown, Nelson, and Case. Each of the defendants Brown and Nelson was armed with a "gun." The evidence is amply sufficient to show a robbery committed by a means of force and fear, in the well-known manner of such transactions. Appellant Case was the one who "went through the pockets of the gentlemen that were lined up against the wall," taking their money and some other personal property.

[2] Appellant contends that the accused were not armed with any dangerous or deadly weapon, and that therefore the evidence does not sustain the verdict of guilty of robbery in the first degree. Pen. Code, § 211a. More specifically, the point is that there was no evidence that the revolvers used by these men were loaded. There is both direct and circumstantial evidence that the guns were loaded.

[3] Appellant contends that, because the burglary and robbery (though they might be two distinct offenses when standing alone) were parts of a single continuing transaction, they became merged into one and are punishable only as one offense; that to allow conviction and sentence on both charges would be a violation of the principle stated in the constitutional rule that no person shall be twice put in jeopardy for the same offense. This

question was recently considered by this court in *People v. Snyder*, 239 P. 705. In that case the defendant, accused of both burglary and larceny, entered a house with intent to commit larceny, and after the entry was completed he committed the larceny. For the reasons therein stated and after careful review of the authorities, we sustained the conviction on both counts. The Supreme Court denied a rehearing. The reasoning of that decision fully applies to the present action.

[4] Appellant contends that the evidence is insufficient to sustain the verdict in this, that the evidence is not sufficient to establish a joint operation of act and intent on the part of appellant, and particularly that the evidence shows that when the crime was committed "he was under threats and menaces sufficient to show that he had reasonable cause to and did believe his life was endangered if he refused." The testimony of appellant, which was to some extent corroborated by the testimony of defendant Brown, was to the effect that appellant, together with Brown and Nelson, came to the Logan house in an automobile; that until they had arrived at the door appellant believed that they were going to this place for the purpose of playing a game of poker; that Brown and Nelson had concealed from appellant the real purpose which they then had in view; that Nelson entered the house first, Case second, and Brown third; that Brown ordered appellant to enter and enforced his order by the use of a gun pressed against the body of appellant; that appellant in taking the money and jewelry acted under Brown's and Nelson's orders to "shake them down"; that throughout the transaction appellant acted solely under the influence of force and fear of said other defendants. But there is other evidence inconsistent with the testimony above indicated. Mr. Logan testified that when the defendants entered the room the two men with guns came in first, and appellant came last. From this testimony alone, together with the evidence showing appellant's further participation in the transaction, the jury was justified in believing that appellant was not forced into the room by Brown following him "with a gun in his ribs," but that, on the contrary, appellant was a voluntary actor in the transaction.

In addition to the foregoing points, counsel for appellant contends that the court committed sundry errors in its rulings on objections to offered evidence, and in the instructions to the jury, and in refusal of requested instructions, and that the district attorney was guilty of misconduct, with resulting prejudice to appellant. These matters have been examined and considered in their bearing upon the merits of the appeal. If there be any error it has not, in our opinion, resulted in an unfair trial of the case or any miscarriage of justice.

The judgment and order are affirmed.

We concur: HOUSER, J.; YORK, J.

77 Cal. App. 472

(246 P.)

PEOPLE v. CUPP. (Cr. 1285.)

(District Court of Appeal, First District, Division 2, California. April 15, 1926. Rehearing Denied May 13, 1926. Hearing Denied by Supreme Court. June 14, 1926.)

1. Criminal law §418(1)—Conversation with another held properly admitted, in view of testimony that it was held within presence and hearing of defendant.

Where state witness, before reciting conversation he had with another, testified that conversation was held within presence and hearing of defendant, it was not improper to allow witness to recite conversation.

2. Arrest §63(3)—Warrant held unnecessary to arrest where officer claimed public offense as to infants was committed or attempted in his presence by defendant (Pen. Code, § 836).

Where officer claimed that public offense had been committed or attempted in his presence by defendant, in that defendant committed certain acts contributing to delinquency of small boys while seated in theater, held that, under Pen. Code, § 836, a warrant was not necessary in order to authorize defendant's arrest.

3. Homicide §269.

In prosecution for assault with deadly weapon with intent to commit murder, intention of defendant at time he fired shot held for jury.

4. Homicide §300(8)—Where defendant presented issue of self-defense, court did not err in giving instruction on that subject, though defendant also testified that he fired shot to summon assistance.

Where defendant, prosecuted for assault with deadly weapon with intent to commit murder, presented issue of self-defense, held that, notwithstanding he testified that he fired shot to summon assistance, court did not err in giving instruction on subject of self-defense.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Charles Cupp was convicted of an assault with a deadly weapon with intent to commit murder, and he appeals. Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Charles A. Wetmore, Jr., Deputy Atty. Gen., for the People.

STURTEVANT, J. The defendant was informed against on a charge of assault with a deadly weapon with intent to commit murder, he entered a plea of not guilty, a trial was had in the trial court sitting with a jury, the jury returned a verdict, guilty as charged, the defendant made a motion for a new trial, his motion was denied, and a judgment of conviction was entered against him. He has appealed from the order denying his

motion for a new trial and from the judgment.

On the evening of the 3d of March, 1925, the defendant entered the Panama Theater and took a seat in the front row. A little later a small boy entered and took a seat on the defendant's left and another small boy entered and took a seat on the defendant's right. During the evening Harry W. Crowley, a police officer, dressed in civilian clothes, and Frank J. McCarthy, his friend, entered the theater and took seats a few rows behind the defendant. The police officer and his companion were acquainted with Chester Conkling, the proprietor, and attended the theater partly to visit the proprietor and partly to see the picture that was being presented. As the performance proceeded the police officer observed certain actions on the part of the defendant that caused him to suspect that the defendant was committing certain acts contributing to the delinquency of the small boys. He excused himself from his companion and held a conversation with the proprietor. Later the police officer took another position where he could the better observe the defendant and his actions. During the evening the proprietor went down the aisle on three different occasions specially to observe if any one of his patrons was misbehaving in any respect. Still later the police officer took a position where he could intercept the defendant and the boys as they came out of the theater. One of the boys arose from the seat above mentioned and went to where some women were seated and did not return to where the defendant was. The other boy and the defendant at a later time came out of the theater. As they approached the police officer the officer testified that he stopped them, and, directing McCarthy to watch the defendant, Crowley proceeded to make inquiries of the boy as to what had happened. In reply to a question propounded to him Crowley stated that the conversation with the boy was held within the presence of the defendant, and thereupon Crowley proceeded to relate the conversation that had taken place. Among other things, he stated that the boy had stated to him the acts committed by the defendant, which need not be recited at this time, but which confirmed the suspicions of the officer. Thereupon Crowley turned to the defendant, who stood nearby with his hands in his coat pockets. As Crowley turned to him he remarked to the defendant, "You are a fine man, aren't you?" The defendant replied, "Yes, you son of a bitch, take that," and he fired a shot. Thereafter, as Crowley attempted to place the defendant under arrest, a struggle ensued. McCarthy went to the assistance of Crowley, and the struggle continued. Later some bystanders assisted, and the defendant was handcuffed. During the struggle the police officer drew his own pistol and held it by the muzzle; he hit

the defendant over the head, using the pistol as a club. After the defendant had been handcuffed a call was put in for the patrol wagon, and when it arrived the defendant was taken to the hospital to be treated for the cuts caused by the strokes he had received over the head. The foregoing facts were fully testified to by the police officer and corroborated by the testimony of Frank J. McCarthy and the testimony of Chester Conkling. The boy who had made the statement to the officer stood by until about the time the shot was fired, and then in the excitement he disappeared and the record does not disclose his name, but does disclose the fact that he has not since been seen by the prosecuting witness. The defendant took the stand in his own behalf and testified to the occurrences of the evening and claimed that he had been guilty of no act looking to the delinquency of the boys; that he knew nothing of the reasons why he was stopped on going out of the theater; that he believed that he was being held up; and that he fired the shot for the purpose of summoning assistance to prevent his being held up and robbed.

[1] From the testimony of McCarthy the appellant quotes passages showing that at the time Officer Crowley was talking to the small boy the defendant was so far away that he could not hear the conversation which took place. Thereupon the appellant claims that the trial court committed error in allowing the police officer to state before the jury what was said to him by the small boy. The point is without merit. Before reciting the conversation the witness Crowley testified that the conversation was held within the presence of the defendant; it was made in the presence and hearing of the defendant. Under these circumstances it was not improper to allow the witness to recite the conversation.

[2] The appellant also contends that Officer Crowley had no authority to make the arrest by stopping the defendant as he came out of the theater. As we understand him, his argument is that the offense, if any, committed by the defendant while seated in the front row with the small boys, was a misdemeanor, and that Officer Crowley did not have a warrant when he stopped the defendant as the defendant was going out of the theater. There are two answers to the point. The record does not disclose whether the officer had procured or had not procured a warrant. Furthermore, it was the claim of Officer Crowley that a public offense had been committed or attempted in his presence, and therefore that he did not need a warrant to authorize him to make an arrest. Pen. Code, § 836.

[3] The appellant makes another point that is not altogether clear, but as we understand him it is his claim that when he fired the shot he did not attempt to shoot at Officer

Crowley, but, as he testified, the shot was fired for the purpose of summoning assistance. In connection with this point there is no claim that any evidence was improperly admitted or that any was improperly excluded. All of the facts were presented to the jury. It was therefore a question for the jury to determine what was the intention of the defendant at the time he fired the shot, and, as the record stands, this court has no power to disturb the finding of the jury thereon.

[4] On the trial the appellant presented the issue of self-defense and examined each juror, on his voir dire examination, on the subject of the juror's prejudice, or want of prejudice, as to that defense. Later the appellant testified that he acted in self-defense. The trial court, among other things, instructed the jury on the subject of self-defense. The appellant does not claim that any one of the instructions was an erroneous statement of the law, but he does claim that instructions on self-defense should not have been given in the instant case. In this connection he quotes his own testimony to the effect that the shot was fired to summon assistance and that he had not made the claim that he fired to defend himself from the acts of Officer Crowley when the officer made the statement, "You are a fine man, aren't you?" and took hold of the lapel of the defendant's coat. The record is not to be judged solely by a consideration of the testimony given by the defendant. Finally, in view of the whole record, we are not inclined to the opinion that the instructions were given in an improper case.

The order and judgment are affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

77 Cal. App. 481

NIELSEN et al. v. E. GOTTSCHALK & CO., Inc. (Civ. 5190.)

(District Court of Appeal, Second District, Division 1, California. April 16, 1926. Hearing Denied by Supreme Court June 14, 1926.)

1. Appeal and error ☞1002.

Appellate court cannot substitute its opinion of facts for that of jury, where evidence is conflicting and is sufficient to sustain verdict.

2. Trial ☞296(11)—Instruction that jury, in assessing damages, should not indulge in speculation or be swayed by sympathy or prejudice, but should be controlled by evidence and law, held to overcome objection that instructions given authorized jury to disregard evidence.

Instruction that, if jury found for plaintiff, they should not, in fixing damages, indulge in speculation or be swayed by sympathy or prejudice, but should be controlled by evidence and the law, held to overcome objection that instruction that jury might fix recovery in

accordance with their sound discretion implied that they might disregard evidence, and refusal of instruction that they must decide case solely on evidence was not error.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Action by John M. Nielsen and another, as executors of the estate of Anna M. Nielsen, deceased, substituted for Anna M. Nielsen, against E. Gottschalk & Co., Incorporated, to recover damages for personal injuries. Judgment for plaintiffs, and defendant appeals. Affirmed.

Gallagher, Simpson & Hays, of Fresno, for appellant.

Theodore M. Stuart, of Fresno, for respondents.

YORK, J. This is an appeal from a judgment rendered in favor of the above-named Anna M. Nielsen, now deceased, but alive at the time of the rendition of judgment. The judgment was rendered in favor of the original plaintiff herein against the defendant for the sum of \$20,000, by reason of injuries sustained by her through negligence of the defendant. The substitution of the executors, as such, has been regularly made herein.

[1] There is substantial conflict in the evidence. But, even if the greater weight of the evidence is on the side of the defendant, there is sufficient evidence to sustain the verdict of the jury, and this court cannot substitute its opinion of the facts for that of the jury. It is claimed by the appellant that that portion of the evidence which sustains the judgment is inherently improbable. After an examination of the entire case, we cannot say that this is so, nor can we say the amount of the verdict is excessive.

[2] Concerning the court's instructions to the jury, appellant contends that two of the instructions given, relating to the assessment of damages, informed the jury that with respect to certain elements of damage they might fix the amount to be recovered in accordance with their sound discretion, and (by implication) that in so doing they might disregard the evidence. Supplementing their criticism of those instructions, counsel for appellant further insist that the court erred in refusing an instruction requested by them, telling the jurors that they must decide the case solely upon the facts as shown to them by the evidence. On both branches of these objections, it seems to us to be a sufficient reply that the court did instruct the jury as follows:

"If you should decide to find the verdict in favor of the plaintiff in this case, then, in the determination of the amount of such verdict, you are not to indulge in speculation nor should you be swayed by sympathy or prejudice, but you should be controlled wholly by the evidence and the law."

Taken as a whole, the instructions given by the court fully and fairly stated the law of the case to the jury.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

77 Cal. App. 483

In re WATSON'S ESTATE.

SALBERG et al. v. COOMBS et al.

(Civ. 5622.)

(District Court of Appeal, First District, Division 2, California. April 19, 1926. Hearing Denied by Supreme Court June 17, 1926.)

Wills  499—Where testatrix left proceeds of residue of property to nephews and nieces, children of niece who predeceased testatrix held not entitled to inherit (Civ. Code, §§ 1310, 1337).

In view of Civ. Code, §§ 1310, 1337, where testatrix by will of 1923 left proceeds of residue of estate to nieces and nephews, children of niece who died in 1907 *held*, in proceeding under Code Civ. Proc. § 1664, to determine heirship, not entitled to inherit portion which their mother would have inherited.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

In the matter of the estate of Josephine B. Watson, deceased. Action by Ruth Lowry Salberg and another against Ella Coombs and others. Judgment for respondents, and plaintiffs appeal. Affirmed.

Powers, Riter & Cowan, of Salt Lake City, Utah, and Wm. Ellis Lady, of Los Angeles, for appellants.

John A. Rush, Cedric E. Johnson, and Charles H. Taylor, all of Los Angeles, for respondents.

STURTEVANT, J. Josephine B. Watson, a resident of Los Angeles, died August 6, 1923, and left an olographic will. The will was admitted to probate, and thereafter this proceeding was commenced under the provisions of section 1664, Code of Civil Procedure, to determine heirship and the beneficiaries under the will. The trial court made and entered its order in favor of the respondents, and Ruth L. Salberg and Emily K. Eiermann, grandnieces, have appealed from the order.

The appeal presents one point and that is whether grandnieces were included as beneficiaries under the terms of the will. The will, as above stated, was olographic and was as follows:

"April 21, 1923.

"I, Josephine B. Watson, in case of my death, will my husband, S. H. Watson, \$10,000, ten thousand dollars—The remainder of my property & means to be sold and the proceeds divided equally among my nieces and nephews—share

and share alike including James A. Tracey of Broudy Center, Iowa, nephew of my deceased husband—Stephen Green. This is my last will and wish."

One of decedent's nieces, Mrs. Lowry, died in 1907, leaving her surviving two daughters, Ruth Salberg and Emily Eiermann, the appellants. The decedent made her will on April 21, 1923, and died on August 6, 1923.

The appellants cite section 1310 of the Civil Code and argue that as their mother was a niece, but is dead, as her descendants they are entitled to inherit the portion which their mother would have inherited. In support of their position they cite many authorities from other jurisdictions. *Kehl v. Taylor*, 114 N. E. 125, 275 Ill. 346, Ann. Cas. 1918D, 948; note, 3 A. L. R. 1688. In reply the respondents cite section 1337 of the Civil Code and argue that as the nephews and nieces constitute a class only those persons will be included who at the testator's death answered the description. In support of that contention respondents cite and rely on *Estate of Hittell*, 75 P. 53, 141 Cal. 432; *Estate of Murphy*, 106 P. 230, 157 Cal. 63, 137 Am. St. Rep. 110; and *Estate of Willson*, 153 P. 927, 171 Cal. 449. In this connection they also cite authorities from other jurisdictions. See note, 5 Ann. Cas. 243-245. The question last presented is one on which the courts in the various jurisdictions do not agree. As will be seen from an examination of the authorities above cited, there are well-considered cases that may be cited in favor of the appellants and others that may be cited in favor of the respondents. Among cases of the latter class is the decision in *Estate of Willson*, 153 P. 927, 171 Cal. 449. This court is controlled by that case.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

MEMORANDUM DECISIONS

I

198 Cal. 593

PEOPLE, Plaintiff and Respondent, v. Jacob FUHR, Defendant and Appellant. (Cr. 2815.) (Supreme Court of California. May 7, 1926.) In Bank. Motion to dismiss appeal by defendant from a judgment of the Superior Court of Alameda County, Fred V. Wood, Judge, of conviction of murder of the first degree with sentence of death. Motion granted. Littleton & Hunt, and Myron Harris, all of Oakland, for appellant. U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

WASTE, C. J. The defendant, Jacob Fuhr, was convicted in the superior court of Alameda county of the crime of murder in the first degree and judgment was pronounced and entered against him sentencing him to be hanged. An appeal from the judgment to this court has been submitted and is pending decision herein. It appears from the affidavit of Frank Barnet, sheriff of the county of Alameda, that the defendant, Fuhr, on or about the 23d day of January, 1926, escaped from the county jail in the county of Alameda, wherein he was confined. He has not since been apprehended and is now a fugitive from justice. Supported by the affidavit of the sheriff, in whose custody the defendant was held, relating these facts, the Attorney General, by motion, asks this court to dismiss the appeal upon the ground that the defendant, Fuhr, has escaped from custody and is now at large. Upon the authority of *People v. Redinger*, 55 Cal. 290, 36 Am. Rep. 32, *People v. Elkins*, 122 Cal. 654, 55 P. 599, and *People v. Clark*, 245 P. 1112, it is ordered that the appeal of said Jacob Fuhr in this case be and the same stand dismissed, unless the defendant, within 30 days from this date, return to the custody of the sheriff of the county of Alameda, state of California. It is further ordered that a copy of this order be served upon the attorneys for the defendant within 5 days hereof

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be considered in determining application of an involuntary payment.

4. Payment $\S$ 41(2).

Court, when required to make application of an involuntary payment, must make it so as to best protect and maintain rights of all parties.

5. Payment $\S$ 38(1), 39(1), 41(1), 47(1)—Neither debtor, creditor, nor guarantor can direct application of involuntary payments made pursuant to compulsory process, but application must be made by court in accordance with equity of parties.

Where payments were made by judgment debtor and his guarantor pursuant to compulsory process, they were not voluntary, and hence neither debtor nor creditor nor guarantor had any right to direct application of payments, but such application must be made by court in accordance with equities of parties under particular facts of case.

6. Payment $\S$ 47(1)—Guarantor of judgment debtor can have involuntary payment of co-guarantor credited as of date of payment on his then contract obligation.

Where judgment creditor collected sum from judgment debtor's guarantor by compulsory process, *held* that coguarantor was entitled to have such involuntary payment credited as of date of its payment upon his then contract obligation.

7. Payment $\S$ 47(1)—Judgment creditor could, as against guarantor, have judgment debtor's involuntary payment applied to unsecured item rather than one covered by guaranty.

Where involuntary payment was made by judgment debtor on account of items not secured by contract of guaranty, *held* that, as against guarantor, judgment creditor could insist that payment be applied to satisfaction of such item, rather than one secured by guaranty.

8. Payment $\S$ 46(1)—Where one obligation is secured better than another, application of involuntary payment may be made on least secured obligation.

When obligations are of same class, a ratable application of involuntary payment may be made, but, where one obligation is secured better than another, application may be made on obligation, security for which is most precarious.

9. Appeal and error $\S$ 907(3).

On appeal on judgment roll alone, trial court's findings are deemed supported by evidence.

In Bank.

Appeal from Superior Court, Los Angeles County; Guy R. Crump, Judge.

Action by the Ohio Electric Car Company against Gideon Le Sage. From an insufficient judgment in its favor, plaintiff appeals. Modified and affirmed.

Parker & Parker, of Pasadena, for appellant.

198 Cal. 705

OHIO ELECTRIC CAR CO. v. LE SAGE. (L. A. 8084.)

(Supreme Court of California. June 2, 1926.
Rehearing Denied July 1, 1926.)

1. Payment $\S$ 47(1).

Civ. Code, § 1479, governing application of voluntary payments, is inapplicable to question of application of involuntary payments made by judgment debtor to judgment creditor, involving rights of judgment debtor's guarantor.

2. Payment $\S$ 38(1), 39(1), 41(1).

As between debtor and creditor, neither can make application of involuntary payments, and rules governing application of voluntary payments by court are inapplicable.

3. Payment $\S$ 47(1).

When interest of guarantor has intervened, as between debtor and creditor, his rights must

Julius V. Patrosso and C. C. Mishler, both of Los Angeles, for respondent.

SHENK, J. On January 12, 1915, the appellant entered into a written contract with E. D. and R. B. MacIntosh, doing business under the name of Washington Street Electric Garage Company, by which the garage company was granted the exclusive right to purchase appellant's automobiles for resale in the city of Los Angeles. The order on each car was to be accompanied by a cash payment of \$250 and the balance was to be due and payable on shipment. At the time of the execution of the contract and as a part of the same transaction, the respondent and one George E. F. Duffet entered into a contract of guaranty with the appellant. This agreement was indorsed on the principal contract, and is as follows:

"Whereas we are interested in the Washington Street Electric Garage Company and at our request the Ohio Electric Car Company has consented to deliver certain automobiles to the said Washington Street Electric Garage Company without payment therefor in cash, and that the said Ohio Electric Car Company has, further, at our request, entered into the foregoing contract with the Washington Street Electric Garage Company, we hereby guarantee to hold the Ohio Electric Car Company whole and harmless from any and all loss or damage by reason of any transaction or transactions between it and the Washington Street Electric Garage Company.

Geo. E. F. Duffet.
"Gideon Le Sage."

Pursuant to said contract, the appellant, on January 20, 1915, shipped to the garage company automobile No. 5041, at the price of \$2,178.70, upon which the sum of \$250 was paid, leaving an unpaid balance of \$1,928.70. On July 14, 1915, appellant also shipped to the garage company automobile No. 5003 at the same price, upon which the sum of \$250 was paid and the balance of \$1,978.70 was unpaid. On February 22, 1916, the garage company purchased from the appellant sundry automobile parts and two used cars, for which it became indebted to the appellant as of that date in the sum of \$1,144.66, and which was not paid. Thereafter the appellant commenced an action in the superior court in and for the county of Los Angeles against the MacIntoshes, said Duffet, and Gideon Le Sage, the respondent herein, for the purpose of enforcing collection of all three of said items from the defendants named in said action. On March 30, 1917, appellant recovered a joint and several judgment against all of said defendants for the sum of \$5,453.56, being the balance due, with interest, on all of said items, together with \$36 costs. The respondent prosecuted an appeal from that judgment and obtained a reversal thereof on the ground that the complaint did not state facts sufficient to constitute a cause of action against him, in that

said complaint charged him as a principal obligor, whereas his contract constituted him a conditional guarantor or a guarantor against loss only. Ohio Electric Car Co. v. Le Sage, 182 Cal. 450, 188 P. 982. Said reversal was ineffective as to the other defendants named in said action, and said judgment became final as to them, including Duffet, whose contract of guaranty was the same as Le Sage's, and who, had he appealed, would no doubt have obtained a reversal as to himself.

Thereafter the appellant commenced the present action against the respondent, as sole defendant. It alleged in its first cause of action the recovery of the judgment in the former action against the MacIntoshes and Duffet, and that the respondent was indebted to the appellant in the amount thereof, in the second and fifth causes of action the unpaid balance of \$1,978.70 on each of said new cars, and in the third cause of action the amount due and unpaid on account of automobile parts and used cars in the sum of \$1,144.66. The fourth cause of action alleged an account stated as to the item included in count 3. In its prayer, the appellant sought recovery from the respondent on all of said causes of action.

The answer denied all liability on the part of respondent, and, as affirmative defenses, alleged the collection by the appellant on January 26, 1921, of the sum of \$1,810.19 pursuant to execution process against the property of Duffet and the collection by the appellant from E. D. MacIntosh on August 8, 1921, of the further sum of \$1,569.55 pursuant to a sale of her property under execution issued in the former action. The respondent prayed that credit be given to him on account of said collections in any judgment that might be entered against him. The court found that the appellant had obtained the judgment in the former action, but that the respondent was not liable to the appellant on account of said judgment; that the respondent was indebted to the appellant in the sum of \$1,928.70, being the unpaid balance due on car No. 5003, with interest at the rate of 6 per cent. per annum from July 14, 1915; that the respondent was also indebted to the appellant in the further sum of \$1,928.70 as the unpaid balance due on car No. 5041, with like interest from January 30, 1915. It also found that the respondent, under his contract of guaranty, was not bound to pay the item of \$1,144.66 on account of automobile parts and used cars. It further found that the appellant had collected from Duffet by compulsory process the sum of \$1,810.19 on January 26, 1921, and the sum of \$1,569.55 by like process from E. D. MacIntosh on August 8, 1921. The court concluded that the respondent was indebted to the appellant in the sum of \$3,109.19 and costs. Judgment was entered accordingly, and from that judgment the plaintiff appeals

on the judgment roll alone, claiming that the judgment in its favor should have been at least \$4,402.50.

No computations are incorporated in the record or in the briefs of counsel, but from the facts found and the amount of the judgment it is apparent that the judgment was determined by ratably apportioning both collections between the amount for which the appellant obtained judgment in the previous action and the amount for which the court gave judgment herein. The appellant is insisting upon the application of said collections, or at least one of them, to its claims and demands not included within the respondent's contract of guaranty at the judgment rate of interest.

[1-3] The only question presented on this appeal is as to the propriety of the application of said payments by the trial court, and it involves rules governing the application of involuntary payments made by the judgment debtor to the judgment creditor, having in mind the rights of the judgment debtor's guarantor, whose contract of guaranty is security for some but not for all of the items included in the former judgment. We are satisfied that section 1479 of the Civil Code has no application to this situation. That section governs the application of payments voluntarily made by the debtor, or by the creditor, if the debtor fail to make such application, and, where the application is made by neither the debtor nor the creditor, each having had the right so to do as provided in the section, and where the interests of third parties have not intervened. As between the debtor and the creditor the general rule is stated with supporting authorities in 30 Cyc. at page 1228, as follows:

"Neither the debtor nor the creditor has a right to make an application of an involuntary payment, and the rules governing the application of voluntary payments by the court where neither party has applied them do not govern involuntary payments. Usually the application by the court will be pro rata, but in some jurisdictions involuntary payments insufficient to pay all claims are applied by the court so as to pay the unsecured rather than the secured claims."

When the interests of a third party, such as a guarantor, have intervened, his rights under the particular circumstances of the case must be taken into consideration. The rule in such cases is also stated in 30 Cyc. at page 1251, as follows:

"Third persons, such as guarantors, sureties, indorsers, and the like, secondarily liable on one of the debts, cannot control the application of a payment by either the debtor or the creditor, and neither the debtor nor the creditor need apply the payment in the manner most beneficial to such persons. So, where neither party applies the payment, the court is not required to apply it so as to exonerate such third persons, although their rights will be considered."

[4] An extended excursion into the authorities, in addition to those cited by counsel, has convinced us that it is impossible to find or to lay down any hard and fast rule applicable to all cases, for the reason that, when the duty devolves upon the court to make the application of an involuntary payment, such application must be made in such a manner, in view of all the circumstances of the particular case, as will best protect and maintain the rights of all parties.

"No specific rule can be laid down that will embrace all the cases that may arise for its application, inasmuch as the infinite variety of human transactions cannot be included within the limits of a formulated rule; and therefore courts must be governed by principles rather than by fixed rules." *Murdock v. Clarke*, 88 Cal. 384, 391, 26 P. 601, 603.

[5, 6] The payments made by Duffet and E. D. MacIntosh were pursuant to compulsory process. They were therefore not voluntary, and in such case neither the debtor nor the creditor nor the guarantor had any right to direct the application of the proceeds, but such application must be made by the court in accordance with the equities of the parties under the particular facts of the case. *Crisman v. Lanterman*, 149 Cal. 647, 87 P. 89, 117 Am. St. Rep. 167; *Murdock v. Clarke*, supra; *Irvine & Muir Lumber Co. v. Holmes*, 26 Cal. App. 453, 147 P. 229; 20 Cal. Jur. 937. In determining the equities, it would seem proper and necessary to look behind the form of the prior judgment, upon which the respondent was not bound, and to consider the nature and source of the obligations on which the payments should be applied and the relationship of the parties thereto to the parties to this action. In considering those factors, it should first be remembered that the respondent was not finally a party to the former action and was not bound by the judgment entered therein on March 30, 1917. The rights and liabilities of the parties to this action were therefore not defined nor established by that judgment. Those rights and liabilities were determined primarily by and under the contract between the appellant and the respondent, apart from any consideration of the former judgment. Under that contract the respondent was bound to hold the appellant harmless on account of the default of the MacIntoshes in their nonpayment for the two new cars. Upon that default he was liable for the unpaid balance of the purchase price in each case, with interest at the rate of 6 per cent. per annum from the date of the shipment. According to the findings herein, the combined unpaid balance was the sum of \$3,857.40. Appellant was therefore entitled to recover that amount from the respondent, together with interest at 6 per cent. per annum to date of judgment herein, less any credits equitably deductible. On January 26, 1921,

the liability of the respondent to the appellant on account of both principal and interest was \$5,190.78. When \$1,810.19 was collected on that date from Duffet, the respondent's coguarantor, the respondent was entitled to have that payment credited as of that date upon his then contract obligation. It was to his interest that it should be so applied. It was a matter of indifference to the MacIntoshes how it was applied, for the reason that any application of it would reduce pro tanto their obligation to appellant. It was of special interest to Duffet to have it so applied, because it reduced to that extent the amount of any contribution which the respondent might thereafter seek to exact from him. And the appellant is not in position to insist that it be otherwise applied, because it could not equitably obtain double payment of that sum from the coguarantors.

[7, 8] As to the collection of \$1,569.55 on August 8, 1921, from E. D. MacIntosh, one of the principal obligors, a different situation is presented. On the date of that collection the indebtedness of the MacIntoshes to the appellant on account of the item for automobile parts, used cars, and costs in the former action with interest thereon amounted to more than the amount of said collection. It would seem that the appellant would have the right to insist that said collection be applied to the satisfaction of that item, for the reason that it was the least secured, lacking, as it did, the security of the respondent's contract of guaranty. When the obligations are of the same class it has been held that a ratable application may properly be made (*Star Mill & Lumber Co. v. Porter*, 4 Cal. App. 470, 88 P. 497; 20 Cal. Jur. 941), but, where the obligations are not the same, or where one obligation is secured better than another, the application may rightly be made on the obligation the security for which is the most precarious (*California National Bank v. Ginty*, 108 Cal. 153, 41 P. 38; *Murdock v. Clarke*, supra). In the early case of *Field v. Holland*, 10 U. S. (6 Cranch) 8, 28, 3 L. Ed. 136, Chief Justice Marshall, in applying the rule where the power of application devolves upon the court, stated:

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"It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious."

When the application of said credits is thus made in accordance with what appear to be the equities of the parties under the peculiar circumstances here presented, the result is that the respondent is not entitled to credit on account of the collection from E. D. MacIntosh; that the collection of \$1,810.19 on January 26, 1921, from Duffet reduced the respondent's obligation to \$3,380.59 as of the date of said collection. That sum, with interest thereon at 6 per cent. per annum, fixed the indebtedness of the respondent to the appellant at the date of the judgment herein, on January 24, 1924, at \$3,987.97, or \$878.78 more than was allowed by the trial court. From this result it will be seen that the respondent is not charged with more than was his legal obligation, and the appellant receives no more from the respondent than was from him justly due.

[9] The contention of the respondent that the appellant was not diligent in pursuing his claims against the principal obligors is not supported by the record. The court found, in effect, that the appellant had exercised reasonable diligence to satisfy its claims against the MacIntoshes prior to the commencement of the present action. As this appeal is upon the judgment roll alone, the said finding must be deemed supported by the evidence, and is not subject to attack on the ground that it is unsupported.

The judgment appealed from is therefore modified by increasing the amount of said judgment by the sum of \$878.78, thus fixing the amount of the judgment to be entered in favor of the appellant and against the respondent at the sum of \$3,987.97 on the going down of the remittitur. As so modified, the judgment is affirmed, the appellant to recover its cost of appeal.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; SEAWELL, J.; LAW-LOR, J.

198 Cal. 695

HARMAN v. HARMAN. (S. F. 11558.)

(Supreme Court of California. June 2, 1926.)

1. Divorce $\hookrightarrow$ 184(4).

In divorce action, every intendment is in favor of the findings of the trial court.

2. Divorce $\hookrightarrow$ 150(2).

In divorce action, finding that allegations of complaint are true implies that sufficient evidence, properly corroborated, and satisfying Civ. Code, § 130, was adduced.

3. Divorce $\hookrightarrow$ 93(3)—**Divorce complaint, alleging cruelty in that wife told husband that she did not love him, prevented him from disciplining children, etc., states cause of action.**

Divorce complaint, alleging that wife told husband that she did not love him, prevented him from disciplining children, and, while driving automobile, continually gave directions as to its operation, and stated he was unreasonable in his demands for sexual intercourse, etc., states a cause of action.

4. Divorce $\hookrightarrow$ 154.

When divorce complaint adequately states cause of action, and its allegations are sufficiently proved, trial court is not authorized to deny a divorce.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action of divorce by Claude H. Harman against Jessie Harman, to which defendant filed a cross-complaint for separate maintenance. Judgment denying relief to either party, and plaintiff appeals. Reversed, with directions.

T. G. Negrich, of San Francisco, for appellant.

Harry I. Stafford, of San Francisco, for respondent.

LAWLOR, J. This is an action for divorce prosecuted by Claude H. Harman, the husband, plaintiff and appellant, against Jessie Harman, the wife, defendant and respondent. The complaint is based upon several asserted acts of cruelty alleged to have been inflicted upon the appellant by the respondent. Respondent filed an answer and cross-complaint for separate maintenance wherein she sets forth three specifications of cruelty. The case went to trial upon the issues, and the trial court, among other things, found that the several allegations of the complaint charging cruelty were true, and that the several allegations of the cross-complaint charging cruelty were untrue. Judgment was entered, however, denying relief to either party, and awarding counsel fees and costs to the respondent.

The appellant asserts that—

“The only question for decision on this appeal is: After the trial court finds that plaintiff

has established his right to a divorce, can the court arbitrarily deny him a decree?”

In support of a negative reply to this question the appellant cites, among other cases, *Lewis v. Lewis*, 167 Cal. 732, 733, 141 P. 367, 52 L. R. A. (N. S.) 675. That case declares that—

“The court is not authorized to deny a divorce where the evidence of the plaintiff, adequately corroborated, establishes the truth of the allegations of the complaint. *Kirkpatrick v. Kirkpatrick*, 152 Cal. 316, 92 P. 853; *Benkert v. Benkert*, 32 Cal. 467. A case having been made out, there is no arbitrary power to grant or refuse the relief. But, in every action for divorce, the court is called upon to determine whether the evidence before it does establish the truth of the charge made in the complaint. As in other cases, every intendment is in favor of the finding made. * * *

[1, 2] In the instant case, we have not before us a transcript of the testimony taken at the trial, but, every intendment being in favor of the findings made, the statement is not unwarranted that sufficient evidence, properly corroborated, must have been adduced by the appellant in support of the allegations in his complaint charging cruelty, for, as already indicated, the trial court found that these several allegations were true. This would necessarily satisfy the provisions of section 130, Civil Code. The allegations of the complaint being sustained by the findings, and keeping in view that the allegations of cruelty in respondent's cross-complaint were found to be untrue, it merely remains to determine whether the several alleged acts of cruelty charged in the complaint, if proved, would warrant the granting of an interlocutory decree to the appellant.

[3, 4] The complaint, in substance, sets forth that on many occasions the respondent told appellant that she did not love him, but lived with him because he was a good provider; that respondent has continually demanded complete control of the children, and has prevented appellant from disciplining them; that respondent frequently told appellant that his mother was “no good,” and that his sister was a “whore”; that, while driving, respondent would continually issue orders and directions to appellant as to the operation of the automobile; that repeatedly respondent has told appellant “that his only idea of marriage is to have a female body at his disposal, and that he is lustful, meaning thereby that plaintiff was unreasonable in his demands of defendant for sexual intercourse”; that appellant is a locomotive engineer, and, upon his seeking to kiss respondent when he returned from trips, she would tell him “that it was his lust for sexual intercourse that prompted him to kiss, or seek to kiss, her * * *”; that respondent has often threatened to commit suicide, stating that appellant would, in such

event, "be branded as her murderer"; that, though plaintiff gave his wages to respondent, she has continually complained of having nothing but "rags"; that respondent has called appellant "vile names, too opprobrious to be set out in this complaint"; that respondent on numerous occasions has told appellant's friends that he is "lustful, in that he was unreasonable in his demands upon her for sexual intercourse * * *"; that respondent has frequently informed appellant that she could have married men of wealth; that all of the several alleged acts have greatly disturbed and injured appellant and interfered with his rest and sleep, making him unfit to bear his responsibilities as a locomotive engineer; and "that, by reason of the acts and conduct of defendant as hereinbefore alleged, she wrongfully inflicted upon plaintiff grievous bodily injury and grievous mental suffering."

In our opinion, these several allegations adequately state a cause of action for divorce, and, as already indicated, it must be assumed, in view of the findings that they were amply supported and proved by sufficient evidence, properly corroborated. Under these circumstances, the trial court is not authorized to deny a divorce. *Lewis v. Lewis*, supra.

The trial court is directed to enter an interlocutory decree of divorce on the ground of extreme cruelty in favor of the plaintiff and appellant. It is also directed to make such provision for the custody, support, and education of the two minor children of the parties, and for the division of the community property as it may deem just.

Judgment reversed with directions.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; RICHARDS, J.

198 Cal. 667

JACOBY v. WOLFF. (S. F. 11010.)

(Supreme Court of California. June 1, 1926.)

1. Taxation ⚡734(4)—Description of property on assessment roll, when sold for delinquent taxes, held sufficient.

Description of property sold for delinquent taxes, contained on face of assessment roll, held sufficient, where it was not in a form to positively mislead a person looking at assessment roll or calculated to mislead him.

2. Appeal and error ⚡204(3), 1050(1)—That court admitted parol proof as to effect of description of property set forth in tax deed held not ground for complaint.

In suit to quiet title to land as against holder of a tax deed thereon, that court permitted witness to testify that numerals appearing upon assessment were not part of description of property and were arbitrarily placed there by

assessor held not ground for complaint, where no objection was made, and numerals did not in themselves operate to cloud true description of property, so that it could not have been readily obtained by reference to remaining description as it appeared upon assessment roll, and which, apart from the numerals, correctly described the property.

3. Statutes ⚡205—Statute providing complete plan for sale of property for nonpayment of taxes must be construed as a whole.

Pol. Code, §§ 3764, 3771, and 3785b, comprising a complete plan for sale of property for nonpayment of taxes, must be construed together as a correlated whole rather than as separate and distinct enactments.

4. Taxation ⚡627—Statutes providing for sale of property for nonpayment of taxes construed as to delinquent list to be published.

Pol. Code, §§ 3764, 3771, 3785b, relating to sale of property for nonpayment of taxes, manifest a legislative intention to provide for publication of a delinquent list to give notice to defaulting taxpayers and prospective purchasers of what property remains unredeemed and what property will be sold, which list should include therein property upon which taxes have become delinquent, and which will be sold at public auction, or to which a deed of such property was made by state after full five-year period of redemption had elapsed.

5. Taxation ⚡660—Sale of land for nonpayment of taxes not rendered invalid by advertising thereof for sale prior to expiration of redemption period.

Sale of property for nonpayment of taxes held not rendered invalid, in view of Pol. Code, §§ 3764, 3771, and 3785b, by advertising of property for sale prior to expiration of five-year statutory period for redemption, especially where such property was not actually sold until three days after expiration of such period.

6. Taxation ⚡659—Tax collector, in ascertaining post office address of delinquent property owner, need not go beyond examination of assessment roll during period of delinquency.

Inquiry of tax collector in endeavoring to ascertain post office address of delinquent property owner need not extend beyond an examination of assessment roll from date of delinquent assessment down to time of assessment last made before sale.

7. Taxation ⚡659—Sale of land for nonpayment of taxes not invalid, because statute relating to mailing of copy of published notice of sale was not shown to have been complied with.

Sale of land for nonpayment of taxes held not invalid because compliance with Pol. Code, § 3771, relating to mailing of copy of published notice of sale, was not shown, where post office address of landowner did not appear on assessment books during years of delinquency, and it did not appear that such address was actually known to tax collector.

8. Taxation ⚡744—Sale of land for taxes not invalid because no deed had ever been made to state.

Sale of land for nonpayment of taxes held not invalid because no deed had ever been made to state under Pol. Code, § 3785, where sale was had under sections 3764, 3771, 3785b, permitting conveyance to be made to purchaser of property without formality of making a deed to state in first instance; sections 3897 and 3898 being inapplicable.

9. Taxation ⚡658(1)—Notice of sale of land for nonpayment of taxes not invalidated because of defect in form.

Notice of sale of land for nonpayment of taxes, published by tax collector under Pol. Code, § 3771, held not invalidated because of slight discrepancy between notice as published and section 3780; such statute not attempting to prescribe form of notice to be given by tax collector, but merely time within which redemption of property may be made by delinquent taxpayer.

10. Taxation ⚡658(1)—Precise form of notice of sale of land for nonpayment of taxes immaterial, if substantially complying with statute.

Precise form of notice of sale of land for taxes is immaterial, so long as it is in substantial compliance with Pol. Code, § 3780, and with reasonable certainty conveys notice of the intended sale.

11. Taxation ⚡788(5)—Tax deed, offered in evidence as proof of defendant's chain of title, held not objectionable on ground that it was not admissible as prima facie proof of notice of sale.

Where tax deed in suit to quiet title was offered in evidence as proof of defendant's chain of title, it was not objectionable on ground that it was not admissible as prima facie proof that a copy of notice of sale was mailed to person to whom property was last assessed.

12. Taxation ⚡734(2).

Sale of land for nonpayment of taxes will not be invalidated because assessor when making assessment in computing penalties added on a half cent.

In Bank.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action by Harold Jacoby against Samuel Wolff, with cross-complaint by defendant. Judgment for plaintiff, and defendant appeals. Reversed.

Marcus D. Wolff, of San Francisco, for appellant.

Harold Jacoby and Milton Shepardson, of San Francisco, for respondent.

LENNON, J. Upon a rehearing and reconsideration of this case, we are satisfied with the opinion originally rendered and therefore adopt the same as follows:

In this action to quiet title to a lot of

land in the city of Oakland, plaintiff claimed title to said lot of land as the record owner thereof. Defendant claimed title to the same lot of land under a tax deed from the state. Plaintiff's complaint was drafted in the form ordinarily employed in actions of this character. The answer of the defendant, while admitting the plaintiff's claim of title in fee simple to the land in suit, denied that the plaintiff ever was the owner of said land. In addition to his answer, the defendant interposed a cross-complaint wherein he alleged that his claim of title to said land was founded upon a tax deed from the state of California, executed to him by the tax collector of Alameda county, pursuant to a sale, at public auction, to the defendant, for the nonpayment of state and county taxes assessed against said land which were then due, owing, and delinquent. All of the allegations of the cross-complaint by stipulation of counsel for the respective parties were deemed denied.

The plaintiff rested his case upon proof of the fact that the record title to the land in suit stood in his name. The defendant, in response to the general issue, and the issues raised by the cross-complaint and answer thereto, offered and there was received in evidence a tax deed from the state, conveying the property in suit to him, and supplemented this with proof of the several and various proceedings which culminated in the execution of that deed.

The trial of the case centered upon the issues relative to the sufficiency of the things done prior to the execution and delivery of the tax deed to the defendant. Upon the issues as made a judgment for the plaintiff was rendered and entered, based upon general findings to the effect that the plaintiff was at all of the times mentioned in the complaint the owner in fee of the land in suit, and that the defendant did not at any time own said land or have any interest therein. The findings of the trial court evidently proceeded upon the theory that the proceedings leading up to the tax sale, and which culminated in the tax deed from the state to the defendant, were irregular to the point of invalidity, and that, as a consequence, the record title of the plaintiff to the land in suit should prevail.

The facts of the case as revealed by the record before us are these:

In the year 1916 a tax was levied on the land in suit. Joseph Lavigne was the then owner of the land, and it was assessed to him. Subsequent thereto, on June 26, 1917, the said tax having become delinquent, a sale of said land was made to the state for the nonpayment of said tax. Thereafter, on June 2, 1922, pursuant to section 3764, Political Code, the tax collector published for the first time a notice that the five-year period allowed by law for the redemption of said property sold to the state for delinquent taxes would expire on

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the 27th day of June, 1922. Said property remaining unredeemed, and the sale thereof to the state being uncanceled at the expiration of said redemption period, the lot of land was sold to defendant Wolff on June 29, 1922, pursuant to the provisions of section 3771 of the Political Code. Subsequent thereto, on July 12, 1922, a deed was executed and delivered to defendant by the tax collector of Alameda county on behalf of the state pursuant to section 3785b of the Political Code.

Respondent contends, among other things, that the assessment in question is void because the description of the property, as it appears on the assessment roll, is defective to the point of being misleading. The description complained of appears on the assessment book in the following form, words, and figures:

Taxpayer's Name and Post Office Address.	School District.	Description of Property in Oakland City.	Lot.	Block.
Joseph I. Lavigne.	Oakland, formerly Lockwood.	Havenscourt map, filed of record in the office of the recorder of Alameda county.	23	35 3276

Upon this phase of the case we are in substantial accord with the reasoning and conclusion reached by Mr. Justice Sturtevant of the District Court of Appeal in an opinion rendered by him when the case was heard and determined by that court in the first instance, wherein he says:

"Turning to the map which was introduced in evidence we find at the top: 'Sheet No. 1, Havenscourt, Oakland, California.' The addition of the expression, 'Sheet No. 1,' is no more than though it were marked simply '1' as indicating a page. There is no material variance, therefore, between the map introduced in evidence and the map designated in the purported assessment.

"Commencing to examine the map, one finds that it has on its face a delineation of blocks 15-35, inclusive. One also finds that each block has delineated on it various lots of various sizes. One also finds that block 35 is subdivided into lots 1-52 inclusive. One also finds that there is no 3276 lot, block or otherwise, and that said numeral does not in any place appear on the face of said map.

"During the trial of the case, the defendant called as a witness H. F. Platts. Volume 45 of the Assessment Roll for the year 1916 having been identified, and page 192 having been introduced in evidence, the examination of the witness proceeded. In reply to questions propounded by the plaintiff's attorney, or the defendant's attorney, or the court, the witness testified: 'I am familiar with the method of assessment proceedings in the city of Oakland and I was familiar with the methods employed during the year 1916. There are blocks in the city of Oakland that have the number corresponding to No. 3276. This property has. There are some blocks in the city of Oakland that have this 3276 as an arbitrary number used by the assessor to locate the property. Not every block in the city of Oakland has an arbitrary number. Lots 1 to 100, and 1 to 112,

have no other number. All the rest have. The numbers do not run consecutively. Some numbers appear in different places in the county. Some numbers will appear twice in the city of Oakland. Talking about the city of Oakland the annexed district might be 3276; I think there might be a 3212. That will appear again in the Claremont district. Within the city limits of the city of Oakland I think there are some. In using the number that I refer to, which I used on my direct examination, it is simply an arbitrary number that is used by the assessor's office for its own convenience exclusively. As the exigencies of the case require it, some of the arbitrary numbers are changed. It may be changed in one district this year and be an entirely different district next year. The supervisors of this county have never adopted a system of numbering for assessment purposes so far as I know. In the assessment of property in the city of Oakland,

we have to deal with properties which are indicated on recorded maps. By giving arbitrary numbers to the blocks in different sections, the assessor has adopted a system for locating the assessment of this property other than by reference to the map by lot and block indicated thereon. The practice was to subdivide the assessments that they might be easily platted on our books and block number given for each page so that, if a new tract was opened, that tract was subdivided in lots that might create new blocks, say 3276 to 3300, meaning that naturally we would cut out that block and make these other numbers later on as the subdivision came along. We were also supposed to fill them up as fast as we could. Then there is supposed to be duplicate numbers too. This same number, 3276, might appear in our books in a different year in another section of the county. We try to have the numbers follow along for a few years, but the rule possibly is to change them in the district not quite so far out as Havenscourt. We had arbitrary numbers but they had to be changed in 1915 and 1916 by virtue of the assessor's authority—an arbitrary method to expedite the work. One deputy assessing in the Piedmont district will have to change certain numbers up there, although the numbers are reported given to the office, and another man may be operating in Emeryville; each has his section; they work simultaneously to get the assessment roll up. The number "3276" has been the uniform number applied to the particular property under controversy and has not been changed since 1916.'

"Looking back over the testimony given by Mr. Platts, it is patent that the number '3276' was no part of the assessment, that it was a memorandum for the convenience of the assessor; that the memorandum could have been in any other column, for instance in the column headed 'Remarks,' and would have had the same force and effect. It further appears that the memorandum might have been in the form of

arbitrary letters instead of arbitrary numerals. No authority has been cited, and we know of none, which is to the effect that an arbitrary memorandum placed on the assessment roll by the assessor or any one else will operate to invalidate the assessment.

"A similar question was before the court in the leading case *Bosworth v. Danzien*, 25 Cal. 296. The lot involved in that case was situated at the corner of Center and Guerrero streets in San Francisco. The assessment contained a description, 'Lot commencing on the north-easterly corner of Center and Guerrero streets, thence easterly on Corbett street, 200 feet, thence at right angles northerly,' etc. The court calls attention to the fact that tax proceedings are in invitum. The landowner intends nothing. Regarding the rules which should be applied, at page 299 the court said: 'The maxim "Ut res magis valeat quam pereat" [that the thing may prevail, rather than be destroyed], is a canon, with reference to which, not only contracts and wills are to be construed, but statutes also—passed, as they are, without any direct co-operation or assent on the part of the citizen. The spirit of the maxim is that nothing should be destroyed merely for the sake of destruction. We have not, by our own examination, been able to find any adjudged case in which it has been held that a false call in an assessment roll, advertisement, or tax deed, necessarily vitiates a tax title. The rule as given in *Tallman v. White*, 2 N. Y. 66, is as follows: "An assessment of land is fatally defective and void, if it contains such a falsity in the designation or description of the parcel assessed as might probably mislead the owner and prevent him from ascertaining by the notices, that his land was to be sold or redeemed. Such mistake, or falsity, defeats one of the obvious and just purposes of the statute—that of giving to the owner an opportunity of preventing the sale by paying the tax." We accept the above decision, not more on the authority of the court by which it was pronounced, than on our entire conviction that it is correct in principle.

"The test, then, to which every false call occurring in the course of tax proceedings is to be subjected, is this: Has it probably had the effect to mislead the landowner in relation to the land assessed, advertised, and sold? In the case at bar, the description in the assessment roll begins at a point fixed with entire precision, and runs therefrom due east 200 feet. The superadded description of that line, "along Corbett street," was not, in our judgment, calculated to mislead the landowner, and for the manifest reason that it was impossible that the call should be true. The call was not only false, but absurd, and that, too, in the light of facts appearing on the face of the general description of the corner and line."

"In the case of *Best v. Wohlford*, 144 Cal. 733, 78 P. 293, the land in controversy was 'lot No. 4 in block No. 178 of a subdivision of the Rancho Rincon del Diablo, containing 14.42 acres of land, more or less, according to the official map thereof on file in the office of the county recorder of said San Diego county, state of California.' The defendant claimed under a tax deed describing the land as 'land lying and being within the said Escondido irrigation district * * * county of San Diego, state of California, described as follows, to

wit: Lot four (4), block one hundred seventy eight (178), 14.42 acres, Rancho Rincon del Diablo.' In connection with the offer of the deed, the defendant thereupon offered evidence to prove that there is, and was at the time of said assessment under which the deed was made, but one lot 4 in block 178 in the Rancho Rincon del Diablo and that such fact is and was at the time of said assessment well known. Under objection the trial court sustained an objection to the tax deed and the offered evidence. The Supreme Court held that the evidence was relevant and competent and should have been admitted, and reversed the case.

"*Lummer v. Unruh*, 25 Cal. App. 97, 142 P. 914, was an action to quiet title. The plaintiff claimed title by adverse possession. The defendant attempted to show that he had paid the taxes. The plaintiff claimed that the assessments did not describe the property and were void. The lands were surveyed and platted in 1869 by Goldsworthy. The map was not filed of record until 1901. No one of the assessments referred to a map. On the trial of the case, the defendant introduced evidence to the effect that the Goldsworthy map was the only map on file which purported to be a map of the rancho; that long before the map was filed it was a well-known subdivision of the rancho; and that the assessments as worded described the boundaries so that the lands could be readily located. The court held that the objections of the plaintiff to the admission of the evidence referred to were without merit, and affirmed the judgment of the trial court.

"In the case of *Fitzimons v. Atherton*, 162 Cal. 630, 124 P. 250, it was held that a description of property in a tax deed as 'lying and being in the county of Kern, state of California, and described as follows, to wit: El. ½ of block 2 Kelly's addition to Delano,' may be explained and rendered certain by the introduction in evidence of the recorded map of Kelly's addition to Delano, and that there was no other recorded map of the addition.

"In the case of *Reclamation Dist. No. 673 v. Diepenbrock*, 168 Cal. 577, 143 P. 763, the court was considering an assessment made for reclamation purposes. The description contained in the assessment described the land by naming the adjacent owners. On the trial of the case the trial court received oral evidence. The north boundary as set forth in the original description contained the designation of one more adjacent tract than the amended call and the east boundary one less, while three tracts were added to the description to make the western boundary complete. The court held that the oral testimony was properly received and that the description was sufficient.

"[1] To know whether the property was assessed, the owner, purchaser, or other person must look at the assessment roll. In looking at the assessment roll, such person would find an arbitrary memorandum on nearly every single assessment. If he wanted further information as to the lot or block, the assessment contained reference to the map of Havenscourt. An examination of that map discloses no block 35/3276 and no block numbered 3276, but does disclose a block No. 35. In the language of the cases just cited, it cannot be said as a matter of law that the description contained on the face of the assessment roll was in a

form to positively mislead such person, or was calculated to mislead him. He may not therefore complain."

culated to mislead him.'" *Green v. Palmer* (Cal. App.) 229 P. 876.

[2] Some contention is made that the trial court erroneously received in evidence parol proof to vary the description set forth in the deed and assessment roll when it permitted the witness Platts to testify that the numerals "3276," which appeared upon the assessment, were not part of the description of the property, and were placed there as a mere arbitrary number, to be used by the assessor to locate the property in accord with a system in vogue in the assessor's office. The record, however, discloses no objection to this particular piece of testimony, and the record does show that, when counsel for the plaintiff objected to the introduction of the tax deed in evidence upon the ground that it recited a misdescription of the property conveyed, in that it contained, in addition to a correct designation of the block in which the land was situated, the numerals "3276," he specifically requested permission of the court to call "Mr. Platts, deputy county assessor," to supplement that objection "by proof from Mr. Platts * * * that there is no block

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— shown on the map which has been introduced in evidence—the map of Havenscourt."

Counsel for the defendant, so the record shows, ultimately acquiesced in that request, and thereupon placed Platts on the stand as a witness for the defendant practically for the same purpose desired by counsel for the plaintiff, who proceeded to testify, without the semblance of an objection, as previously indicated. In view of this condition of the record, counsel for the plaintiff is in no position to complain of the reception of the evidence referred to. Moreover, the entry of the numerals "3276" beneath the numerals "35," which latter correctly designated the block in which the land in suit was situated, did not operate, in and of themselves, to cloud the true description of the property to such an extent that it could not have been readily obtained by a reference to the remaining description of the property as it appeared upon the assessment roll, and which, apart from the numerals "3276," correctly described the property.

"It has been repeatedly held that when such is the case the description may be explained by evidence at the trial and then becomes sufficient to answer all the requirements of the law. *Campbell v. Shafer*, 162 Cal. 206, 212, 121 P. 737; *Furrey v. Lautz*, 162 Cal. 397, 400, 122 P. 1073; *Fitzimons v. Atherton*, 162 Cal. 630, 632, 124 P. 250. In *Lummer v. Unruh*, 25 Cal. App. 104, 142 P. 914, the court quoted with approval the following statement of Mr. Cooley in his work on Taxation: "The designation of the land will be sufficient if it affords the owner a means of identification and does not positively mislead him or is not cal-

Respondent advances the additional theory that the description on the assessment roll is void because the property cannot be identified without reference to two maps; that the assessment calls for one map, while the block reference is taken from another map. In this respect it is urged that the block reference is taken from a private unofficial map of the assessor, while the assessment calls for an official map on file in the recorder's office, and that without both maps the property cannot be identified. The description of the property in suit on the assessment book refers to only one map, viz. Havenscourt. There was a map of Havenscourt on file in the recorder's office, and upon this map there is a lot 23 and a block 35. This, it seems to us, in view of what has been said in reference to the description of the land, was a sufficient reference to the recorded map, and clearly identifies the said land.

It is claimed by respondent that the tax collector was authorized to include in the delinquent list published pursuant to the provisions of section 3764 of the Political Code, only such property as had been sold to the state five years previous to the publication of said list. The land in controversy had been sold to the state on June 26, 1917, and it was included in the delinquent list published on June 2, 1922. Said property, however, was not sold to the defendant until June 29, 1922. This alleged premature inclusion of the property in the delinquent list, respondent argues, deprived the owner of said property of the full time allowed by law for the redemption of property sold to the state for delinquent taxes, and therefore the subsequent sale of said property to defendant was void. Section 3764 of the Political Code, when closely considered, does not lend itself to such a construction.

[3] A perusal of the provisions of sections 3764, 3771, and 3785b of the Political Code makes manifest that they must be considered and construed together as a correlated whole rather than as separate and distinct enactments. These sections comprise a complete plan for the sale of property for the nonpayment of taxes.

Section 3764 of the Political Code, as it existed in 1917, makes provision for the preparation and publication of the delinquent tax list, when it is to be made, what it is to determine, and then specially provides with reference to property previously sold to the state:

"* * * That before publication of said list the tax collector and auditor shall jointly arrange said list in such manner that said publication shall designate in some particular manner the property contained in said list which was sold to the state five years previous under the provisions of section three thousand seven hundred and seventy-one of this Code, on which

the taxes remain unpaid, or which property has not been redeemed or the sale thereof canceled, and which property the state would otherwise be entitled to a deed thereof after the lapse of five years from said previous sale." (Italics added.)

Section 3771 of the Political Code, as it stood in 1917, in part, provided:

"That any property contained in the advertised list as provided for in section 3764 of this Code, which has not been redeemed from the sale made to the state five years previously, shall be sold by the tax collector at public auction. * * *"

[4] These Code sections do not in terms, nor by necessary inference, limit the listing of the property proffered for sale only to such property as may have been sold to the state five years previous to the date of the publication of the delinquent list. On the contrary, the provisions of these Code sections, pertinent to the point presented here, indicate that the Legislature intended rather to provide for the publication of a delinquent list which should include therein property upon which taxes had become delinquent, and which would be sold at public auction, or to which a deed of said property was made by the state after the full five-year period of redemption had elapsed. Obviously the primary purpose of the publication of this list was to give notice to defaulting taxpayers and prospective purchasers of (1) what property remained unredeemed, or the sale of which to the state remained uncanceled; and (2) what property would be sold, for which a deed thereto could be given to the state.

[5] It is to be noted in this behalf that, pursuant to the provisions of section 3764 of the Political Code, the delinquent list "shall designate in some particular manner" two classes of property on which taxes remain unpaid, namely: (1) Such property as has been sold to the state five years previous to the publication of the delinquent list under section 3771 of the Political Code; and (2) such property as "has not been redeemed or the sale thereof canceled, and which property the state would otherwise be entitled to a deed thereof after the lapse of five years from said previous sale." Reading section 3764 of the Political Code in the light of this purpose, it seems obvious that the Legislature intended that the delinquent list should include, not only such property as had been sold to the state five years prior to the publication of said list, but, in addition thereto, all other property to which the state would be entitled to a deed thereof after the expiration of five years from the previous sale made to the state. The sale last referred to is that made five years prior to the sale advertised in the delinquent list and not five years prior to the publication of said list. Furthermore, a consideration of the

phrase "after the lapse of five years from said previous sale," in conjunction with the context of the Code sections immediately under consideration, fortifies this construction. This phrase connotes a present or a future sale from which a sale made five years previous thereto can be counted and considered. The Legislature doubtless was referring to the sale advertised in the delinquent list rather than to the date of the publication of the delinquent list. The inclusion in the delinquent list of property which would be sold by the state on a date five years from the original sale to the state, although the delinquent list was published prior to the expiration of the full five-year period permitted for redemption, is, we think, authorized by the provisions of section 3764 and the provisions of the several correlated sections of the Political Code which deal with the sale of property for the nonpayment of taxes. The advertising of a delinquent taxpayer's property for sale prior to the expiration of the five-year statutory period for redemption does not operate to toll the period of redemption, nor is the advertising of such property at such a time prohibited by statute. The right of redemption given by statute has no bearing upon the time when the property is to be advertised for sale. It is patent that the respondent was not injured because of the advertising of the property for sale prior to the expiration of the full five years provided for redemption. The land in suit was not actually sold until three days subsequent to the expiration of that period. Moreover, it may be said that the construction contended for by respondent would operate as a decided discrimination in favor of those delinquent taxpayers whose statutory period of redemption would expire on the days between the date of publication of the delinquent list and the date of the sale as advertised.

Respondent contends that compliance with the provisions of section 3771 of the Political Code, as it stood in 1917, appertaining to the mailing of a copy of the published notice of sales, was not shown. In this behalf it is argued that it was incumbent on appellant, who was relying on the tax deed, to make proof of the mailing of said notice in order to establish an essential link in the chain of tax proceedings through which he was claiming title, and that, under the rule announced in the case of *Smith v. Furlong*, 160 Cal. 522, 117 P. 527, the mailing of such notice was a jurisdictional prerequisite to the making of a valid tax deed by the tax collector.

[6, 7] The rule of law relative to the necessity of mailing a copy of the published delinquent list, as enunciated in *Smith v. Furlong*, supra, has been limited by the case of *Kehlet v. Bergman*, 162 Cal. 217, 121 P. 918, to cases where the last known post office address of the landowner was upon the as-

assessment roll from the date of the delinquent assessment down to the time of the assessment last made before the sale. The inquiry of the tax collector in endeavoring to ascertain the post office address of the delinquent property owner need not extend beyond an examination of the assessment roll during the period mentioned.

"All the tax collector has to do as to mailing notice is to look at the assessment roll and ascertain to whom the property about to be sold was last assessed, and whether the address of the party appears thereon. If it does, he must mail a notice. If it does not, no mailing of notice is required. He is not bound to look beyond or outside the assessment roll to ascertain the address of a party when the assessment roll does not furnish it." *Kehlet v. Bergman*, supra; *Heaton v. Morrison*, 162 Cal. 673, 124 P. 240.

It was an admitted fact in the case that the post office address of the landowner did not appear on the assessment books for the years 1916, 1917, 1918, 1919, 1920, 1921, and 1922. The record is silent as to whether or not the post office address of said landowner was actually known to the tax collector, and, as was said in *Campbell v. Shafer*, 162 Cal. 206, 213, 121 P. 737, 740:

"If no address is given on any assessment, in the absence of evidence to the contrary it must be assumed, in accord with the presumption of law that official duty has been regularly performed (Code Civ. Proc. sec. 1963, subd. 15), that the address of the person assessed was not known to the assessing officer. The mere fact that such person had in fact resided at a certain place * * * would not be sufficient to overcome the force of this presumption."

[8] Respondent urges that the state could not execute a deed to the lot in controversy, because no deed had ever been made to the state, as provided by section 3785 of the Political Code. It is respondent's theory, in connection with this phase of the case, that the execution and delivery of the deed to the state was an advertised condition of the notice of sale, and without compliance therewith the state cannot make a deed to a purchaser. In answer to this contention, it may be said that the Legislature provided two methods of selling and transferring real property for the nonpayment of taxes subsequent to the expiration of the period of redemption. One method, the method which governs and controls the instant case, is provided for in sections 3764, 3771, and 3785b of the Political Code. Section 3785b of the Political Code provides for the deed to be executed and delivered by the tax collector to the purchaser. Section 3771 of the Political Code provides that only in case the delinquent owner's property, "if not so redeemed, or if no sale is had," under the provisions of the fourth proviso thereof, to a purchaser, then the property shall be deeded to the state as provided in section 3785 of the Political Code.

If, however, a sale is made to a purchaser under section 3771 of the Political Code, there is no provision made for a deed to the state, but the tax collector is directed to convey the property directly to the purchaser under section 3785b of the Political Code, which section governs and controls the transfer of a delinquent owner's property sold to a purchaser at a delinquent tax sale, "*other than the state of California*." (Italics added.) Thus it is evident a conveyance is permitted to be made to the purchaser of the property without the formality of making a deed to the state in the first instance.

The sale in the case at bar was not made or had pursuant to sections 3897 and 3898 of the Political Code. These sections relate to and deal with the sale of delinquent property after a deed thereof has been made to the state and a subsequent sale made to a purchaser, and have no application to the sale of the property in the instant case. The authorities cited, construing these sections, likewise have no bearing on the question presented in the instant case. No authorities are cited by respondent where it is held that a sale to a purchaser under sections 3771 and 3785b of the Political Code is invalid unless the property has been first deeded to the state.

That the Legislature had the power to provide for such a method of selling and transferring property to purchasers at delinquent tax sale as is provided by sections 3771 and 3785b of the Political Code we have no doubt. The tax collector has been designated as the agent of the state to perform the required duty of executing and delivering the required deed. The plan is simple and direct, and creates no legal anomaly. If the tax collector can by deed transfer a good title to the state, the state has a right to determine the method by which the tax collector may deed the property to a purchaser, and make his act of corresponding legal force and effect as if the transfer were first made to the state.

[9,10] Respondent claims that the notice of sale was void because of an alleged defect in its form. In this behalf it is argued that section 3780 of the Political Code provides that the redemption of property sold to the state for delinquent taxes may be made within five years from the date of sale to the state, "* * * or at any time prior to the entry or sale of said land by the state, * * *" and that the notice as published by the tax collector stated that the delinquent taxpayer would have five years, and thereafter "until the entry of sale of said land by the state." This slight discrepancy between the notice as published and the wording of the statute cannot be held to invalidate the sale of the land in suit. This notice of sale was published by the tax collector under section 3771 of the Political Code. This Code

section provides for the notice of sale to be published, but does not prescribe the form of the notice. Section 3780 of the Political Code does not refer to, nor does it attempt to prescribe, the form or kind of notice to be given by the tax collector; it merely provides for the time within which redemption of property may be made by the delinquent taxpayer. The precise form of the notice of sale is immaterial, so long as it is in substantial compliance with the section, and with reasonable certainty conveys notice of the intended sale.

[11] It is urged that the tax deed from the state to the defendant was not admissible as prima facie proof of the fact that a copy of the notice of the sale was mailed to the person to whom the property was last assessed. The answer to this contention is to be found in the fact, as shown by the record, that the deed in question was offered in evidence, as a pertinent and permissible piece of proof in support of the defendant's chain of title. It was not offered in evidence for any other purpose, and, that being so, of course, no objection was made or could have been rightfully made upon the ground stated.

[12] The point is made for the first time, upon a rehearing of the case, that in computing the penalties an extra cent was added to the penalties due on the second installment. This contention is evidently based upon the fact that the assessor, when making the assessment, added on a half cent. The point is not well taken, we think, nor is it worthy of serious consideration. The excess demanded appears to be less than one cent and it appears to be the rule that a sale will not be invalidated where "the excess is less than the smallest fractional coin authorized by law." *Treadwell v. Patterson*, 51 Cal. 637.

It not appearing from the record before us that there was any invalidity, as a matter of law, in the tax proceedings leading up to the deed from the state to the defendant, it follows that judgment should have been entered in favor of the defendant on the issues raised by his cross-complaint and the answer thereto.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.

198 Cal. 698

MAKINS v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 11799.)

(Supreme Court of California. June 2, 1926.)

1. Master and servant §375(2)—Employee, on working premises, or means of access while going to or from work, is protected by Compensation Act.

Employee going to work, or leaving working premises, without unnecessary loitering, is pro-

ected by Compensation Act while on such premises or means provided for access to and departure from them, though they are not wholly under employer's control.

2. Master and servant §375(2).

Generally, injuries to employee going to, returning from, or after leaving, on personal errand, place of employment, are not compensable.

3. Master and servant §375(2)—Bicyclist, injured while returning over prescribed course followed in delivering papers, was in "course of employment" on master's premises.

Bicyclist, returning over course followed in delivering newspapers in area fixed by employer, when struck by automobile, was injured on master's premises in "course of employment."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

4. Master and servant §375(1)—Injury to newspaper carrier held not inflicted outside working district because he was riding bicycle on opposite side of bounding street, as required by traffic laws.

Injury to newspaper carrier, struck by automobile while riding bicycle, as required by traffic laws on west side of street, constituting west boundary of his route, was inflicted within working district.

In Bank.

Proceeding for compensation under the Workman's Compensation Act by George A. Craig, employee, by Mabel Craig, his mother, opposed by J. N. Makins, employer. An award of compensation by the Industrial Accident Commission was annulled by the District Court of Appeal on certiorari by the employer, and the commission's petition for a hearing by the Supreme Court was granted. Award affirmed.

W. S. Angwin, of Oakland, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondent.

SEAWELL, J. [1] The petition of respondent Industrial Accident Commission praying for a hearing by this court after decision by the District Court of Appeal, First District, Division 1, having been granted, the proceeding is properly before us for final determination. The respondent commission made an award in favor of respondent George A. Craig, a youth 15 years of age, who was injured by a traffic collision that occurred upon Grove street, city of Oakland, this state. The commission found that said George A. Craig was employed by petitioner, J. N. Makins, as a deliverer or distributor of newspapers, and that the injury sustained by said George A. Craig occurred in the course of, and arose out of, his employment. The circumstances of the injury and the contentions of the respective

parties to the proceeding are well stated by Mr. Justice Cashin, author of the opinion adopted by said District Court of Appeal, and we hereby adopt it in part as follows:

"The compensation claimant was, on December 6, 1924, in the employ of petitioner as a carrier of newspapers in the city of Oakland, his route of delivery being within a definite territory, which began at Fourteenth street, and included the section between San Pablo and Telegraph avenues, extending north to the intersection of Grove street with San Pablo avenue, and thence covered the section between Grove street and Telegraph avenue to Thirty-Sixth street in that city.

"Claimant in the course of his employment received each morning at the corner of Sixteenth street and San Pablo avenue a portion of the newspapers to be delivered, being supplied with additional papers at points along his route, and from Fourteenth street proceeded with such delivery in a northerly direction to the southeasterly corner of Grove and Thirty-Sixth streets, at which point the last delivery by him in the course of such employment was made; no deliveries being made by him at any place west of the east side of Grove street. Claimant was paid a stated sum each month for the service rendered, furnished his own means of conveyance, which in this case was a bicycle owned by him, and his duties in every respect ceased each day upon the last delivery being made at the point above mentioned. On December 6, 1924, claimant, after the last delivery on his route, and with the purpose of proceeding to his home, which was situated several blocks to the south and west, crossed to the west side of Grove street at or near its intersection with Thirty-Sixth street, and proceeded thence in a southerly direction along said street, remaining, in accordance with the traffic regulations, on the west side thereof, to its intersection with Thirty-First street, at which point he received injuries from an automobile being driven westerly across such intersection.

"Respondent, as its conclusion from the above facts, found that the injuries occurred in the course, and arose out, of the employment, and awarded compensation therefor.

"Petitioner in this proceeding bases his application for relief upon the contention that the facts shown, and which are not disputed, do not support such conclusion, and that, therefore, respondent acted in excess of its powers in making the award.

"Respondent contends that, the injuries having occurred on Grove street, though the westerly side thereof had not been traversed by claimant in the course of his employment in making deliveries, and at a point approximately five blocks south of the point where the last act in the rendition of services to petitioner was performed, claimant was still within his working territory, and that until he passed the corner of Sixteenth and Grove streets, where the first papers for delivery were received, he remained within the protection of the compensation act.

"The rule is well settled that an employee, in going to work, comes under the protection of the act when he enters the employer's premises or upon the means provided for access thereto, though the premises and such means of access are not wholly under the employer's

control or management (Starr Piano Co. v. Ind. Acc. Comm., 181 Cal. 433, 184 P. 860; Judson Mfg. Co. v. Ind. Acc. Comm., 181 Cal. 300, 184 P. 1); and the same rule applies when the employee is leaving such working premises provided he does not unnecessarily loiter thereon (Wabash Ry. Co. v. Ind. Comm., 294 Ill. 119, 128 N. E. 290; Lienau v. Northwestern Telephone Exchange Co., 151 Minn. 258, 186 N. W. 945). * * *

At the time the accident occurred respondent Craig was traveling in a southerly direction upon Grove street, after serving those customers of his employer whose places of business or residences abutted upon the easterly half of said street. The easterly property line of said Grove street marked the westerly boundary of his district in so far as the physical act of delivering newspapers was concerned. Upon making delivery to the last and furthestmost subscriber on Grove street, respondent crossed from the east to the west side of said street, and was traveling homeward over the same course he had gone in his outward journey, which course led southerly past said employer's residence and also past the initial and other points where packages of newspapers were left by the employer for distribution on the outgoing trip. The carrier had traveled about five blocks on the return trip, whereupon an automobile collided with his bicycle. As a result of the impact, the youth suffered a fracture of the right femur about four inches above the knee. The course taken upon his return trip was the one habitually traveled by him, and it was the most practicable route for him to take. He was receiving a flat salary of \$15 per month, and his employment was confined to a fixed, definite area or district; the hours of his employment being from 4:45 a. m. to about 7 o'clock a. m. of each day. The papers designed for distribution within the district were divided into three separate packages or bundles, and placed along the route by the employer at fixed stations, and so apportioned as to weight and number as to be convenient for distribution by said employee. As successive stations were reached, the bundles left for distribution by the employer were taken in charge by the employee. The initial station of deposit was located within the district a short distance from the southerly boundary line at a point on San Pablo avenue between Sixteenth and Seventeenth streets. This point marked the beginning and practically the end of the route required to be taken by respondent Craig in the discharge of his duties. The route and method of distribution were laid out by, and were under the control and direction of, the employer. Undoubtedly the employee was required to deliver newspapers in accordance with the instructions given him by his employer. No claim is made that respondent was guilty

of loitering within the area of his employment, or that he was guilty of willful misconduct in any degree. The injury occurred after the carrier had thrown his last paper, but before he had arrived at the initial point at which he received the first parcel or lot of newspapers, and while he was yet within the exterior limits of the district to which he had been assigned. While it is a fact that there was no established office or headquarters at which the employee was required to report, it is a reasonable inference arising out of the nature of the employment and the circumstances disclosed by the record that the instructions essential for the proper performance of the service for which Craig was employed were left by the employer and received by Craig at the stations where the parcels of papers were left for distribution, or at some point along the route of his travel.

[2, 3] It is the contention of petitioner that the facts of this case bring it within the rule generally known as the "going and coming rule." This rule has been considered and applied by this court in numerous cases where the person injured was employed to perform service at or in a particular plant or upon particular premises, and the injury claimed to be compensable was inflicted while he was going to, or returning from, his place of employment, or where the employee had left the place of employment on an errand personal to himself. The general rule, subject to many exceptions, however, is that injuries inflicted under the foregoing circumstances are not compensable. *California C. I. Exchange v. Industrial Accident Commission*, 190 Cal. 433, 213 P. 257; *London Guarantee & Accident Co. v. Industrial Accident Commission*, 190 Cal. 587, 213 P. 977. Awards have been affirmed by this court, however, where the facts of the case showed that the injured employee was not at the time he was injured upon his master's premises. *Judson Mfg. Co. v. Industrial Accident Commission*, 181 Cal. 300, 184 P. 1. Each case must be adjudged by the facts which are peculiarly its own. Industrial accidents are produced by so many varying circumstances that it is rather unusual to find any two or more cases that may be ruled by the same legal precedent. While the facts of this case present a situation that has not heretofore come to the attention of this court, we are of the opinion that the principles of law applicable to the decision of an ordinary case of injuries received by an employee while upon the master's premises, and who is thus injured within the course of his employment, must rule the instant case. It is true that no physical

wall or barrier circumscribed the area or district which was adopted by the master as the place of the respondent's employment and to which he had been assigned; nevertheless, the limits of his working district were as definitely fixed by the employer as if it had been inclosed by a physical structure. The area thus definitely marked by reference to designated streets as fixing its boundary was adopted by the employer with full knowledge of all its attendant traffic hazards, and assigned to the youth as his place of employment. The streets were used not only as a means of conducting the business, but were also occupied as supply stations at three separate points along the route of distribution. This, it will be observed, is not a case where an outside worker, such as a solicitor or agent, selects his own territory or working district *ad libitum*, but it is a case where the employer has definitely fixed the boundaries of a district within which the employee is required to labor without any right upon his part to change them in any respect whatsoever. Under the facts of this case, the district thus established and controlled by the employer will be held to be the employee's place of employment. No unreasonable expansion of the Industrial Accident Act (St. 1913, p. 279, as amended) is required to bring the instant case within its compensatory provisions.

[4] It is a further contention of petitioner that the injury was inflicted without the working district of the respondent, and, therefore, is not compensable. This contention is predicated upon the theory that respondent Craig's district was limited by the center line of Grove street, and not by the street considered with reference to its entire width. There was no other way by which respondent could have returned to the initial point at which he entered without crossing to the westerly half of Grove street. Had he attempted to return on the easterly side of said street he would have violated the traffic laws of the state, and would thereby have subjected himself to arrest and imprisonment.

It would be a harsh and narrow construction of the act, indeed, that would deprive a person of his civil rights who, while acting in obedience to the law's mandate, is injured under the circumstances disclosed by the record in the instant case. As to this issue we think there is no substantial merit in petitioner's contention.

The award is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; LAWLOR, J.; RICHARDS, J.

198 Cal. 713

(247 P.)

EMMANUEL v. SICHOFSKY et al.
(Sac. 3747.)

(Supreme Court of California. June 4, 1926.)

1. Attachment ⚡64—Garnishment ⚡58—Ordinarily, money on person of prisoner not subject to seizure when outside of prison walls is not subject to attachment or garnishment when taken over on incarceration by officer authorized (Pen. Code, § 1587).

Ordinarily, money on person of prisoner not subject to seizure while outside of prison walls is not subject to attachment or garnishment when passing involuntarily from his possession upon incarceration to custody of officer appointed by law to take it, in view of Pen. Code, § 1587.

2. Attachment ⚡64—Garnishment ⚡58—Public policy requiring exemption from attachment or garnishment of money upon person of prisoner at time of arrest does not require extension of exemption to money taken after final conviction in criminal case.

Exemption of money on person of prisoner from garnishment or attachment after passing into hands of officer upon incarceration is based upon public policy to prevent misuse of criminal process in causing arrests in order to reach such money, and therefore is not necessary after final conviction.

3. Attachment ⚡64—Garnishment ⚡58—Money on person of fugitive from justice passing to prison warden on his apprehension held not exempt from attachment or garnishment (Pen. Code, §§ 674-676, 1587).

Money on person of fugitive from justice taken in custody by warden of prison under Pen. Code, § 1587, when fugitive was turned over to him to serve sentence, held not exempt from attachment or garnishment since arrest was not made subject to criminal charge in view of sections 674-676.

In Bank.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by John M. Emmanuel against Albert Sichofsky, wherein J. J. Smith, Warden of the California State Prison at Folsom, was cited to appear and answer concerning property of prisoner in his possession. From an order directing payment by Warden of certain moneys held in trust, latter appeals. Affirmed.

U. S. Webb, Atty. Gen., and Robertson T. McKisick and Thomas H. Christiansen, Deputy Attys. Gen., for appellant.

Marshall B. Woodworth, of San Francisco, for respondent.

Martin I. Welsh and Robt. H. Schwab, both of Sacramento, for defendant.

WASTE, C. J. Appeal from an order of the superior court made in proceedings supplemental to execution. The defendant Sichofsky was prosecuted and convicted in the superior court of Los Angeles county on a

charge of grand larceny and felony embezzlement. He appealed from the judgment of conviction, which was subsequently affirmed. 58 Cal. App. 257, 208 P. 340. While the appeal was pending, Sichofsky became a fugitive from justice. Some three years thereafter he was recognized and taken into custody by the sheriff, who delivered him to the warden of the state prison, there to serve his sentence. The sheriff, upon taking him into custody, found \$35,890 in currency, other money, and some valuable diamonds upon Sichofsky's person, and upon delivering him to the prison turned the money and property over to the warden, to be kept by the latter pursuant to section 1587, Penal Code. Thereafter the plaintiff, Emmanuel, brought an action in the superior court of Sacramento county against Sichofsky, and obtained judgment against him for \$14,300, with costs, for moneys loaned and advanced by Emmanuel to Sichofsky, and for merchandise intrusted by plaintiff to defendant to be sold and accounted for by the latter, and which Sichofsky had in fact sold and converted the proceeds thereof to his own use. These financial transactions between Emmanuel and Sichofsky appeared to have occurred subsequent to the latter's trial and conviction, and after he had become a fugitive from justice. Execution was issued upon this judgment and levy thereof made upon the warden of the prison where Sichofsky was confined. Upon affidavit of counsel for plaintiff, the warden was cited to appear before the superior court (Code Civ. Proc. § 717 et seq.) to answer concerning the property of the prisoner within his possession. The warden admitted that he held the money, but contended that it was in custodia legis and not subject to seizure under execution. The lower court, after hearing, made its order requiring the warden to pay over to the sheriff sufficient of the money in his custody to satisfy the execution. From this order the warden has appealed.

[1] From the authorities upon the subject it may be gathered as a general rule that, if money on the person of a prisoner when outside the prison walls is not subject to seizure, it is not subject to attachment or garnishment when it passes involuntarily from his possession to the custody of the officer appointed by law to take it into possession, when such person enters as a prisoner within the walls. Public policy requires the adoption and maintenance of this rule. Were it otherwise, it would lead to a grave abuse of criminal process. It would tempt creditors whose debtors keep their funds upon their persons, and thus beyond the reach of civil process, to make unfounded criminal charges against their debtors, and bring about their arrest and the transfer of their funds to the custody of the arresting officers, in order to make them reachable by the process of

garnishment. It needs no citation of the cases to show that the general rule, as thus broadly stated, is supported by the preponderance of authority. Appellant's position is that the rule finds expression in the section of the Penal Code (section 1587) wherein it is provided that the warden of the prison shall keep a correct account of all money and valuables upon the prisoner when delivered at the prison, and that each convict, when he leaves the prison, shall be supplied with the money taken from him, and which he has not disposed of. Assuming that to be so, it does not follow that the rule must be applied in every case. In *Coffee v. Haynes*, 124 Cal. 561, 57 P. 482, 71 Am. St. Rep. 99, the principal question presented was whether money belonging to a convicted murderer which was still in the possession of the arresting chief of police, as garnishee, was protected from process because in custodia legis. It was held (page 567 [57 P. 482]) that the property did not come within the reason of the rule and ought not to be placed within its operation.

[2, 3] Respondent earnestly contends, and with much reason, that the rule should be confined in its application to cases where money or property of the prisoner has been taken from his person by the arresting officer in connection with his arrest upon a criminal charge, and before his conviction. It is argued that where the reason for the rule ceases the rule itself should cease, and the reason for the rule is not applicable at all to the present case. The arrest of Sichofsky, when the money was found on his person, was not made as the result of any criminal charge filed against him, either by procurement of this plaintiff or of any one else. It was because he was a fugitive from justice and, in a sense, an escaped convict. His conviction may well be regarded as conclusive evidence that the charge against him was not "trumped up," and that his arrest after conviction did not involve an abuse of process. It seems to us that it does no violence to the application of the rule in question to hold that it may properly be limited to those cases where the money or property is taken from the person of the prisoner in connection with his arrest upon a criminal charge, and may as properly be held inapplicable to cases like this, arising after his

conviction upon the charge. A person sentenced to imprisonment in the state prison for life is civilly dead (Pen. Code, § 674), but the forfeitures and disabilities imposed by the common law upon persons attainted with felony are unknown to the laws of this state. No consequences follow a conviction of felony except such as are declared by statute. The convicted person is not dead in law. His civil rights in some matters are suspended, but the rights of his creditors are not suspended. Pen. Code, § 676; *Estate of Nerac*, 35 Cal. 392, 95 Am. Dec. 111; *Coffee v. Haynes*, supra. He is not, by reason of the conviction, rendered incompetent as a witness upon the trial of a criminal action or proceeding, or incapable of making and acknowledging a sale or conveyance of real property (Pen. Code, § 675), and this court said, in *Coffee v. Haynes*, supra, (page 566 [57 P. 483]):

"If he may sell his property we can see no reason why his property may not be taken to pay his debts."

While the money involved in that case was held not to be in custodia legis, by reason of the circumstances under which it was obtained by the arresting officer, the reasoning in the case is persuasive, and the decision is authority for the rule that "the custody of the officer is not necessarily nor always the custody of the law." The distinction to be drawn in the cases, and applicable here, is that the general rule rests for its application to cases in which the money is taken from a prisoner on his arrest by an officer charged with that duty. After a final conviction in a criminal case the purpose of the legal custody of the money or property taken from the person of the prisoner has presumably been accomplished. *Holker v. Hennessey*, 141 Mo. 527, 544, 42 S. W. 1090, 39 L. R. A. 165, 64 Am. St. Rep. 524. To permit the application of the rule of custodia legis to this case would be to subject to misuse and grave abuse a rule salutary and beneficent in its effect when properly applied.

The order of the lower court is affirmed.

We concur: SEAWELL, J.; SHENK, J.; CURTIS, J.; RICHARDS, J.; LENNON, J.; FINLAYSON, Justice pro tem

198 Cal. 685

CHRISTENSON et al. v. CUDAHY PACKING CO. (S. F. 10854.)(Supreme Court of California. June 1, 1926.
Rehearing Denied July 1, 1926.)

1. Pleading ⚡236(5) — Denial of leave to amend answer to conform to proof held not abuse of discretion, where evidence on which leave to amend was grounded had been withdrawn.

Where evidence offered was withdrawn and stricken and jury instructed to disregard it, denial of defendant's motion for leave to amend answer to conform to proof was not abuse of discretion, there being no evidence on which motion could be grounded.

2. Exchanges ⚡9—Under arbitration rules, award of arbitrators before copy of seller's statement of facts was submitted to buyer and without opportunity of buyer to reply thereto held invalid.

Where arbitration rules of association provided that chairman should submit copy of statement of facts to parties to arbitration and each should have right to reply thereto, award of arbitrators before copy of seller's statement of facts was submitted to buyer, and without opportunity to buyer to reply thereto, held invalid, and not validated by act of association's chairman, subsequent to award, in sending copy of statement and offering buyer opportunity to reply.

3. Arbitration and award ⚡16(1).

Party to common-law arbitration may revoke submission and refuse further to participate, in view of Code Civ. Proc. § 1285.

4. Arbitration and award ⚡57.

An award by arbitrators is not binding on parties thereto unless there has been a substantial compliance with agreement of submission.

5. Exchanges ⚡9—Award of arbitrators appointed by chairman of commerce association held valid, though by-laws did not provide who should appoint arbitrators.

Where at time of request that arbitration be held before commerce association and according to its rules parties had knowledge of by-laws under which chairman was its only officer and had responsibility of carrying out its purposes, but which did not directly authorize anybody to appoint arbitrators, award by arbitrators appointed by the acting chairman was legal, and judgment based thereon is binding.

6. Exchanges ⚡9—Remedy of person dissatisfied with award was in the courts, where remedy of appeal from award was lacking in by-laws and rules of association.

Where machinery for appeal from award of arbitrators was lacking in by-laws and rules of commerce association, remedy of party dissatisfied with award was in the courts.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Eleanor L. Christenson, as executrix of the last will and testament of Edwin A. Christenson, deceased, and others, against the Cudahy Packing Company. Judgment for plaintiffs, and defendant appeals. Reversed in part, and affirmed in part.

Preston & Duncan, and Casper A. Ornbaum, all of San Francisco, for appellant.

Thomas, Beedy & Lanagan, and J. W. Parmore, all of San Francisco, for respondents.

CURTIS, J. This action was instituted for the purpose of enforcing two common-law arbitration awards. The facts which form the basis of this controversy grew out of two contracts for the sale and delivery of 11 railroad tank cars of soya bean oil. The contracts were identical in form except as to the date and number of cars of oil. One of them bore date May 21, 1920, and was for six cars of oil, and the other bore date May 25, 1920, and was for five cars of oil. The contracts were entered into by the defendant, the appellant herein, with the firm of Christenson, Hanify & Weatherwax. Since the commencement of this action two of the original plaintiffs have died, and the executrix and executor of their respective wills have been substituted in place of the deceased plaintiffs. There is no controversy over eight of said cars, as they were received by the buyer, the appellant, and paid for according to the contracts. The dispute between the parties concerns the remaining three cars of oil. These cars the buyer refused to accept, claiming that they were not delivered according to contract. They were afterwards sold by the original sellers, Christenson, Hanify & Weatherwax, at public sale, and it is now sought by this action, and the arbitration proceedings in which said awards were rendered, to recover damages for the buyer's failure to accept and pay for said three cars according to the contracts. The amount which they seek to recover is the difference between the contract price and the amount for which the sellers subsequently sold said cars at public sale. Of the three cars in dispute two were covered by, and were a part of, the six-car order of date May 21, 1920, and the other car was a part of the five-car order covered by the later contract of May 25, 1920. Each of these contracts contained the following provision:

"This contract is subject to published rules of the Foreign Commerce Association of the Pacific Coast, adopted and now in force, as same may apply to the commodity herein covered, and which are hereby made a part of this contract, except in so far as these rules may be abrogated by specific conditions written into this contract."

The rules of the Foreign Commerce Association of the Pacific Coast, which association we will hereafter refer to as the Commerce Association, provided for a plan of

arbitration as a means of settling disputes arising between its members or arising between any of its members and others who might agree to submit their differences to arbitration according to said rules. We gain from the record that the sellers were members of the association, but the buyer was not. This fact, however, is not in any way material to any of the issues arising herein. The rules provided that in case the parties to any controversy decided to arbitrate their differences according to the plan of arbitration of said association, it was necessary for each of said parties to sign a written request for arbitration. In this writing the parties signing the same requested that arbitration be held before the Commerce Association and under the rules of said association of the matter in dispute, and agreed to abide by the award and findings of the arbitrators. Shortly after the controversy between the parties hereto arose over the delivery and acceptances of said two cars of oil covered by the contract of May 21, 1920, the buyer requested that arbitration of said matter be held before said Commerce Association by signing a written request as provided by said rules. The sellers also signed a written request, similar in form, and the controversy was submitted to three arbitrators appointed by the chairman of said Commerce Association, who rendered an award in favor of the sellers. Rules 105 and 106 prescribed the procedure to be followed by the litigants in presenting their respective claims before the board of arbitration, and are as follows:

"Rule 105: Written statements of fact, together with written arguments thereon, must be presented in duplicate to the Foreign Commerce Association of the Pacific Coast, which shall be submitted in their entirety to the arbitrators, but no oral evidence shall be given unless requested by the arbitrators.

"Rule 106: Immediately upon receipt thereof, the chairman of the association shall submit a copy of the statement of fact to the respective parties to the arbitration, and each shall have the right to reply thereto, but if no such answer is made by either party within a reasonable time, it shall be considered a waiver of the right of answer. Provided, there shall be no interchange by the chairman of any exhibits submitted in connection with any statement of fact."

After the appointment of the arbitrators in the matter of the dispute regarding the two cars of oil, each of the parties to said controversy presented to said arbitrators their written statements of fact, together with written arguments thereon in duplicate, as provided by rule 105. No copy of the statement of fact presented by the sellers, however, was ever submitted to the buyer as prescribed by rule 106, and no reply thereto was made by said buyer, and no opportunity was given said buyer to make any reply to the statement of fact of the sellers prior to the rendition of said award; and without

submitting to the buyer the written statement of the sellers and without any reply thereto by the buyer, the board of arbitration rendered its award against the buyer. It appears that it was an oversight on the part of the arbitrators in not sending to the buyer a copy of the sellers' statement of fact, and upon being advised that the buyer had not received said copy the chairman of the Commerce Association mailed a copy of said statement to the buyer, and wrote the latter that if it should find anything in said statement which it felt should be answered, it was at liberty to file a supplemental statement for the arbitrators' consideration. The buyer refused to take any further action in the matter, and the award was allowed to stand by the arbitrators.

Regarding the third car of oil in dispute and being the one covered by contract of date May 25, 1920, it appears that each party signed a written request for the submission of the dispute to arbitration before the Commerce Association as provided by the rules thereof. Three persons appointed by the acting chairman of the association served as the board of arbitration and conducted the arbitration of the matter submitted to them in all respects as provided by the rules of the association. The award in this matter was also in favor of the sellers and against the buyer. The buyer refused to acknowledge either of these awards, and this action was instituted to enforce the same and to collect the amounts claimed to be due thereon. The case was tried by a jury, and after the conclusion of the evidence, upon the motion of the plaintiffs, the court instructed the jury to render a verdict in favor of plaintiffs for the sum of \$3,881.70 upon the award rendered in the two-car controversy and for the sum of \$2,496.20 upon the award rendered in the other controversy. The jury acted upon this instruction, and upon their verdict judgment was rendered against the buyer, the defendant herein, for these several amounts, from which it has appealed.

[1] The first contention of appellant is that the court erred in denying its motion for leave to amend its answer to conform to the "proof" made during the trial. By this amendment appellant sought to set forth by way of answer that the sellers had never signed any agreement to submit to arbitration the controversy involving the two cars of oil. Just previous to the making of this motion there had been received in evidence and read into the record a certain request or agreement to submit to arbitration, signed by the sellers, but which, it is claimed, mentioned only one of said cars. Appellant objected to this evidence, and, after the same had been received and the document read into the record, renewed its objection thereto. Whereupon the plaintiffs withdrew their offer and the court struck out the evidence and instructed the jury to disregard the same.

This was the only "proof" tending to support the allegations of appellant's proposed amendment to its answer. It is apparent that there was no evidence before the court upon which appellant could ground its motion to amend, and there was therefore no abuse of discretion on the part of the court in denying the same.

[2] Appellant further contends that the court erred in admitting in evidence the award of the arbitrators relating to the two-car controversy. As recited before, the record shows that after the parties had signed the written request provided for by the rules of the Commerce Association for the submission of this dispute to arbitration, each of said parties, in pursuance of rule 105, presented to the said association written statements of fact, together with written argument in support of their respective claims; thereafter the arbitrators submitted a copy of the statement of fact presented by appellant to the sellers, the predecessor of the respondents herein, and said sellers in due time filed their reply thereto in accordance with said rule 106. Before any copy of the statement of fact presented by the sellers had been submitted to appellant and without any opportunity being given appellant to make any reply thereto, the arbitrators made their award in favor of the sellers. On learning of this action of the arbitrators the appellant refused to take any further part in the proceeding. The chairman of the Commerce Association after the award had been made wrote appellant that it was an oversight that a copy of the required papers had not been sent, and inclosed sellers' statement of fact, and stated that "if you find anything therein that you feel should have been answered prior to arbitration you are at liberty to file a supplemental statement for the arbitrators' consideration." This offer was not accepted by appellant, and the award as originally made by the arbitrators was allowed to stand, and is the one which respondents now seek to enforce against appellant. That this award was not made in accordance with the agreement of the parties submitting the controversy to arbitration must be apparent from the provisions of rules 105 and 106 of the Commerce Association. These rules provide that in place of oral evidence the parties shall present written statements of fact to the association, and that upon receipt of these statements the chairman shall submit a copy of the same to the respective parties and each shall have a right to reply thereto. As before observed, no copy of the statement of fact presented by the sellers was ever submitted to appellant, and no opportunity was given appellant to make any reply to said statement before the award was made by the arbitrators. The statement of fact and reply thereto provided for by the above rules of the association were to be received and considered by the arbitrators in place of oral evi-

dence of the parties. In fact these statements and replies were the only means offered by said rules whereby the parties might present the facts of their respective claims before the board of arbitrators. To deprive either of the parties of this right would be to deny to such a party his right to present his case, or to make his defense, as the case might be, and for the arbitrators to make an award before either party had been given the opportunity to present his statement and reply would be to decide the matter before such party had an opportunity to submit his evidence in support of said cause. In *Meloy v. Imperial Land Co.*, 163 Cal. 99, 101, 124 P. 712, it was held that:

"The parties to an arbitration have a right to introduce evidence in support of their claims. * * * To decide a matter before the evidence thereon, and the matter itself, have been submitted to the arbitrators for decision, is a plain denial of this right."

We do not think that the failure of the arbitrators to permit appellant to be heard in reply to the sellers' statement of fact can be regarded as a mere irregularity and therefore disregarded.

"The want of an opportunity to be heard goes directly to the authority of the arbitrators to make an award." 2 *Ruling Case Law*, p. 379.

"Where the submission directs that certain requisites shall be complied with by the arbitrators in making their award, they must follow such directions strictly, or the award will be invalid." 2 *Am. & Eng. Ency. of Law* (2d Ed.) p. 720; 5 *Corpus Juris*, p. 119; *Ryan v. Dougherty*, 30 Cal. 219; *In re Abrams and Brennan*, 2 Cal. App. 237, 84 P. 363.

[3, 4] We are unable to see that the offer in the letter of the chairman of the Commerce Association to appellant to permit appellant to file a supplemental statement of fact, after the award had been made, for the consideration of the arbitrators, can help out or validate the award thus illegally made. The chairman of the association was not a member of the board of arbitrators, and, assuming that he had the authority to appoint the members of said board, a question we will later discuss, his authority as to the arbitration ceased with their appointment, and any action taken by him thereafter would not be binding on the arbitrators. We are not convinced that had this offer come direct from the board of arbitrators that its effect would have been any different unless they had followed this offer by setting aside the award rendered and giving appellant an opportunity to reply. Had this course been pursued by the board of arbitrators, a different question would be presented. But even if this procedure had been followed, the arbitration not having been made in accordance with the provisions of the code and being simply a common-law arbitration, the appellant could have revoked the submission thereof and

refused further to participate in this proceeding. Code Civ. Proc. § 1285; *Sidlinger v. Kerkow*, 82 Cal. 42, 23 P. 932. In holding the award invalid we do not necessarily find that the board of arbitrators had no jurisdiction to render an award. By the agreement of submission signed by the parties jurisdiction was conferred upon the arbitrators to make an award, but an award is futile and of no binding effect upon the parties thereto unless there has been a substantial compliance with the terms of the agreement of submission. 2 Ruling Case Law, p. 377, § 24; *Curtis v. Sacramento*, 64 Cal. 102, 104, 28 P. 108; *Meloy v. Imperial Land Co.*, supra. Our conclusion, therefore, is that the award rendered by the arbitrators in the controversy involving the sale and delivery of the two cars of oil covered by the contract of May 21, 1920, was invalid and was not binding upon the appellant, and its admission in evidence was therefore erroneous and prejudicial to appellant's rights. This conclusion, however, does not affect the award as to the one car covered by the contract of May 25, 1920. This latter award is valid and binding upon the parties thereto unless the contention to be next considered is well taken.

[5] This contention, made by appellant, is that both awards are absolutely void on account of a serious defect in the proceedings appointing the arbitrators. This defect, appellant asserts, is the absolute want of authority in the chairman of the Foreign Commerce Association, or the chairman pro tem., or acting chairman of the said association, to appoint the arbitrators who composed the board rendering said awards. It appears to be conceded that the arbitrators of the two-car controversy were appointed by the chairman of said association and that the arbitrators in the other controversy were appointed by the acting chairman of said association. The evidence shows that H. Arthur Dunn was appointed acting chairman, and that in the absence of the chairman he was vested with all the powers of the chairman during such absence, and that while the regular chairman was absent he appointed the arbitrators in the one-car controversy. By reference to the request for arbitration, signed by the parties and heretofore mentioned, it will be observed that the parties agreed that the arbitration be held before the Foreign Commerce Association and under its rules. From the record before us it appears that this association was a voluntary association of firms and corporations engaged in Pacific Coast foreign commerce. It adopted a set of by-laws and also a set of general rules. The by-laws provided that there shall be but one officer of said association, a legal adviser, who shall act as chairman, and who is made the sole executive of the association and given broad powers, including the appointment of the various committees provided for in said by-laws and the general conduct of the affairs of the associa-

tion. No direct authority is given the chairman to appoint arbitrators when an arbitration is called for under the rules of the association. Neither is it made the duty of any of the various committees provided for by the by-laws to appoint arbitrators, nor have any of said committees any duty to perform in relation to any arbitration matter coming before said association. Unless the chairman had such authority there is no power in the association to appoint arbitrators. No arbitration could therefore be held before said association. The parties requested that such an arbitration be held. This request, it is conceded, amounted in effect to an agreement for arbitration. It must have been made with full knowledge of the by-laws and rules of the association. If so, the appellant knew at the time it made said request that there was no officer or authority directly authorized to appoint arbitrators, but that the chairman of the association was its only officer, and as such had the general direction of the affairs and the responsibility of carrying out the objects and purposes of the organization. With such knowledge on its part the only reasonable inference it could have drawn therefrom at the time it requested that an arbitration be held before said association and according to its rules was that the arbitrators to act thereunder were to be appointed by its chairman. To hold otherwise would be to hold that appellant performed the idle act of requesting that the matter in dispute be settled by arbitration before the association, knowing at the time that there was no power in the association to appoint arbitrators, and therefore that no arbitration could be held. In our opinion appellant was bound by its agreement to accept the arbitrators appointed. Any other conclusion would not only render all the provisions of the by-laws and rules of the association providing for the settlement of a dispute by arbitration inoperative and ineffectual, but it would nullify the agreement entered into by the appellant itself. Respondents advance the claim that the chairman of said association under the power given him to appoint all committees has the power to appoint boards of arbitrators. But whether we hold that the chairman under his general powers or under the by-laws authorizing him to appoint all committees has authority to appoint the arbitrators is not material. In either case the appointment would be valid, and their acts, in so far as they were within the terms of the agreement of the parties, would be legal and binding upon the parties thereto. We conclude, therefore, that the award as to the one-car arbitration was legal, and the appellant is liable for the amount of the judgment based thereon.

[6] It is insisted by respondents that, as the rules of the association provide for an appeal from an award, the remedy of the appellant, if dissatisfied with the award of

the arbitrators, was by appeal to the board of appeal provided for by the rules of the Commerce Association. A sufficient answer to this contention is that the machinery for such an appeal is entirely lacking in the by-laws and rules of the association. Not only is there no rule or by-law designating who shall appoint said board, but the rules and by-laws are silent in so far as our attention has been directed thereto, upon a number of essential requirements for such an appeal, including the number constituting said board, the time and manner of taking the appeal, and the power or duty of the board upon appeal.

There were other points discussed by the parties in their respective briefs on appeal, but the claims involved thereunder appear to have been abandoned subsequently, and upon the rehearing the arguments of counsel have been directed in the main to the consideration of the subjects discussed herein.

The judgment is reversed as to the award against appellant amounting to the sum of \$3,881.70, and is affirmed as to the award amounting to \$2,496.20 rendered against said appellant, appellant to recover costs.

We concur: WASTE, C. J.; CASHIN, Justice pro tem.; SEAWELL, J.; RICHARDS, J.; LENNON, J.

77 Cal. App. 584

In re STEUER'S ESTATE.

JENSEN et al. v. LARSEN.
(Civ. 5623.)

(District Court of Appeal, First District, Division 2, California. April 27, 1926.)

1. Executors and administrators $\S$ 227(2)—When claim against estate of decedent based on instrument in writing, copy of instrument must be attached and filed therewith to relieve it from statute of limitations (Code Civ. Proc. $\S$ 339, 1497, 1499).

Where claim against decedent's estate is based on instrument in writing, copy of instrument must be attached to statement of claim, and be filed therewith under Code Civ. Proc. $\S$ 1497, in order to relieve it from limitations of sections 339 and 1499.

2. Limitation of actions $\S$ 28(1)—Claim against estate of decedent for services covering period of three years before death held barred as to portion covering services rendered beyond two-year limitation (Code Civ. Proc. $\S$ 339, 1499).

Under Code Civ. Proc. $\S$ 339, 1499, claim against estate of decedent, based on monthly charge for services for period of three years before death, held barred as to that portion covering services rendered beyond two-year limitation.

Appeal from Superior Court, Los Angeles County; Frank B. Willis, Judge.

Final accounting of Minnie Larsen, administratrix of the estate of Katinka Steuer, deceased. From a decree settling the account, Laura Jensen and others, heirs of the deceased, appeal. Reversed.

Henshaw, Black & Lyders, Eric Lyders, and William A. Montan, all of Los Angeles, for appellants.

Wetherhorn, Hoyt & Jones, of Los Angeles, for respondent.

NOURSE, J. Katinka Steuer died in this state on October 6, 1924, intestate, and leaving as her heirs at law four sisters and one brother. One of the sisters, Minnie Larsen, was duly appointed administratrix of the estate, which was of the value of about \$3,500. During the course of administration, Christian Larsen, the husband of this administratrix, presented to her his verified claim against the estate, reading as follows:

"For board, room and care furnished to Katinka Steuer from November 27, 1920, to November 27, 1923, total thirty-six months at \$70 per month—\$2,520."

This claim was in due time approved by the administratrix and allowed by the probate judge. The administratrix then presented her final account, from which it appeared that, after the payment of this claim and the expenses of administration, nothing was left in the estate to be distributed to the heirs. These heirs, other than Minnie Larsen, the administratrix, protested against the allowance of the Larsen claim upon the grounds that a large portion of it was barred by the statute of limitations. These objections were overruled, and the account was settled, and the decree in accordance therewith was entered. From this decree the heirs of the decedent, other than the administratrix, have appealed.

[1] The sole ground urged on the appeal is that all that portion of the claim which did not cover services rendered within the two-year period was barred by the provisions of section 339, Code of Civil Procedure. In this connection attention is directed to section 1499 of the same Code, which provides that no claim must be allowed by the executor or administrator or by a judge of the court which is barred by the statute of limitations. These express inhibitions in the statute are conceded by the respondent, and the only argument which she makes in support of the decree is that the claim does not appear on its face to be barred, and that no evidence was offered to show that the claim was not based upon some instrument in writing sufficient to take it out of the bar of section 339. To the latter point the appellants correctly answer that, if the claim were based upon any such instrument, it was incumbent upon the claimant, under section 1497, Code of Civil Procedure, to attach a copy of the instrument to the

statement of the claim, and to file it therewith. In that case the claim must be based on the written instrument. Here the claim is merely "for board, room and care * * * from November 27, 1920, to November 27, 1923, total, thirty-six months at \$70 per month," and is based on the legal presumption to pay for services rendered. The case is on all fours with *Etchas v. Orena*, 127 Cal. 588, 60 P. 45. There a claim, in the same form as the above, was presented for services rendered to the deceased "from June 1, 1885, to June, 1895, * * * at \$30 a month." In that case the Supreme Court say (page 592):

"It appears, therefore, on the face of the claim as presented, that all that part of it was barred by the statute except for services that became due on or after January 19, 1894. If barred by the statute of limitations, the claim could not be allowed by the executor or the judge. Code Civ. Proc. § 1499." (Emphasis ours.)

[2] Here the claim shows plainly on its face that it was a monthly charge for services rendered from November 27, 1920, to November 27, 1923. Because of this fact, it follows as of course that the portion of the claim covering services rendered beyond the two-year limitation of the statute is barred, and was improperly allowed by the administratrix and the probate judge. The difference between the indebtedness incurred within the terms of the statute and the amount allowed would, therefore, be available for distribution to the heirs of the decedent and the order settling the first and final account was, therefore, prejudicial to them.

Order reversed, with costs to appellants.

We concur: LANGDON, P. J.; STURTEVANT, J.

77 Cal. App. 164

PEDROW et ux. v. FEDEROFF et al.
(Civ. 2960.)

(District Court of Appeal, Third District, California. March 18, 1926. Rehearing Denied April 17, 1926.)

1. Carriers §318(10)—Findings that injuries to plaintiff in leaving defendant's taxicab were proximately caused by defendant's negligence, and hence not due to plaintiff's negligence, held warranted by plaintiff's testimony.

Plaintiff's testimony that defendant's taxicab made sudden jerk or moved while driver was at wheel, thereby throwing her to ground and causing injuries complained of while she was leaving cab in exercise of due care, held to warrant finding that injuries were proximately caused by defendant's negligence, and hence not due to plaintiff's negligence.

2. Appeal and error §1011(1).

Where there is substantial conflict in evidence as to how accident happened, District Court of Appeal cannot interfere with finding for plaintiff.

3. Appeal and error §1010(1)—Reviewing court may set aside findings only where evidence is so weak and unsatisfactory as to afford no support thereto as matter of law, or inherently improbable, and hence unbelievable on face.

Court of review may set aside findings, necessary to uphold judgment, only where evidence is so weak and unsatisfactory on its face as to afford no support to such findings as matter of law, or is inherently improbable, and hence unbelievable on its face.

4. Appeal and error §1011(1)—District Court of Appeal is bound by trial court's decision on facts, where testimony of witnesses for victorious party is in substantial conflict.

District Court of Appeal is bound by trial court's decision on facts, where there is substantial conflict in testimony of witnesses for victorious party, as well as where conflict arises between their testimony and that of opposing party's witnesses.

5. Appeal and error §994(3)—Truth of plaintiff's testimony as to period of employment before injury and time of return thereto afterward held for trial court, notwithstanding employer's conflicting testimony.

Truth of plaintiff's testimony as to how she received injuries held for trial court sitting without jury, though integrity of her testimony as to how long she had worked for laundry before injury, and how soon she was able to return to work thereafter, was shaken by laundry proprietor's testimony from his time book.

6. Appeal and error §994(3)—Witnesses §317(1)—Rule that witness false in one part of testimony is to be distrusted in others merely means that entire testimony may be rejected for such reason, not that fact trier may not believe other parts of testimony, and cannot be invoked in District Court of Appeal on review of facts (Code Civ. Proc. § 2061, subd. 3).

Doctrine that witness false in one part of testimony is to be distrusted in others (Code Civ. Proc. § 2061, subd. 3), is for guidance of fact triers at nisi prius in determining witness' credibility, and merely means that entire testimony may be rejected because of false swearing in material part, not that jury or judge trying facts may not believe and credit other parts of witness' testimony, and rule cannot be invoked in District Court of Appeal on review of facts.

7. Damages §132(2)—\$300 for broken tibia and injury to knee joint, necessitating cast on knee and thigh for three or four weeks and use of crutches for six weeks, over five months of pain, possible future suffering, and loss of wages for several weeks, held not excessive.

\$300 for impacted fracture of tibia and injury to knee joint causing slight amount of fluid therein, necessitating cast on leg and thigh

for three or four weeks and use of crutches for about six weeks, continued pain for over five months, possible future suffering, and loss of wages for several weeks, *held* not excessive.

8. Appeal and error ⚡1004(1)—Verdict or judgment cannot be interfered with by District Court of Appeal unless damages are so disproportionate to compensation warranted by facts as to shock sense of justice and raise presumption of passion or prejudice.

Unless damages awarded are, as matter of law, so disproportionate to compensation reasonably warranted by facts as to shock sense of justice and raise presumption that they are result of passion or prejudice, verdict or judgment cannot be interfered with by District Court of Appeal.

9. Appeal and error ⚡926(5)—Where record does not show that each witness was called by name and directed to remain outside courtroom until called to testify, it must be assumed that defendant leaving room was not specially commanded to do so.

Where record does not show that each witness was called by name and directed by court to remain outside courtroom until called to testify, it must be assumed that defendant absenting himself from courtroom was not specially commanded to do so.

10. Trial ⚡41(3)—Party to action is not subject to order excluding witnesses from courtroom, but is entitled to remain therein and aid in and observe progress of trial.

Party to action is entitled to remain in court during trial and aid in and observe progress thereof, and is not subject to order excluding witnesses.

11. Appeal and error ⚡206(1)—Counsel not calling court's attention to fact that client, absenting himself from courtroom under order excluding witnesses, was party to suit, cannot complain.

Counsel, not calling court's attention to fact that client absenting himself from courtroom under mistaken belief that order excluding witnesses included him was party to suit, cannot complain.

12. Appeal and error ⚡1046(1)—Defendant's absence from courtroom during trial held not prejudicial to defendants, where fact was not discovered nor suggested until plaintiffs rested case and defendants were about to introduce defense.

Where defendant's absence from courtroom was not discovered nor suggested until plaintiffs rested case and defendants were about to introduce defense, defendants were not prejudiced; their counsel evidently having found no use for absent defendant's presence.

13. Trial ⚡18—Ordering defendant and plaintiffs' witness to stop talking and leave courtroom held proper in discharge of court's duty to maintain decorum during trial.

In ordering defendant and plaintiffs' witness to stop talking and leave courtroom, court did no more than his duty to maintain decorum during trial; presumption being that they were

speaking in tone sufficiently audible to disturb proceedings.

14. Appeal and error ⚡1046(i)—Defendants were not prejudiced by exclusion of one of them from courtroom, where he was not present when accident causing injuries sued for occurred and later testified to inconsistent statements by plaintiff, and court weighed testimony carefully and based decision on testimony of other witnesses than plaintiff.

In action against taxicab driver and owner for injuries to passenger, requiring latter to leave courtroom during examination of witnesses of accident by defendants' attorney was not prejudicial to defendants, where he was not present when accident occurred and later testified as to statements by injured plaintiff after accident inconsistent with her testimony as to how it happened, and judge trying case without jury weighed testimony carefully and declared that, but for other witnesses' testimony, he would be disposed to order judgment against plaintiffs.

On Petition for Rehearing.

15. Appeal and error ⚡994(3)—Injured plaintiff's statement, incompatible with testimony as to how accident occurred, held not ground for reversal of judgment for plaintiffs.

Injured plaintiff's statement, inconsistent with her testimony as to being thrown to ground by sudden lurch or movement of taxicab while leaving it, that at time of doing so she handed fare to driver still sitting at wheel, *held* not ground for reversal of judgment for plaintiffs, where judge stated that he would be inclined to give defendants judgment if there were no other testimony on which to predicate judgment rendered and there was other testimony sufficient to show that accident was directly due to taxi driver's negligence; impeaching evidence merely producing substantial conflict for trial court to resolve.

16. Trial ⚡45(3)—Trial judge's refusal to receive testimony as to statements by injured plaintiff inconsistent with her testimony as to how accident occurred held not available error; question to witness as to whether he was in party in front of defendant's place when defendant and attorney were there not disclosing nature or materiality of testimony expected.

Refusal of court, trying personal injury suit against taxicab driver and owner without jury, to receive testimony as to statements by injured plaintiff inconsistent with her testimony as to how accident occurred, *held* not available error; question to witness as to whether he was in party in front of owner's place when latter and attorney putting question were there not showing nature or materiality of testimony expected.

17. Appeal and error ⚡205—Questioner, to reserve exception, must formally reframe question to make materiality apparent, where not material on face.

Where question is not material on its face, questioner, to reserve exception, must formally reframe question so that its materiality is apparent.

Appeal from Superior Court, Sutter County; W. A. Anderson, Judge.

Action by Thomas J. Pedrow and wife against W. R. Federoff and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

John R. Connelly, of Sacramento, for appellants.

Crofton & Wetmore and Frank A. Duryea, all of Marysville, for respondents.

HART, J. This is an action for personal injuries alleged to have been received by the plaintiff Lydia Pedrow through and by the negligence of the defendants. The complaint alleges the facts in detail, and prays for damages—damage to Lydia Pedrow, damage to Thomas J. Pedrow, and for doctor's bill and medicine, each separately stated—in the total sum of \$1,750. The answer specifically denies the allegations of the complaint and sets up as a special defense contributory negligence. The cause was tried by the court without a jury, and plaintiffs were awarded judgment in the sum of \$369. The defendants appeal from the judgment, supporting the same by a transcript of the proceedings taken at the trial as authorized by section 953a of the Code of Civil Procedure.

The principal point is that there is no evidence which sufficiently supports the findings.

The plaintiffs, as the title indicates, are husband and wife, and, at the time of the injuries herein complained of were sustained, resided in Yuba City, in Sutter county. The defendant Federoff was at said time the owner of a taxicab business in the city of Marysville and locally engaged in the transportation of passengers from place to place for hire, and at the same time the defendant O'Neil was in the employ of Federoff as a taxicab driver. Yuba City is situated a mile or less from the city of Marysville, in Yuba county; the two places being divided by the Feather river, across and over which a bridge for the use and accommodation of the traveling public is maintained.

The facts as herein stated will be based largely upon the testimony of the plaintiff Lydia Pedrow.

The home of the plaintiffs, at the time the injuries were received by Lydia Pedrow, was at 143 Kiley avenue, in Yuba City. In front of their home was an embankment, which sloped perceptibly toward the curbing directly in front of the residence. At and before the day on which the accident occurred, both plaintiffs were employed at a laundry in the city of Marysville; her duties being those understood as a "press" worker. The elder of the two daughters of the plaintiffs was, at the time Lydia Pedrow received her injuries, and had been for a period prior thereto, attending school in the city of Marysville, and the younger child was then attending school at Yuba City. Early on the morning

of the 12th day of May, 1924, Lydia Pedrow left her home in Yuba City for Marysville, for the purpose of purchasing a can of oil to be used in oiling a vacuum cleaner. She was accompanied by her two daughters and her husband, the latter going to Marysville for the purpose of resuming his daily labors at the laundry above spoken of. They arrived in Marysville shortly before 8 o'clock a. m. and, after making the purchase of the oil, she started on her return home. This was about 8 o'clock. She noticed a taxicab standing at a corner of a street in Marysville, not far distant from where she stood when she first observed the cab, and, being anxious to get back to her home as soon as possible because of the fact that her younger daughter was required to report at school in Yuba City at the hour of 8:30 a. m., she sent one of the girls to the taxi driver to inquire what his charge would be to convey the three to Yuba City. The charge for the service being satisfactory, she and the two girls entered the cab and were driven to Yuba City and directly to their home. The cab was stopped in front of her residence, the door was opened (she stated by the driver), the two children alighted, and, as she was in the act of leaving the cab, her left foot on the running board and the right still inside the cab—her body half in and half out of the cab, as she explained it—the machine suddenly started, or, as she several times described it, started to roll down the embankment, or, as she also once described it, the cab made a movement in the nature of a "jerk," and she was by said jerk or movement thrown to the ground. The driver, one O'Neil, without assisting or offering to assist her to her feet, immediately started away and was soon out of her sight. She stated that she was unable, unaided, to get on her feet, but, after some effort, finally succeeded in getting into her house and onto a couch by crawling on her hands and knees. On getting into the house she began to realize that her left knee had been injured, as she was suffering much pain in the region of the knee cap. She remained on the couch, unable to use her left leg, until her husband returned from his work in the late afternoon, when he sent for a physician, who called at the house, examined the injured limb, found a bruise on the knee, which was swollen, and some fluid in the joint. He administered temporary treatment of the injured limb for the purpose of alleviating the suffering of Mrs. Pedrow, as far as thus it could be done under the circumstances. On the following morning the doctor caused the patient to be conveyed to his office, where he took an X-ray plate of the injured knee. The doctor, by the aid of the X-ray plate, discovered a "possible fracture of the upper end of one of the small bones of the left leg" (the "tibia," as technically the doctor described the bone), "with an injury to the knee joint sufficient to cause a slight amount of fluid in there. I took her

home," proceeded the doctor, "and put a cast on her leg and thigh, immobilized the knee. * * * I think she had the cast on for three or four weeks." The doctor stated that the main injury to the leg was what is called an "impacted fracture," further explaining that "an impacted fracture is not a bone broken off but just mashed in." He stated that it would be difficult in such a case to venture a definite prognosis as to the length of time in the future during which the patient would suffer pain from the injuries she had received. After the limb was put in a cast, as above explained, Mrs. Pedrow was able to go about on crutches. From the time she was injured until the time she dispensed with the use of the crutches a period of about six weeks was covered.

Both plaintiffs testified that, for several weeks after Mrs. Pedrow was hurt, the husband was compelled to perform the household duties of their home. These he would attend to in the early morning before going to work and in the evening on returning from work. The elder daughter was required to remain home from school to assist her mother until the latter's injured limb was removed from the cast. Mrs. Pedrow testified that she had suffered more or less pain from the injuries from the time she received them down to the time of the trial, a period of over five months from the time she was hurt. Particularly, in damp weather, she said, was the pain noticeable. She received as compensation for her work at the laundry, when employed, the sum of \$19.50 per week.

The explanation by Mrs. Pedrow of the manner in which she fell or was thrown to the ground was in part corroborated by her daughter (the elder of the two) and a Mrs. Mack, a neighbor, whose house was next to that of the Pedrows. Mrs. Mack stated that she was out on her porch engaged in sweeping when the cab stopped in front of the Pedrow home. The Pedrow children first alighted from the cab, and then, as Mrs. Pedrow was attempting to do likewise, one foot being on the running board and the other on the inside of the car, and her body being "half in and half out" of the car, the cab made a sudden move, throwing Mrs. Pedrow to the ground. She stated that the driver was in his seat in the cab when it made the move.

The testimony of the driver of the cab, O'Neil, was directly contradictory to the testimony of Mrs. Pedrow as to the manner in which she fell to the ground, and was to the effect that the cab was standing perfectly still when Mrs. Pedrow left the car and in doing so fell to the ground. O'Neil testified that the moment that he reached a point directly in front of the Pedrow home, he stopped the motor and that the car did not move, nor was it moved after he stopped it and until he started on his return to Marysville. He stated that Mrs. Pedrow fell after

her feet struck the ground, there being there at the time "a lot of rubbish," etc., into which she stepped. He said that he assisted Mrs. Pedrow to her feet and that she thereupon went into the house without apparent difficulty or inconvenience. Another witness, a lady then living near the Pedrow home, stated that she saw Mrs. Pedrow leave the cab and that the car did not move nor was it moved while she (Mrs. Pedrow) was in the act of getting out of the machine. That witness further testified that the driver of the cab assisted Mrs. Pedrow to her feet and that she (Mrs. Pedrow) walked into her house, but was supported by her two children. And as to how Mrs. Pedrow got into the house after she was hurt, her testimony and that of her elder daughter are not altogether in harmony.

Certain witnesses for the defense testified that Mrs. Pedrow, prior to bringing this action, and shortly after the accident, made certain statements as to the manner in which the accident occurred which, if true, would be inconsistent with her testimony given at the trial. This impeaching testimony, however, she contradicted, positively declaring it to be a fabrication.

[1-3] It will not be disputed that if, as Mrs. Pedrow testified, the cab made a sudden jerk or lurch or moved while the driver was still in his seat at the wheel, and she, exercising due care when the act of leaving the cab, was thrown to the ground and received the injuries by reason of such moving or lurching of the cab, then, manifestly, the court, believing her story, was legally authorized to find that the proximate cause of her injuries was the negligence of defendant and, consequently, not due to negligence on her part. It is to be conceded that, upon the face of the record, there is a conflict in the evidence upon the question of how the accident resulting in the injuries happened, but it is a substantial conflict. In such a situation as to the evidence, this court, as is well understood, is without legal right to interfere with the verdict, so far as is concerned the evidentiary phase of the case. It is only where, upon its face, the evidence from which findings necessary to uphold the judgment have been drawn is so weak and unsatisfactory as to justify the conclusion that it, as a matter of law, affords no support to such findings, or is inherently improbable, and therefore unbelievable upon its face, may a court of review set aside the findings, and, as stated, this we cannot say as to the evidence upon which the findings in this case are founded.

[4-6] The rule that a court of appeal is bound by the decision of the trial court upon the facts where the evidence is in substantial conflict upon such facts applies as well where such conflict arises in the testimony given by the witnesses for the party victorious in the trial as where the conflict arises between

the testimony given by the witnesses of one of the parties and that given by the witnesses testifying for the opposing party. It is suggested, however, that Mrs. Pedrow's own testimony was not only shown to be false in part, but that the court, in deciding the case, in effect so stated. This has reference to her declaration that she had worked for the laundry in Marysville for a period of two or three years prior to the time when she was hurt, and also that she was unable to return to her employment for about three or four weeks after she was injured, and then resumed her work while on crutches, whereas, the proprietor of the laundry, testifying from his time book in which a record of the days, weeks, or months during which his employees worked at the establishment was kept, stated that, about two years prior to the day she was hurt, both Mrs. Pedrow and her husband worked for him in his laundry, but that they left the laundry and were gone about two years; that they returned after that period of time and were re-employed by him and put to work in the laundry in the latter part of April, 1924; that, within a few days after she was injured, she returned to her work. With the integrity of her testimony thus shaken, it was still with the trial court to determine whether her testimony as to the manner in which she received her injuries was true or false. The doctrine that "a witness false in one part of his testimony is to be distrusted in others" (Code Civ. Proc. § 2061, subd. 3) is a rule designed for the guidance of the triers of the questions of fact at nisi prius in passing upon and determining the credibility of a witness whose testimony they may find has been in part false. "The rule merely means that where the witness is found to have sworn falsely in a certain material part of his testimony, his entire testimony may for that reason be rejected. But no one will attempt to challenge the right of a jury or a judge, trying the facts, to believe and credit certain parts of the testimony of a witness who has been shown to have sworn falsely as to certain other material parts thereof." The rule is in any event "one which cannot well be invoked in a court of appeal on a review of the facts." *Brandt v. Krogh*, 111 P. 275, 279, 14 Cal. App. 39, 48; *Robinson v. Robinson*, 113 P. 155, 159 Cal. 203.

[7, 8] We cannot say that the judgment is excessive. The doctor testified that for the professional services rendered Mrs. Pedrow by him his fee amounted to \$60, and it was shown that the plaintiffs paid \$9 for medicines to be used and which were used in the treatment of Mrs. Pedrow's injuries. The court, in deciding the case, stated that it "will allow \$369 damages—that includes the doctor's bill and medicine," and, as seen, rendered and caused to be rendered judgment in accord therewith. There is thus left the sum of \$300 to plaintiffs for damages as in com-

pensation for the damage actually sustained. That sum appears to constitute a reasonable admeasurement, in terms of money, of the damages which will at least approximately compensate plaintiffs for the injuries and the consequences to them following therefrom. There was the loss of wages for several weeks, also the pain and suffering Mrs. Pedrow endured when the injuries were still fresh and at the time of the trial, which took place something over five months after the accident happened, and possible future suffering. It is, of course, always difficult in cases of this character to fix the amount which should be allowed for the element of pain and suffering, present and future, but unless it can justly be said, as a matter of law, that the damages awarded by the verdict or the judgment "are so far disproportionate to any compensation reasonably warranted by the facts as to shock the sense of justice and raise the presumption that they are the result of passion or prejudice, rather than of honest and sober judgment," interference with the verdict or the judgment by a court of review is forbidden. 8 Cal. Jur. § 88, p. 834, and cases named in the footnote. As before indicated, under the state of the record as to the evidence in this case, we cannot so hold here.

[9-11] The defendant complains of the action of the court in excluding from the courtroom during the progress of the trial the defendants W. R. Federoff and J. W. O'Neil. On the opening of the case, counsel for defendant stated: "For the reason that there is a conflict of evidence we would like the witness to testify out of each other's hearing." The record then shows the following in parentheses: "At this time the witnesses are excluded from the courtroom." While the defendants were putting on their case, the following occurred, as the record shows:

"Mr. Connelly (Attorney for Defendants): I see that one of the defendants was excluded with the rest of the other witnesses. (J. W. O'Neil is called into the room.)"

[12] The record does not show that, in making the order excluding the witnesses, each of the latter was first called by name and thereupon directed by the court to remain outside the courtroom while the trial was going on and until called to testify, and it is therefore to be assumed that O'Neil was not specially commanded to depart from and remain outside the courtroom until required to give his testimony, and, of course, being a party to the action, was not, and could not have been so intended to be, subject to the order of exclusion. Counsel for defendants better than the judge knew who O'Neil was—whether he was the defendant O'Neil or only a witness having no interest in the case other than as a witness—and knowing that a party to an action is entitled to remain in the court during the trial of such action and aid in and observe the progress thereof (Ches-

ter v. Bower, 55 Cal. 46, 48), it was his duty to protect the right of O'Neil in that respect by calling the attention of the court to the fact that he (O'Neil) was a party to the suit. Having failed to take that course, counsel can blame no one but himself for the act of O'Neil in absenting himself from the courtroom under the mistaken belief that the order of expulsion included him. But, aside from these considerations, it is clear, from the record, that defendants suffered no prejudice from O'Neil's absence from the courtroom while the trial was in progress, as (so the record would indicate) his absence was not discovered, or at least it was not suggested, until the plaintiffs had rested their case and the defendants were about to introduce their defense. Evidently counsel for defendants had found no use for O'Neil's presence while the plaintiffs were introducing their proofs or when their witnesses were undergoing cross-examination by him; otherwise, undoubtedly, counsel would have called for O'Neil.

[13.14] When counsel for plaintiffs were about to take up the cross-examination of the defendant O'Neil, the court interrupted, addressing the defendant Federoff and one Winship, the latter, a witness for plaintiffs, having already testified, and saying: "Stop your talking back there, gentlemen. Don't look at me that way. Leave the room." Thereupon, so the record states, Mr. Federoff and Mr. Winship left the room. The defendants assign the action of the court in thus ordering Federoff to leave the courtroom as misconduct prejudicial to the rights of the defendants. It is to be presumed that, when the court ordered the parties named to "stop talking," the latter were speaking in a tone of voice sufficiently audible to disturb the proceedings. A court has the right—indeed, it is its duty—to maintain decorum in the courtroom when a trial or other judicial proceeding is under way therein, and, of course, may to that end require all present to remain orderly and quiet, and in ordering the individuals named not to carry on a conversation in the courtroom while the trial was in progress, the judge did nothing more than what it was his duty to do to preserve proper demeanor on the part of those in attendance upon the trial, and thus the dignity with which trials and proceedings in courts of justice should always be conducted. It is not, however, pointed out by counsel how or in what way, if at all, the defendants were prejudiced by the action of the court in ordering and requiring Federoff to depart from the courtroom, and, from the record itself, as it is presented here, we cannot say that prejudice to defendants followed from the circumstance. Federoff was not present when the accident occurred, so he could have been of no assistance to his attorney in the latter's examination and cross-examination of the witnesses as to that matter. He was later called into

the courtroom and testified to statements alleged to have been made by Mrs. Pedrow after the accident inconsistent with her testimony as to how it happened. Besides, there was no jury to be prejudiced by the action of the court, if, indeed, such a circumstance would or might have the effect of causing prejudice to arise in the minds of the intelligent and fair-minded men and women of whom it is to be presumed trial juries are usually constituted, nor is it made to appear that the judge's decision was affected thereby. To the contrary, the record shows that the judge was scrupulously careful in weighing the testimony and reaching a conclusion therefrom, for he did not base his decision entirely on the testimony of Mrs. Pedrow. He declared that, but for testimony given for plaintiffs by other witnesses than Mrs. Pedrow herself, he would be disposed to order judgment against plaintiffs. He stated this in deciding the case, saying that it was his opinion that the plaintiffs tried to "squeeze the damages up" by testifying that Mrs. Pedrow was forced to remain from her employment for a longer period than the real truth disclosed. He based said opinion upon the testimony of the proprietor of the laundry at which she had been, and at the time she was injured was, employed to the effect that she returned to her labors some two weeks prior to the time at which both plaintiffs testified that she resumed her work there.

There are some other criticisms of the record, but in these, as in other assignments to which attention has herein been given, there is no substantial merit.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

On Petition for Rehearing.

HART, J. [15] Two points are urged for a rehearing of this cause. The point first made in the petition was practically considered and disposed of in the original opinion. It is this: That the testimony of Mrs. Pedrow is, upon its face, plainly incredible, and that, in deciding the case, the trial court should have attached to it no weight whatsoever, and that, in giving it credit, as presumptively it did, it abused its discretion. It is to be conceded that Mrs. Pedrow made one statement while testifying which does not bear the earmarks of truth, and that was that, while in the act of alighting from the cab, she at the same time handed to the driver, still sitting in the taxi and at the wheel, the fare for conveying her and her daughters to Yuba City. This statement appears to be incompatible with her testimony that, on attempting to leave the car, and while her body was outside the cab, she was thrown to the ground by reason of a lurch or sudden movement of the taxi. But we paid no specific attention to that apparent inconsistency in the former opinion because, as shown in said

opinion, the record showed that the judge, in deciding the case, stated that he would be inclined to give defendant judgment if there were before him no other testimony than that of Mrs. Pedrow upon which the court could justifiably predicate a judgment for plaintiffs. Thus, it would clearly appear to be true, the judge discredited, to some extent at least, Mrs. Pedrow's testimony. And, as shown in the former opinion, there was testimony other than that of Mrs. Pedrow sufficient to show that the accident and the resulting injuries to Mrs. Pedrow were directly due to the negligence of the taxi driver. It follows that, without considering Mrs. Pedrow's testimony involving her version of the circumstances under which the accident happened, there exists substantial evidentiary support to the decision, and the evidence presented by defendants as in impeachment of the case of plaintiffs as made by the proofs, merely had the effect of producing a substantial conflict in the evidence as a whole which it was the sole function of the trial court to resolve.

[16, 17] The second point stressed by counsel in support of the petition here is that the court erroneously refused to receive testimony the particular object of which is not disclosed by the record, but which counsel declares in his briefs and the petition here would have the effect of impeaching the testimony of Mrs. Pedrow; that is, that it would show that she had at some other time made statements as to the manner in which or the circumstances under which the accident occurred which were in material particulars inconsistent with her testimony before the court. One L. B. Smith was called by defendants for that purpose, and the following thereupon occurred:

"Q. (By Counsel for Defendants): Mr. Smith, were you in the party that went over in front of Mr. Federoff's place some time the latter part of May, on the evening when Mr. Federoff and myself were there? A. Yes, sir.

"The Court: Are you going to testify, too?

"Mr. Connelly (Counsel for Defendants): No, I won't.

"The Court: If you don't mind, I don't think this will have any effect on me whatever.

"Mr. Connelly: It is only as to statements made.

"The Court: I am not paying any attention to them.

"Mr. Connelly: Then that is all."

Whereupon the witness was withdrawn. It cannot be determined from the question propounded to the witness what the nature of the testimony was that counsel expected to elicit from the witness, or whether, whatever the nature of the testimony thus proposed to be introduced, it was material to any issue in the case. Even counsel's explanation to the trial court of what the testimony would be afforded no enlightenment upon

that proposition. He merely stated that it related "only as to statements made," of what character or by whom made was not by him made to appear. The trial judge's remarks regarding the proffered testimony would imply that he was familiar with the character thereof, and, assuming that he was, it may also be assumed, from the record as it stands with regard to the matter, that he considered it as not being material to any issue in the case. But, however that may be, it is clear that we cannot, from the record, say whether it would or would not be material. The counsel should have propounded a question to the witness in such form as that it would have indicated the nature of the testimony which he expected and desired the witness to give, in which case an exception to a ruling excluding the testimony, if it thus was shown to be material to any of the issues of the case, would have justified and facilitated a review of the ruling by this court. "Where the question does not show on its face whether or not it is material, the questioner, in order to reserve an exception, must formally reframe the question so that its materiality is apparent." *People v. Singh*, 182 Cal. 457, 482, 188 P. 987, 998; *Snowball v. Snowball*, 164 Cal. 476, 129 P. 784; 9 *Ency. of Evidence*, 170; *People v. Bryant* (Cal. App.) 246 P. 815.

The petition for a rehearing must be denied, and it is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

77 Cal. App. 519

SKAGGS v. TAYLOR, Constable. (Civ. 5231.)

(District Court of Appeal, First District, Division 1, California. April 22, 1926.)

1. Replevin $\S$ 103(4).

Where property replevied is delivered to plaintiff and delivery back to defendant cannot be had, judgment for defendant need not be in alternative under Code Civ. Proc. § 667, but may properly be for its value alone.

2. Replevin $\S$ 103(4)—Where property replevied was delivered to plaintiff, and defendant made claim for its return pleading circumstances under which he had been deprived of it which were uncontradicted, defendant held entitled to return of property or its value when plaintiff was nonsuited.

In action in claim and delivery in which property was delivered to plaintiff and defendant made claim for its return, pleading circumstances under which he had been deprived of it, which were uncontradicted, defendant held entitled to return of property or its value when plaintiff was nonsuited.

3. Replevin $\S$ 103(4).

Granting return of property replevied or its value to defendant does not depend on his proof of title to the property, but upon his

obtaining a judgment in his favor and upon having made a claim for return of the property.

4. Replevin ⚡103(1).

Judgment of nonsuit against plaintiff is "judgment for defendant" within meaning of Code Civ. Proc. § 667, relative to judgment for defendant in claim and delivery action.

5. Judgment ⚡303.

Where judgment of nonsuit in claim and delivery action failed to provide for return of property or its value to defendant under Code Civ. Proc. § 667, court may modify judgment to make such provision.

6. Courts ⚡90(7).

Decision of District Court of Appeal in prior case similar in principle to case under consideration is conclusive on points involved therein.

7. Appeal and error ⚡105.

Minute order granting nonsuit *held* not appealable where it was superseded by judgment from which appeal had been taken.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action in claim and delivery by Ammie Skaggs, also known as Mrs. James E. Skaggs, against Walter J. Taylor, Constable of Oakland Township in and for the County of Alameda. Judgment of nonsuit, and defendant appeals from the minute order granting the nonsuit, the judgment, and the order denying his motion to modify such judgment. Judgment and order denying motion to modify reversed with directions. Appeal from the minute order dismissed.

Goldman & Altman, of San Francisco, for appellant.

Silverstein, Collier & Silverstein, of Oakland, for respondent.

KNIGHT, J. Plaintiff brought this action in claim and delivery to recover possession of an automobile which, following the commencement of this action, was seized by the sheriff subject to the usual replevin proceedings, and upon the failure of defendant to except to the sufficiency of plaintiff's sureties or to give an undertaking for its return, was delivered before the trial into the possession of the plaintiff. At the trial judgment of nonsuit was entered, and although defendant's answer contained a claim for the return of said automobile or its value in case a return could not be had, no order or judgment to that effect was granted or rendered. Subsequently defendant moved the court to modify its judgment so as to incorporate such provision therein, but the motion was denied. The defendant has taken three appeals, the first being from the minute order granting the nonsuit, the second from the judgment of nonsuit, and the third from the order denying his motion to modify said judgment.

The judgment of nonsuit conformed in terms to the order made in that respect, and was as follows:

"* * * Witnesses on the part of the plaintiff were duly sworn and examined, whereupon plaintiff closed his case, and thereupon defendants moved the court for a judgment of nonsuit on the ground that plaintiff had failed to prove a sufficient cause of action against said defendants and the court having heard the arguments of counsel for the respective parties and being fully advised in the premises, granted said motion for nonsuit, and ordered a judgment of nonsuit entered against said plaintiff and in favor of said defendants and the defendants have their costs herein. Wherefore by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that the plaintiff take nothing by this said action, and that judgment of nonsuit be, and the same is hereby given, made, and granted in favor of said defendants, against said plaintiff and that defendants shall have and recover of and from the plaintiff his costs. * * *

Said judgment was entered on December 23, 1924, and subsequently, on January 2, 1925, defendant served and filed a notice of motion to modify the same in the manner hereinabove mentioned upon the ground that said judgment did not conform to the provisions of section 667 of the Code of Civil Procedure. At the hearing of the motion defendant offered in evidence, in support thereof, "all of the papers, records, and files in the above-entitled action, and particularly the second amended complaint of plaintiff and the answer of defendant thereto. * * *" Said answer, besides denying plaintiff's claim of ownership and right to the possession of said automobile, set forth facts showing the circumstances under which said automobile came into defendant's possession and was being detained by him. Those circumstances, briefly stated, were that as constable he levied upon said property under a writ of attachment issued in an action brought by a corporation named Field & Lee against James E. Skaggs, the husband of this plaintiff, and later sold the same under execution proceedings to said Field & Lee; that on or about September 11, 1923, pursuant to a demand made upon him by this plaintiff, he surrendered the automobile to her, and afterwards she voluntarily returned the same to him; that thereafter said automobile remained in his possession until seized by the sheriff under process issued in this action, without further demand of any kind being made upon him. Said answer also contained certain denials and allegations as to value and damages, but the same are unimportant here. The prayer of the answer was that plaintiff take nothing by her action and that defendant be given judgment for a return to him of the property or the value thereof in case a return could not be had, together with damages for its de-

preciation while in plaintiff's possession. As additional evidence, defendant offered in support of the motion an affidavit made by one of his attorneys which set forth, among other things, that at the time of the commencement of the action said automobile was at the request of this plaintiff seized by the sheriff, had since been in the possession of the sheriff or the plaintiff, and had not been returned to the defendant; that at the time of the seizure said automobile was in defendant's possession, and that he was entitled to the return thereof; that it was stipulated during the trial that the value of said automobile at the time it was seized was \$400. In the return to the writ of replevin which was filed in the action prior to the service of the notice of motion, the sheriff stated that after the seizure defendant failed to except to plaintiff's sureties and "omitted to require a return of said property and no other person other than the defendants having made return thereto, I did, at the expiration of the time required by the statute for seeking such delivery and making such claim, to wit, on the 4th day of December, 1923, deliver the property so taken to the plaintiff herein as by said order I am commanded." The evidence thus offered by defendant was not contradicted by plaintiff, no showing whatever being made in opposition thereto.

[1-3] Section 667 of the Code of Civil Procedure, relied upon by defendant in furtherance of his contention that he was entitled to the relief above mentioned, provides that in an action to recover the possession of personal property, "if the property has been delivered to the plaintiff and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, * * *" or, as the cases hold, where it appears that a delivery cannot be had, or the property is lost or destroyed pending trial, the judgment need not be in the alternative, but may properly be for its value alone. *Nahas v. Browning*, 183 P. 442, 181 Cal. 55, 6 A. L. R. 476; *Erreca v. Meyer*, 75 P. 826, 142 Cal. 308. In construing said section 667 it has been held that where there is no prayer, claim, or demand of any kind in the answer for a return of the property or its value, a judgment for its return to the defendant, or its value in case a return cannot be had, is not permissible. *Banning v. Marleau*, 35 P. 772, 101 Cal. 238; *Imperial Valley Auto Co. v. Toney*, 190 P. 1043, 47 Cal. App. 541. But in this connection it is also declared that it is not necessary for a defendant to allege affirmatively that he, or a third person, is entitled to the possession of the property, but that the general denial, if the plaintiff fails to prove his averments, determines that the property should be restored to the defendant; that consequently if in his answer the defendant has made due claim for such return, he is entitled to a judgment to that effect. *Pico v.*

Pico, 56 Cal. 453. It would therefore seem that defendant's answer herein not only met the requirements of the law to entitle him to the judgment sought, but went even further than was necessary by having pleaded the circumstances under which he had been deprived of the property by plaintiff; but in any event having set forth a claim in unmistakable terms for the return of the property, he was clearly entitled to such relief. *Pico v. Pico*, supra; *Lee v. De La Motte*, 189 P. 1034, 47 Cal. App. 23; *Al G. Barnes Shows Co. v. Toyo Kisen Kaisha Oriental Steamship Co.*, 214 P. 1015, 61 Cal. App. 304; *Imperial Valley Auto Co. v. Toney*, supra. Plaintiff concedes that defendant "pleaded" for a return of the property, but contends that having introduced no testimony to substantiate his claim, was not entitled to the relief now demanded. It is manifest, however, that the reason no such evidence was offered was that a nonsuit was entered. Moreover, the granting of such relief to a defendant does not depend upon the strength or weakness of the defendant's proof of title to the property, but upon his obtaining a judgment in his favor and upon having made a claim for the return of the property. *Pico v. Pico*, supra.

[4] It cannot be successfully maintained that a judgment of nonsuit is not a "judgment for the defendant" within the meaning of said section 667 for the reason that it has been expressly held in the case of *Kowalsky v. Nicholson*, 137 P. 607, 23 Cal. App. 160, that a defendant is entitled to the full benefit of the provisions of said section notwithstanding that the judgment is one of dismissal. The case of *Nahas v. Browning*, supra, holds likewise. In *Kowalsky v. Nicholson*, supra, the action was in claim and delivery wherein plaintiff secured possession of the property pending trial. After the cause had been at issue for nearly four years, the court, upon notice to the plaintiff, granted defendant's motion to dismiss the same for want of prosecution. Subsequently the court, upon due notice to the plaintiff, amended its order of dismissal *nunc pro tunc* as of the date of its original entry by adding the following:

"And the defendant is entitled to have returned to her all the property taken from her under the previous proceeding of this action of replevin, or if return thereof cannot be had, then she shall have judgment for the value thereof in the sum of \$1,000 and for the delivery to her of the undertaking in this matter."

[5, 6] The record, so the decision states, did not show that the original entry as made by the clerk was different from the one directed by the court; and plaintiff therefore contended as respondent claims here that the court had no power to change the order or judgment. Upon appeal the action of the trial court in amending its order and judgment of dismissal was sustained, the court saying:

"Upon the dismissal of the action in the case at bar defendant was entitled to the return of the property involved in the action; and a failure to enter the requested correction of the judgment would be equivalent apparently to a judgment in favor of the plaintiffs on the merits of the case. This would be manifestly unjust; and as the record shows that defendant was entitled to judgment as finally entered, and as the motion to correct the mistake was promptly made, the action of the court in the premises must be sustained."

We find no difference in principle between that case and the one before us, and consequently the decision therein must be held to be conclusive upon the points here involved.

[7] For the foregoing reasons the judgment and the order denying defendant's motion to modify the judgment must be reversed, with directions to grant said motion and to modify said judgment so as to give the defendant the benefit of the relief provided for in section 667 of the Code of Civil Procedure. *Etche-pare v. Aguirre*, 27 P. 668, 929, 91 Cal. 288, 25 Am. St. Rep. 180. It is so ordered. The appeal from the minute order granting the nonsuit is dismissed upon the ground that the same was not appealable, having been superseded by the judgment from which an appeal has been taken.

We concur: TYLER, P. J.; CASHIN, J.

77 Cal. App. 483

PEOPLE v. MORALES. (Cr. 902.)

(District Court of Appeal, Third District, California. April 17, 1926. Hearing Denied by Supreme Court June 14, 1926.)

1. Criminal law — 1129(3).

The appellate court does not review assignments of error, unless complaining party points out reasons on which they are founded, or shows or attempts to show substantial merit therein.

2. Indictment and information — 71—Omission to state that "duel" was fought with deadly weapons held not to render information objectionable, in that it did not state offense so as to enable defendant to know what was intended (Pen. Code, § 950, subd. 2, and sections 225, 226, 951, 952; Words and Phrases, "Duel").

In view of Pen. Code, § 950, subd. 2, and sections 951, 952, omission to allege in information for dueling, under sections 225, 226, that duel was fought with deadly weapons, held not to render it objectionable, in that it did not so state offense as to enable one of common understanding to know what was intended; "duel" meaning a "combat between two persons, fought with deadly weapons, by agreement" (citing Words and Phrases, "Duel").

3. Indictment and information — 71.

Generally, each essential ingredient of a public offense, as such offense is defined by law,

should be set forth in clear and understandable language.

4. Criminal law — 518(3)—Proper foundation was laid for admission of defendant's extrajudicial statements, where he was informed that his statements must be voluntary, and that they would be used against him at trial (Code Civ. Proc. § 2052).

In view of Code Civ. Proc. § 2052, in prosecution for dueling, evidence that, preliminarily to questioning defendant about the combat and prior to his statements, prosecuting attorney informed him that his statement must be voluntary, and would be used against him at trial, held sufficient foundation for evidence as to his extrajudicial statements as to facts of the combat.

5. Criminal law — 519(1).

To admit defendant's confession, it is necessary to show only that he made it freely and voluntarily without coercion by threats or undue pressure or promises of reward or leniency.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Daniel Morales was convicted of dueling resulting in death, and he appeals. Affirmed.

A. K. Robinson, of Auburn, for appellant.
U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was convicted in the superior court of Placer county of the crime of fighting a duel with one Zacharius Martinez, which resulted in the immediate death of the last named. Pen. Code, §§ 225 and 226. He made a motion for a new trial and the same was denied. He appeals from the judgment of conviction and the order denying him a new trial.

The defendant, as was the deceased, is a Mexican, and both, at the time of their fatal meeting on the afternoon of the 7th day of March, 1925, were employed as laborers in the sewer pipe department of the Gladding, McBean & Co. Pottery, at Lincoln, in Placer county. About half past 3 o'clock on the afternoon of the day named, the two men engaged in a quarrel, and, so defendant testified, the deceased called him (defendant) a "bad name," whereupon the defendant continued to testify, the following angry colloquy took place between them: Deceased addressing defendant: "What kind of a man are you?" Defendant, replying: "You well know who I am." Deceased to defendant: "I do not think you will come out with me to-night." Defendant answered: "Let's go right now." Deceased replied, "Come on, let's go," and thereupon the two men left their work; the defendant requesting another employee to tell the foreman that he (defendant) had gone out "to arrange some business," and deceased making a like request. Before leaving the pottery, the two men agreed to meet at some spot near a "little red house," which was situated ap-

proximately three miles from and east of the town of Lincoln. The land there was hilly and covered with brush and trees. The defendant, on leaving the pottery, went directly to his home and there procured a weapon described as a "32-20" pistol. The deceased went to his home and armed himself with a Luger revolver. The defendant stated that the deceased carried two pistols or revolvers to the scene of the shooting. However, the two men, within a short time after departing from the pottery, met at the place agreed upon. It is not necessary to go into the details herein of what occurred between the men, as described by the defendant, after they arrived at the place where the shooting was carried on. It is sufficient to state that, immediately upon reaching the place above indicated they began firing at each other, with the result, after a number of shots were exchanged, that the deceased received a mortal wound in the head; death following from said wound instantaneously, in the opinion of the doctor conducting the autopsy at the post mortem examination of the body of the deceased, while defendant was shot in the breast, and conveyed to the county hospital of Placer county and was there administered medical treatment.

The attorney for defendant sets forth in his brief 120 distinct specifications of error alleged to have been committed by the court in the trial of the case. When called for hearing in this court the cause was submitted for decision without oral argument, but upon the briefs on file, and two only of the multiplicity of specifications of error does counsel for defendant, in his briefs, attempt to support by argument, or to point out wherein the numerous rulings complained of were erroneous and prejudicial to his client. All that appears in the briefs of defendant as to each of the specifications of error, with the exception of the two referred to above, is the mere statement or charge that the court erred in giving certain instructions or in its ruling upon evidence, for example as follows: "The court erred in giving instruction No. 20," and "the court erred in overruling defendant's objections found in lines 11 to 20, transcript, p. 22."

[1] We are not required to review assignments of error unless the party relying upon them points the reasons upon which the assignments are founded or shows or attempts to show wherein there is substantial merit therein. The appellate courts are not supposed to perform the work of counsel who present cases thereto for review. The rule thus stated and to which the appellate courts of this state almost uniformly adhere is explained as follows in *People v. McLean*, 135 Cal. 306, 309, 67 P. 770, 771:

"We again repeat what we have said before that we will not examine alleged errors presented in this way. It is due to this court from the members of the bar to point out clearly

and concisely the rulings complained of as erroneous and the reasons why they are so, with reference to authorities, if any. In case counsel will not take the trouble to do so, we shall deem the matter as of not sufficient importance to merit notice in an opinion. *People v. Woon Tuck Wo*, 120 Cal. 297 [52 P. 833].

The cases of *People v. Cebulla*, 137 Cal. 314, 70 P. 181, and *People v. Chutnacut*, 141 Cal. 682, 685, 75 P. 340, are to the same effect.

[2] The two points to which counsel addresses argument in his briefs are: (1) That the information does not state a public offense and is obnoxious to the objection that it does not satisfy the requirements of sections 950, 951, and 952 of the Penal Code; (2) that it was error for the court to admit in evidence certain extrajudicial statements made by the defendant after the alleged duel was fought.

1. Section 225 of the Penal Code defines the crime with which it was sought to charge the defendant as follows:

"A duel is any combat with deadly weapons, fought between two or more persons, by previous agreement or upon a previous quarrel."

Section 226 of said Code reads:

"Every person guilty of fighting any duel, from which death ensues within a year and a day, is punishable by imprisonment in the state prison not less than one nor more than seven years."

The charging part of the information is as follows:

"* * * The said defendant * * * did willfully, unlawfully and feloniously fight and engage in a duel with one Zacharius Martinez, and he, the said defendant, did then and there kill said Zacharius Martinez while he, the said defendant, was so fighting said duel with said Zacharius Martinez, a human being," etc.

It will be noted that the information omits to state that the duel was fought by the parties "with deadly weapons," and this omission is employed as the predicate for the argument by counsel for defendant that the accusatory pleading fails in the statement of a public offense, as the crime is thus attempted to be charged.

The defendant demurred to the information on both general and special grounds, and the demurrer was overruled. The special exceptions to the information, as stated in the demurrer, are that two different and distinct offenses are charged, to wit: (1) A felony, in that the defendant engaged "in the fight and duel with one Zacharius Martinez"; and (2) that defendant is therein charged "with committing a felony, in that he, said defendant, did then and there kill Zacharius Martinez while he, said defendant, was so fighting said duel with said Zacharius Martinez, a human being." Nowhere does the demurrer specifically or directly object to

the information on the ground that therein it is not charged that the combat between the belligerents was fought with deadly weapons. The information stands challenged, therefore, on the general ground only, and the question is whether it sufficiently states the offense attempted thereby to be charged to overcome the objection presented by a general demurrer, or, in other words, whether it states an offense known to the law.

[3] We think that, in charging the crime of fighting a duel, where deadly weapons were used, and the result of the fight is the death of one of the combatants, it would be the better practice to allege in the information or indictment that deadly weapons were used by the parties in fighting the duel, but we do not think that mere failure to do so would render the accusatory pleading subject to the objection that it does not state the offense "in such manner as to enable a person of common understanding to know what is intended." Pen. Code, § 950, subd. 2. The conclusion thus announced is with full appreciation of the general rule that each of the essential ingredients of a public offense, as such offense is defined by law, should be set forth in an information or indictment in clear and understandable language, or in the manner above indicated. In the present case, the information not only states that the defendant and the deceased fought a "duel," but further alleges that, in fighting such duel, and as a direct result thereof, one of the combatants was killed. The word "duel" bears a fixed, definite signification, not only colloquially, but juridically. Webster's Dictionary defines a "duel" as a "combat between two persons, fought with deadly weapons, by agreement." This definition is, as stated, the common—in fact, we may truthfully say the universal—understanding of the word. It indeed, is its intrinsic signification, and as so defined has been invariably adopted and used in the law and followed by the courts. See 3 Words and Phrases, p. 2258; *State v. Fritz*, 133 N. C. 725, 45 S. E. 957; *State v. Herriott*, 1 McM. (S. C.) 126, 130; *Bassett v. State*, 44 Fla. 2, 33 So. 262, 265; *Davis v. Modern Woodmen of America*, 98 Mo. App. 713, 73 S. W. 923, 924; 9 Cal. Jur. 940; Const. Cal. art. 20, § 2. In *State v. Fritz*, supra, the signification of the term is thus explained:

"A 'duel' is defined to be a combat between two persons, fought with deadly weapons, by agreement. The use of weapons of some kind seems to be a necessary ingredient of the offense, since it is held that challenging to fight a fair fight with fists and hands, and not to use any deadly weapon, is not a 'challenge to fight a duel,' within Code, § 1012, providing that any person challenging to fight a duel shall be guilty of a misdemeanor."

Thus the word itself, or when taken alone, expresses as fully the complete thought em-

braced within its intrinsic signification as does the word "murder" without the amplification necessary to the specific expression of all the essential ingredients of the crime so generically designated, expresses the fact of the "killing of a human being with malice aforethought." When Doe says to Roe, "A murder has been committed," Roe thus immediately has conveyed to his mind the fact that some one has unlawfully, and with premeditation and malice aforethought, taken the life of another human being; in other words, it is not necessary, in ordinary parlance, to express the fact that the crime of murder has been committed, to say that some person has willfully, premeditatedly, and with malice aforethought killed a human being. So it is true, where B. is told by A. that a "duel has just been fought" or "is about to be fought," that the thought thus immediately conveyed to B.'s mind is that at least two persons have been engaged or are about to engage in a combat with one another, with deadly weapons, by previous agreement or upon a previous quarrel. To express the fact that a duel has been fought, it would be wholly superfluous to say that it was fought between two persons, since, manifestly, no single person can fight a duel or any other kind of a personal combat. Thus it would seem that it is tautological to say that "two persons have fought or are about to fight a duel, with deadly weapons, by previous agreement," etc. This involves a view of section 225 of the Penal Code from a grammatical standpoint, but we do not concede the impropriety of that view of the section as an aid to the determination of the question whether the information in this case states the offense therein intended to be charged "in such manner as to enable a person of common understanding to know what is intended." To what we have hereinabove said, however, we may add that, if the words "with deadly weapons" had been eliminated from the section or not inserted therein by the Legislature, we would have no hesitation in saying that the courts would construe the section as meaning a combat fought between two or more persons with deadly weapons and this construction would be predicated upon the proposition that such is the natural or intrinsic signification of the word "duel."

Our conclusion is, as is necessarily to be understood from the views thus expressed, that the information sufficiently complies with the requirement of the statute as to the essentials of a properly stated crime in a criminal pleading; that the defendant could not have been under the least misapprehension as to the specific crime that was intended to be charged against him; and that, in point of fact, since he made no objection to the information or objected to any evidence introduced at the trial upon the ground that the crime of fighting a duel with deceased

with deadly weapons was not properly and understandably thus charged to his account, it is clear that he did not at any time experience any difficulty in determining the precise issue or charge against which he was called upon by the information to defend himself or to prepare himself for a defense.

[4, 5] 2. The complaint that the rulings admitting in evidence certain extrajudicial statements of the defendant in which he recited the circumstances leading to and attending the fatal combat between himself and the deceased, and involving, in effect, a confession of guilt of the crime charged, were erroneous, for the alleged reason that a proper foundation was not laid for the admission of said statements, cannot be sustained. Immediately following the fatal shooting, the district attorney interviewed the defendant at the county hospital and secured from him a statement, which was reduced to writing by a stenographer and admitted in evidence. A day or two thereafter the district attorney again held an interview with defendant at the county hospital and again obtained from him a statement of the facts and circumstances of the duel. This statement was also taken down and transcribed by the stenographer, and was also introduced in evidence. The facts of the case as they were given by defendant on both occasions were substantially the same. Before offering these statements in evidence the district attorney showed that, preliminarily to asking defendant any questions about the combat and prior to the making of the statements by him relative to the circumstances or facts of the fight, he informed the accused that he was not required to make a statement of the facts leading to and attending the act of killing the deceased; that, if he did make such a statement, it must be voluntary on his part; and that whatever statement he might make which would involve a confession of the commission of a crime or any incriminatory admissions regarding any charge growing out of the killing of the deceased would be used against him by the people at the trial of such charge. In reply the defendant, in effect, stated that he understood the situation with respect to any statement he might make, and thereupon proceeded to give his version of the circumstances and facts of the case. It is clear that a sufficient foundation was laid for admitting the statements in evidence. Counsel, however, seems to be of the opinion that, besides showing that the statements were voluntarily made, it was also necessary, before proof of the confession could be made, to show the time and place at which the same was made and the persons present at such time and place. This contention involves a confusion of the rule prescribing the prerequisite to the proof of a confession with the rule prescribing the prerequisites to the impeachment of a witness on the ground that

he had at some time made statements inconsistent with the testimony given by him at the trial. Code Civ. Proc. § 2052. All that it is necessary to show before a confession by a defendant that he committed the crime with which he is charged may be proved is that he made the confession freely and voluntarily or without being coerced to make the confession by threats or undue pressure of any sort practiced upon him by those in authority or upon promises of reward or leniency by those having authority, either real or apparent, to grant immunity from punishment or from the heavier penalties of the law. This is elementary. If, however, the element of "time, place and persons present" were an essential component of the foundation to be established as a prerequisite to the admissibility of evidence of a confession, there would still be no ground for complaint that a proper foundation for the proof of the statements in this case was not laid prior to their reception in evidence, for the times and place at which they were made and at least some of the persons present at those times were shown in the appropriate order of proof in such instances.

Although, as above stated, most of the points suggested in the opening brief of defendant we have not been required to review for the reason heretofore explained, we have, nevertheless, read the entire record, and thus have been convinced that the record is free from error of a prejudicial character; that in fact, on the whole the case was carefully and fairly tried; and that the verdict is abundantly supported.

Accordingly, the judgment and the order are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

77 Cal. App. 542

JAQUITH v. JUSTICE COURT IN AND FOR BRAWLEY TP., IMPERIAL COUNTY, et al. (Civ. 4127.)

(District Court of Appeal, Second District, Division 2, California. April 23, 1926.)

1. Appeal and error ⇐901.

Order refusing to issue a peremptory writ of prohibition will be affirmed in view of Code Civ. Proc. §§ 1088, 1094, 1105, where bill of exceptions does not show that refusal was not based on failure of appellant to support allegations of his petition by proof.

2. Appeal and error ⇐901.

Burden is on one who appeals from a judgment of superior court to convince appellate court that it was rendered through error.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Proceeding for writ of prohibition by E. C. Jaquith, in which Elmer M. Jaquith, execu-

tor, was substituted on plaintiff's death, against the Justice Court in and for Brawley Township, County of Imperial, State of California, and another. From judgment denying writ, plaintiff appeals. Affirmed.

Goodspeed & Pendell, of Los Angeles, for appellant.

James L. Allen, of Santa Ana, for respondents.

WORKS, J. E. C. Jaquith was originally the petitioner in this proceeding. After the present appeal was prosecuted, he departed this life, and Elmer M. Jaquith, executor of the last will and testament of E. C. Jaquith, deceased, was substituted in his place as appellant and petitioner. This is a proceeding for the writ of prohibition. Petitioner appeals from an order or judgment of the trial court refusing to issue a peremptory writ.

Upon the filing of the petition the trial court issued its alternative writ of prohibition and the writ was served upon the respondents. After some sort of hearing, the nature of which is not clearly confided to us, the court made its order refusing to issue the peremptory writ. The record comes to us by bill of exceptions. The bill recites:

"No answer or pleading of any kind was filed by the defendants, or either of them, in said matter above entitled."

Following a copy of the petition for the writ and copies of other papers which were served with it, the bill of exceptions next contains the recital that it appearing that the defendants had been duly and regularly served with the writ and other necessary papers, "the matters mentioned in said petition were argued" by the respective attorneys, whereupon the court "made its order denying said petition." A copy of the order is then set forth in the bill. It shows, "This matter coming on regularly to be heard," the parties on each side being "represented" by counsel, who are named, and "after hearing the arguments of counsel for both parties and after listening to the authorities cited in support of said arguments, the court being fully advised in the premises, denies the plaintiff's application to make the writ permanent." This constitutes the total material showing of the bill of exceptions.

[1] Unless we are able to determine from this unsatisfactory record that the court's refusal to issue a peremptory writ did not spring from a failure of appellant to support the allegations of his petition by proof, the court's order must be affirmed without going further. If the record allows the assumption that evidence was introduced and considered, we must also assume that the decision turned upon a question of fact and that the evidence supported the order which was made. We are bound to resolve all possible intendments in favor of the ruling of the court. Section

1088 of the Code of Civil Procedure, which concerns the writ of mandate, but which by section 1105 of the same Code is made to apply also to the writ of prohibition, provides:

"The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appears or not."

Section 1094, which is also made to apply to the writ of prohibition by section 1105, contains the following:

"If no answer be made, the case must be heard on the papers of the applicant."

There are at least two decisions which seem directly to bear upon the meaning of these two sections. The first of these cases is *Pereria v. Wallace*, 129 Cal. 397, 62 P. 61, a proceeding for the writ of mandate which was commenced in the superior court. The writ issued and the defendant appealed. The facts show that a demurrer to the petition was interposed, but that, the demurrer having been overruled, no answer was filed. The opinion of the Supreme Court then recites that—

"The matter was heard upon the complaint, and the court made and filed findings, and ordered a writ of mandate to issue. * * *"

The conclusion of the court was stated in this language:

"Appellants * * * contend that the judgment is contrary to law and void; that the writ cannot be granted by default. (Citing Code Civ. Proc. § 1088.) The complaint was verified, and the failure of the defendants to answer conceded the truth of all the facts alleged. Facts so conceded do not need to be otherwise proved. (Code Civ. Proc. § 1094; *Hayward v. Pimental*, 107 Cal. 390 [40 P. 545])."

The remaining case to which we have referred is *Jackson School District v. Culbert*, 134 Cal. 508, 66 P. 741. In that proceeding the superior court rendered judgment refusing to issue the writ of mandate and the petitioner for the writ appealed. Following is the language of the Supreme Court in disposing of the questions arising upon the appeal:

"No answer was filed by the respondent. The judgment, after a recital of preliminary matters, among which is the statement that C. P. Vicini and William J. McGee appeared as counsel for respondent, is: 'It is hereby ordered, adjudged, and decreed that said petition be, and the same is, hereby denied.' It is said that the court filed an opinion, but it is not before us, and we can only surmise upon what ground the writ was denied. The opinion, however, if we were at liberty to take it into consideration, would not supply the defect. Section 1088 of the Code of Civil Procedure provides: 'The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appear or not.' If the trial

court cannot grant the relief upon the pleadings, it would seem to follow that this court cannot reverse a judgment denying the writ, unless it is made to appear that such a showing was made before the lower court as would require the issuance of the writ. As the allegations of the petition are not taken as true because of the default, it may be that it was there shown that the board of supervisors had fully performed their duty. At all events, appellant must show by the record that the court erred in refusing the writ, or the judgment must be affirmed, and it is so ordered."

It is said in *Ferguson v. Board of Education*, 95 P. 165, 7 Cal. App. 568, that there is a conflict in the two opinions of the Supreme Court from which we have just quoted, but it appears to us, from a consideration of the effect of the two cases, that the conflict does not exist. In the *Pereria* Case a demurrer was interposed to the petition for the writ of mandate, but no answer was filed. The opinion in the *Culbert* Case shows that no answer was presented there, and an examination of the record on appeal shows also that no demurrer was filed. There was therefore no appearance whatever in the latter proceeding. This difference in the two cases seems to place them upon an entirely different footing. That they do not conflict in result appears from an examination of other cases decided by the Supreme Court. In a proceeding for the writ of prohibition it was said that "the legal effect of the [demurrer] was to admit the truth of allegations of the [petition]." *Heilbron v. Campbell*, 23 P. 1032, 5 Cal. Unrep. 745. In another proceeding of the same nature this language occurs:

"The cause was submitted on a demurrer to the petition. The facts alleged are therefore admitted to exist." *Favorite v. Superior Court*, 181 Cal. 261, 184 P. 15, 8 A. L. R. 290.

The context of each of the opinions in these two cases shows that it was by them determined, not that the facts alleged were admitted by demurrer merely for the purposes of the demurrer, but that they were admitted for all purposes. This result seems to have sprung from the view that a demurrer in a prohibition or mandate proceeding is equivalent to an "answer" under the provisions of section 1094 of the Code of Civil Procedure, when a respondent has appeared by demurrer and has submitted the proceeding for decision thereon. This result is doubtless upon the theory that it is to be deemed that the respondent thereby admits that he cannot deny the allegations of the petition. The rule stated in the *Heilbron* and *Favorite* Cases supports the conclusion reached in the *Pereria* Case, although in the latter the court did say that the facts alleged in the petition were conceded by a failure to answer, not by the filing of demurrer and the submission of the proceeding thereon. This circumstance appears at first glance to be trivial, as in the *Pereria* Case the proceeding was submitted

upon the petition and the demurrer thereto, exactly as in the *Heilbron* and *Favorite* Cases, but the circumstance appears to be worthy of mention as it apparently misled the court in *Ferguson v. Board of Supervisors*, supra.

It now appears that *Jackson School District v. Culbert*, supra, stands alone, unimpeached by any utterance of the Supreme Court in any other decision. When the court says in that case, "If the trial court cannot grant the relief upon the pleadings," we think upon a consideration of what immediately follows the expression, that it meant to decide that a trial court cannot grant the writ upon the petition, where no demurrer or answer is filed. When the court says further, in that case, "As the allegations of the petition are not taken as true because of the default," we understand, considering what follows those words, that the court decides that the allegations of a petition for the writ are not taken as true because of a default. The District Court of Appeal of the Third District was evidently inclined to the same view in *Ferguson v. Board of Education*, supra, although the court found it unnecessary to decide the point, for it was said in the opinion there rendered:

"Respondents contend that under section 1088 of the Code of Civil Procedure it was incumbent upon appellant to allege and prove demand whether denied or not. Where default is made the section seems to uphold this view; and in *Jackson School District v. Culbert* [66 P. 741], 134 Cal. 508, where the defendant failed to answer, it was said: 'If the trial court cannot grant the relief on the pleadings, it would seem to follow that this court cannot reverse a judgment denying the writ, unless it is made to appear that such showing was made before the lower court as would require the issuance of the writ.'"

[2] When we come to apply the *Culbert* Case to the present controversy, the situation becomes plain. The trial court could not have issued the writ upon the allegations of the petition. The hearing of evidence to support the pleading must have preceded such a result. This is equivalent to saying that the court could not have tried the facts of the case except upon the consideration of evidence introduced to prove the allegations of the petition, whether the decision were to be rendered on the facts either in favor of or against the petitioner. Of course, the reception of such evidence was not strictly necessary to a denial of the petition, for the court might have refused the writ under the issue of law arising upon the face of the pleading itself. There is, however, no showing by the bill of exceptions that the issuance of the writ was denied on that ground. No demurrer was filed—the bill of exceptions affirmatively shows that. There was no "appearance" in opposition to the petition, but the court permitted "attorneys" of respondent

to present argument in his behalf at the hearing of the case which was had. The bill of exceptions is barren of a showing that any objection was made by these attorneys to the legal sufficiency of the petition. Again, the bill does not show that the court entertained or expressed the view that it was insufficient. The bill also fails to show whether or not evidence was heard in support of the petition. In short, we are left altogether in the dark upon the question whether the petition was denied under an issue of fact or under an issue of law. It is a settled rule that the burden is upon one who appeals from a judgment of a superior court to convince the appellate court that it was rendered through error. Under this rule it was incumbent upon appellant to bring to us a bill of exceptions showing, if such was the case, that the denial of the writ for which he prayed did not result from a failure on his part to support his petition by proof. In the absence of such a showing, we are bound to assume that the writ was denied for that reason, and not only so, but that the evidence which was heard justified the finding of the trial court that it was not sufficient to warrant the issuance of the writ. These views find ample support, among many cases, in *Jackson School District v. Culbert*, supra.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

77 Cal. App. 500

LANDSRATH v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.
(Civ. 5275.)

(District Court of Appeal, Second District, Division 1, California. April 21, 1926.)

1. Master and servant — 417(7).

Power to review findings of fact by Industrial Accident Commission is limited to consideration of question whether there is substantial evidence on which findings may rest.

2. Marriage — 50(1)—Finding of Industrial Commission that evidence was insufficient to show claimant was deceased's wife held not supported by evidence (Code Civ. Proc. §§ 1959, 1963).

In compensation proceeding, where claimant showed she had been living with deceased and holding herself out as his wife and that marriage ceremony had been performed, finding of commission that evidence was insufficient to show marriage held not supported by evidence, in view of Code Civ. Proc. §§ 1959, 1963, raising presumption that man and woman deporting themselves as husband and wife are lawfully married.

3. Marriage — 50(1)—On issue of marriage of claimant for compensation with deceased, that deceased had said that marriage meant only slip of paper, and that there was no record of marriage between parties, held merely negative (St. 1917, p. 844, § 14).

In claim under St. 1917, p. 844, § 14, for compensation for death of husband, where issue was whether claimant was wife of deceased, that husband had stated that he regarded marriage as slip of paper, and that there was rumor that he had lived with another woman without marriage for 11 years, and that there was no public record of marriage of claimant and deceased, held merely negative evidence, not touching question of sufficiency of evidence adduced sustaining marriage of parties.

4. Evidence — 53—Mere inference will be allowed to stand, not against facts represented, but only in lieu thereof.

Mere inference will be allowed to stand, not against facts represented, but only in lieu thereof, and where facts are proven to be contrary to inference, no conflict in evidence arises.

5. Master and servant — 388.

Woman in good faith believing herself to be wife of deceased, cohabiting with him, and at all times holding herself out and recognized as such, held entitled to compensation for his death as "dependent," under St. 1917, p. 844, § 14, subd. 1.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Depend-ent.]

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Mrs. Pauline Landsrath, claimant, for compensation for the death of A. H. Landsrath, her husband. To review an order of the Industrial Accident Commission, awarding compensation to Alvina Landsrath and rejecting claimant's claim, she brings certiorari. Award annulled.

Leslie H. Kranz, of Los Angeles, for petitioner.

G. C. Faulkner and Warren H. Pillsbury, both of San Francisco, for respondent Industrial Acc. Commission.

Adams, Adams & Binford, of Los Angeles, for respondent Alvina Landsrath.

HOUSER, J. The purpose of this proceeding is to review an award made by the respondent Industrial Accident Commission.

From the return herein it appears that one A. H. Landsrath was killed while engaged in his employment, and that in due course the respondent commission made an award in the sum of \$4,900 in favor of the infant daughter of the deceased. The petitioner herein, who claims to be the widow of the deceased, was denied any relief, and it is because of such latter fact that a review of the proceedings before the Industrial

Accident Commission is sought by petitioner, to the end that her rights may be finally determined. It is conceded by the parties hereto that the reason for the failure of the commission to award any relief to the petitioner was predicated upon its finding of fact as follows:

"That the evidence is insufficient to establish as a fact that the applicant, Pauline Landsrath, was dependent upon the employee at the time of the sustaining of said injury by him, or that she was his wife at said time."

[1] The power of this court to review findings of fact by the Industrial Accident Commission is limited to a consideration of the question of whether there is any substantial evidence upon which such findings may rest. In the absence of evidence to support a given finding, it cannot stand, but if with relation to such finding a mere conflict appears in the evidence, or if opposing inferences may reasonably be drawn therefrom, the conclusion reached by the commission is final and cannot be disturbed by this court. *Walker v. Industrial Accident Commission*, 177 Cal. 737, 171 P. 954, L. R. A. 1918F, 212. So far, therefore, as concerns this tribunal in the instant case, it is authorized to consider the evidence adduced on the hearing before the respondent commission for the purpose only of determining its sufficiency to warrant the finding that the evidence was insufficient to establish either the dependency of the petitioner of that she was the widow of the deceased.

By one of the terms of the statute (section 14, Stats. 1917, p. 831), a wife living with her husband at the time he received an injury which resulted in his death is conclusively presumed to have been wholly dependent for support upon her husband. In cases other than those for which the statute expressly provides, the question of whether a given person is a "dependent" must be determined in accordance with the facts as they may appear as of the time of the receipt of the injury by the employee. It therefore becomes of importance to ascertain whether at the time A. H. Landsrath received the injury the petitioner was his wife, in which case she would be conclusively presumed to be "dependent" and entitled to share in the award, or, failing in establishing the fact that she and the deceased were husband and wife at the time in question, in accordance with the provisions of the statute she may otherwise be legally considered as a "dependent" and as such entitled to recognition in the award.

[2] The evidence of the marriage between the petitioner and A. H. Landsrath included the following facts: That before the marriage took place petitioner had been engaged to be married to Landsrath for a period of about four weeks; that petitioner accompanied Landsrath in an automobile to the court-

house in Jeffersonville, Ind., for the purpose of procuring a marriage license; that petitioner sat in the automobile while Landsrath was inside the courthouse presumably for the purpose of procuring the license; that immediately thereafter Landsrath had a "paper" in his possession which petitioner "supposed" was a license; that thereupon the parties went to a "shabby" office on the window of which was a sign "Justice of the Peace"; that Landsrath handed the "paper" which he had in his hand when he came out of the courthouse to a man, who afterward performed the marriage ceremony between the parties; that the ceremony was performed in the presence of a witness; that before that time petitioner had been once married and was familiar with the marriage ceremony; that the magistrate who performed the marriage ceremony between petitioner and Landsrath gave to petitioner a marriage certificate; that after the ceremony had been performed petitioner saw Landsrath with some money in his hand and presumed that he gave it to the magistrate; that immediately thereafter the parties went to the home of the mother of petitioner, and, before coming to California, lived with a sister of petitioner for a period of approximately two months; that after their arrival in California for a period of about one month the parties lived with petitioner's "folks," including the mother and the sister of petitioner, the sister's husband, and a little boy; that continually from the date of the marriage of petitioner and Landsrath they lived together as husband and wife, deported themselves as husband and wife, held themselves out to the world as husband and wife, were reputed to be husband and wife, were publicly recognized as husband and wife, declared themselves to be husband and wife, were received among their friends, relatives, and neighbors as husband and wife; and that at all times after said marriage ceremony petitioner believed herself to be the wife of said Landsrath.

As opposed to the conclusion that the parties were legally married, the respondent suggests that the evidence showed that prior to the marriage between petitioner and Landsrath he had "expressed the view that marriage meant only a slip of paper anyway, and he didn't see that it made any difference"; to which statement petitioner immediately responded that she "didn't believe in anything like that and would not under any circumstances ever live with any one without being married legally," and that she would insist on a ceremony of marriage; to which Landsrath immediately acceded; that some time after the marriage ceremony was performed petitioner was "informed" that for a period of 11 years Landsrath had lived with another woman without being married to her; that at the time the marriage license was issued and the marriage ceremony be-

tween the parties was performed, records of the issuance of marriage licenses and of marriage certificates were being kept at Jeffersonville, Ind., but that petitioner failed to produce any evidence showing a record of either the marriage license or the marriage certificate, or that the records covering the period in question had been destroyed.

From an examination of the return of the writ herein it may be noted, as hereinbefore set forth, that the finding is not that no marriage ceremony was performed, but that the finding declares "that the evidence is insufficient to establish as a fact that the applicant Pauline Landsrath was dependent upon the employee * * * or that she was his wife at said time." No attempt is made by the findings to actually determine the fact in issue. They are simply declarant of the opinion of the commission that there is a lack in the quantity of evidence necessary to a determination of the point involved.

By section 1959 of the Code of Civil Procedure a presumption is defined as a deduction which the law directs to be made from particular facts. Section 1963 of the Code of Civil Procedure contains a list of presumptions which "are satisfactory, is uncontradicted." Among them is the presumption (30) "that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage." The evidence introduced at the hearing before the commission, and which was uncontradicted, among other things, established the fact beyond peradventure that the petitioner and Landsrath conducted themselves as husband and wife. In addition thereto, the positive first-hand testimony of the petitioner was that a marriage ceremony had been performed by which she was married to Landsrath. While testimony might have been given by the justice of the peace who performed the marriage ceremony, or by the witness thereto, such testimony, as well as evidence of the issuance of the marriage license or the recordation of the marriage certificate, would have been merely cumulative of facts as testified to by the petitioner. Her testimony of the surrounding facts, including the performance of the marriage ceremony, was primary evidence and was sufficient in itself as a basis for a conclusion that petitioner and Landsrath had been legally married. In view, therefore, of the legal presumption of marriage arising from the conduct of the parties to which reference heretofore has been had, together with the undisputed testimony of the petitioner, it must be held that the evidence, instead of being insufficient, as found by the commission, was ample to establish the fact that petitioner was the wife of Landsrath at the time he received the injury which resulted in his death.

[3] But it is suggested by respondent that the question presented is whether the facts that Landsrath had expressed the view that

"marriage meant only a slip of paper," that there was an unproved rumor that prior to his marriage with petitioner he had lived with a woman for 11 years without being married to her, and that no record of the marriage between the parties herein was produced, raise a reasonable inference upon which the finding by the commission to which reference has been had may be sustained. Such assumed facts are wholly negative in character and do not touch the question of the sufficiency of the evidence adduced sustaining the marriage between the parties. The only possible office which evidence of the nature of that referred to could fulfill would be that of creating a conflict in the evidence which, were it of sufficient strength and vitality, might justify a positive finding of fact that no marriage ceremony had been performed. That a man stated that he regarded marriage as "a slip of paper," that a rumor existed to the effect that during a period of 11 years he had lived with a woman without being married to her, and that no public record of the issuance of a marriage license or the performance of a marriage ceremony was produced, certainly do not rise to the dignity of constituting a reason upon which a deduction or an inference of the nonperformance of the marriage ceremony might be founded. The "rumor," of course, is no evidence at all; nor does the failure on the part of the petitioner to produce the record to which we have referred necessarily establish the fact that the record is nonexistent. The same thing is true with reference to the alleged view of Landsrath that a marriage was but "a slip of paper." Assuming that he did make such a statement, it would merely serve as a foundation for the inference that he had no regard for the marriage ceremony—not of the ultimate fact that no marriage ceremony had actually been performed.

[4] There is, then, no reasonable inference contained in the evidence which conflicts with the positive testimony given by the petitioner that a marriage ceremony was performed and that she was the wife of Landsrath at the time he received the injury which resulted in his death. Moreover, it has been ruled in effect that a mere inference will not always be enough to create a conflict in the evidence. In the case of *Maupin v. Solomon*, 41 Cal. App. 323, 183 P. 198, it is said (syllabus):

"* * * Inferences are allowed to stand, not against the facts they represent, but only in lieu of proof of such facts, and where the facts are proven to be contrary thereto, no conflict arises and a finding of the jury in accordance with such inference cannot be supported thereby."

The question presented in that case was whether positive testimony that an employee was not acting in the scope of his employment at the time a collision occurred between two automobiles which caused the damage, and

which damage was the foundation for the action, could be overcome by an inference to the contrary. In denying the petition for hearing by the Supreme Court after decision by the District Court of Appeal, ruling as hereinbefore indicated, the Supreme Court said in part:

"In this case the direct uncontradicted evidence introduced in response to the prima facie case as to the circumstances under which the employee of appellant was driving appellant's automobile was of such a nature as to leave no reasonable ground for an inference based solely on the fact of appellant's ownership of the automobile and the further fact that the person driving was an employee of appellant, that the driver was acting within the scope of his employment at the time of the accident. The verdict, therefore, was contrary to the evidence, and this is all we understand the opinion of the District Court of Appeal to decide."

In the case of *Everett v. Standard Accident Insurance Co.*, 45 Cal. App. 332, 187 P. 996, the court distinguishes presumptions from inferences, and says:

"The rule differs as to an inference which can be drawn only from facts proved. Where evidence is offered controverting the inference which might ordinarily be drawn under the circumstances, the jury is bound to find according to the controverting evidence. The distinction is found in the Code. Section 1958 of the Code of Civil Procedure defines an inference as 'a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect.'"

In *Mar Shee v. Maryland Assurance Corporation*, 190 Cal. 1, 210 P. 269, it is ruled:

"A fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence, and when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case."

In that case the court cited numerous authorities, and quoted the following from *Savings & Loan Society v. Burnett*, 106 Cal. 514, 529, 39 P. 922, 925:

"Disputable inferences or presumptions, while evidence, are evidence the weakest and least satisfactory. They are allowed to stand, not against the facts they represent, but in lieu of proof of them. The facts being proven contrary to the presumption, no conflict arises;

the presumption is simply overcome and dispelled."

See, also, *Ransford v. Ainsworth* (Cal. Sup.) 237 P. 747, 750, where the court, referring to this same subject, said that "the difficulty with the appellant's contention lies, not with the law, but with its application to the facts of the particular case."

[5] There is, however, another reason why the finding to which reference has been had should not be permitted to stand so as to form the basis for a refusal on the part of the respondent commission to make its award in favor of petitioner. It will be remembered that, in addition to that part of the finding relating to the sufficiency of the evidence to establish the fact that Landsrath and petitioner were husband and wife, the finding also declares that "the evidence is insufficient to establish as a fact that the applicant, Pauline Landsrath, was dependent upon the employee. * * *" As heretofore pointed out herein, by the terms of the statute (section 14, subd. 1), a wife is conclusively presumed to be dependent "upon a husband with whom she was living at the time of his death. * * *" But, independently of such provision, it is laid down in the case of *Temescal Rock Co. v. Industrial Accident Commission*, 180 Cal. 637, 182 P. 447, 13 A. L. R. 683, that:

"If the applicant is a member of the family or household of such employee in good faith, compensation may be awarded, although he or she may not bear any relation by adoption, blood, or marriage to the employee."

In that case an award was allowed to a woman who in good faith believed that she was married to a man with whom she had been living and cohabiting, although no marriage ceremony between them had been performed. The evidence in the instant case is uncontradicted, and establishes beyond question that petitioner and Landsrath lived and cohabited together as husband and wife, that they deported themselves as such, that they were so recognized by their neighbors, friends, and relatives, and that at all times during which petitioner and Landsrath so lived and cohabited together petitioner in good faith believed herself to be the wife of said Landsrath. The finding of the commission, therefore, is unsupported by the evidence and cannot stand.

It is ordered that the award of the commission be and it is annulled.

We concur: CONREY, P. J.; YORK, J.

77 Cal. App. 495

In re CATE. In re STEVENS. In re CRUICKSHANK. (Civ. 4702, 4733, 5303.)

(District Court of Appeal, Second District, Division 2, California. April 20, 1926.)

1. Attorney and client ☞61.

On application for reinstatement as attorney, questions for determination are honesty, integrity, and general morality of applicant, and his degree of learning in law enabling discharge of duties.

2. Attorney and client ☞61.

In determining attorney's moral qualifications for reinstatement, contrary evidence, if existing, should be presented, and findings of fact made on all the evidence produced by either party.

3. Attorney and client ☞61.

In determining mental qualifications of applicant for reinstatement as attorney, a rule of discretion will be followed as to procedure therefor depending upon circumstances of each case.

4. Attorney and client ☞61—In determining mental qualifications of applicant for reinstatement as attorney, his history as attorney, nature and extent of activities since disbarment, continued touch with law, time since disbarment, and mental and physical condition, are to be considered.

In determining mental qualifications of applicant for reinstatement as attorney, matters among others for consideration are age at time of admission, whether he took examination and nature and extent thereof, length of period of practice from admission to disbarment, nature and extent of practice, his ability, nature of pursuits, and extent of mental activity since disbarment, especially his continued touch with law, lapse of time since disbarment, soundness of mind, and physical condition in so far as it may affect mental ability.

5. Attorney and client ☞61.

Upon application for reinstatement as attorney, where it is decided examination of mental and moral attributes is necessary, such examination will be referred preferably to board of bar examiners, in view of Code Civ. Proc. § 279.

6. Attorney and client ☞61.

Upon reference of application for reinstatement to bar by former attorney, for examination as to moral or mental qualifications, burden is upon applicant, and he will first produce his evidence.

7. Attorney and client ☞61—Upon reference to determine mental and moral attributes of applicant for reinstatement as attorney, applicant will be given fullest opportunity to meet all derogatory evidence.

Upon reference for determination of mental or moral attributes of applicant for reinstatement as attorney, where applicant's evidence is controverted, he will be given fullest opportunity within reasonable time to meet in his closing case all affirmative matter adduced against him.

8. Attorney and client ☞61.

Examination as to mental attributes of applicant for reinstatement as attorney may be of special character, depending upon exigencies of each particular case.

9. Attorney and client ☞61.

Where examination as to mental attributes of applicant for reinstatement as attorney is found necessary, nature thereof will, in its entirety be left for final determination of appellate court.

10. Attorney and client ☞61—Board of bar examiners will report evidence in proceeding upon application for reinstatement of attorney, together with findings on moral qualifications, on whether examination is necessary, and, if so character and extent of examination to which applicant should be subjected.

Where application for reinstatement as attorney is referred to board of bar examiners for determination of mental and moral attributes, board will report evidence by filing transcript or copy with clerk of appellate court, together with its findings on moral qualifications, whether examination of mental qualifications is necessary to test them, and, if so, character and extent of examination to which applicant should be subjected.

11. Attorney and client ☞61.

In proceedings for reinstatement as attorney before board of bar examiners, either applicant or respondent may take exceptions to any or all findings of board.

Three original applications by Clyde E. Cate, Walter H. Stevens, and Vernon Cruickshank, respectively, for reinstatement as attorneys and counselors at law. Applications referred to the State Board of Bar Examiners for further proceedings.

See, also, 60 Cal. App. 279, 212 P. 694; 241 P. 95; 219 P. 1014.

Cooper, Collings & Shreve, of Los Angeles, for petitioner Cate.

Gates & Randles and James D. Randles, all of Los Angeles, for petitioner Stevens.

Kimball Fletcher, of Los Angeles, for petitioner Cruickshank.

Guy R. Crump, Oscar Lawler, Eugene Overton, and Norman Sterry, all of Los Angeles, for respondent Los Angeles Bar Ass'n.

WORKS, J. Each of the petitioners in these proceedings was formerly an attorney at law. Each is now resting under the ban of a judgment of disbarment. Each asks for a reinstatement in the ranks of the profession. We refrain, for reasons which will appear upon a perusal of what follows, from stating the matters of fact upon which a reinstatement is prayed in each proceeding.

A recent decision of the Supreme Court (In re Stevens, 241 P. 88) makes it convenient and proper for us to lay down for the conduct of the present proceedings, not only such rules as may apply specifically to them, but which

as well may serve as our guide, whenever applicable, in other matters of a like character which in the future may be presented for our consideration.

[1] In every instance in which is presented an application such as those which now lie before us, two prime questions will arise: (1) Is the applicant in the possession of the honesty, integrity, and general morality which would entitle him to reassume the discharge of the trust of which he has been deprived? (2) Has he the degree of learning in the law that would enable him to discharge efficiently his duty to the public whose servant he desires again to become? The attributes contemplated by the first of these questions will be referred to for convenience, throughout this opinion, as moral qualifications, while those intended by the second question will be designated as mental qualifications.

[2] Upon the score of his moral qualifications, each of the petitioners presents evidence in the form of affidavits, accompanying his petition for reinstatement. Contrary evidence, if it exists, should be uncovered and presented, and findings of fact should be made upon all the evidence which may be produced either by the petitioners or by respondent. The process by which the evidence shall be accumulated, sifted, and weighed is pointed out below. No more is to be said at present upon the subject of the evidence which is to bear on the issue of moral qualifications.

[3] The question as to the mental qualifications of the respective applicants calls for a more extended consideration, as that matter was the subject of the opinion in *Re Stevens*, supra, and is therefore our principal concern here. In that opinion the Supreme Court decided that the sections of the Code of Civil Procedure creating and defining the powers of the state board of bar examiners do not require that an applicant for reinstatement as a member of the bar shall submit himself to the board for an examination as to his mental qualifications. In concluding its discussion of that particular question, and in laying down what we may term a rule of discretion, as distinguished from the rule of the statute which was contended for by the respondent in the proceeding, the court says:

"In any event, it is proper to say that we are not prepared, in the absence of legislative expression, to accept the conclusion that every applicant for restoration to practice must submit to a re-examination as to his mental qualifications. No adequate reason occurs to us for making the rule invariable. The law is interested in the regeneration of erring attorneys, and in the enforcement of a sound discipline its disposition ought not to be to place unnecessary burdens upon them. In some cases, where it would be in the interest of justice to restore to his life work a disbarred attorney, and concerning whose grasp of the law there is no question, such a requirement would be unnecessary. On the other hand, cases may arise where it is

apparent the applicant has not shown as an attorney that he possesses the requisite mental qualifications, and in such cases the rule contended for would be properly applied. In our opinion, the alternative rule proposed by the respondent that the question of a re-examination of the applicant by the board of bar examiners should be left to the sound discretion of the courts we hold to be the proper one, and, in a case calling for such re-examination and restoration, the same procedure may be followed as in the case of an original applicant seeking admission."

It seems clear to us that in an endeavor in most proceedings to make application of the rule of discretion here enunciated, a sifting and weighing of evidence must become necessary. It may require but a perfunctory effort in an occasional instance to determine whether the applicant is one "concerning whose grasp of the law there can be no question," but we apprehend that in a vast majority of cases the ascertainment of the applicant's mental attributes will not involve a labor so easily to be discharged. A part of the language of the Supreme Court, included in the paragraph which is quoted above, bears upon this question, and it is so presented as to require the most serious consideration on our part. The court says, immediately following its reference to those "concerning whose grasp of the law there is no question":

"On the other hand, cases may arise where it is apparent the applicant has not shown as an attorney that he possesses the requisite mental qualifications, and in such cases the rule contended for would be properly applied."

[4] We understand this sentence to contemplate the cases of applicants who have not shown, while they were attorneys, and before their disbarment, the possession of the requisite mental qualifications. If this view is correct, and if we take the context of the entire opinion with the sentence, we regard the expression as showing nothing more than an intention on the part of the court to state, by way of illustration, a single circumstance or condition requiring an examination as to mental qualifications. It having been determined that a discharge of the duty contemplated by the rule of discretion announced by the court is incumbent upon the District Courts of Appeal, we cannot suppose that the discretion was intended to be circumscribed within the narrow limits of the sentence. The discretion having been held to exist, it is logical to believe upon general principles, that we are to exercise it in its fullness, subject only to the application of a proper corrective for its abuse in particular cases, as such cases may arise. Not only so, but, as we have already remarked, the sentence does not appear to have been intended as a limitation upon our power. Furthermore, it seems obvious that a variety of considerations, not included within the expression, may show a necessity for the ascertainment of the mental qual-

fications of one who, having been disbarred, would procure a restoration to the ranks of the legal profession. It is proper to state here, in so far as we may outline them in advance, the sources from which may arise such a question, including the matters mentioned by the Supreme Court. These are: The age of the applicant at the time of his admission to the bar; whether he took an examination to test his qualifications when admitted; the nature and extent of the examination, if he did take one; the length of the period during which he practiced law, from admission to disbarment; the nature and extent of the business which he conducted during his practice and the ability and facility with which he performed his duty as a lawyer; the nature of his pursuits since disbarment, with particular reference to the question whether his employments have required the exercise of mental activity; the extent of his mental activity generally since disbarment, and especially the extent to which he has kept himself informed in the law and in the changes which have been effected in it and in its administration; the length of time which has elapsed between the date of disbarment and the filing of petition for reinstatement; the petitioner's soundness of mind at the time of the investigation under application for reinstatement, whether any alleged unsoundness be total or partial, continuous or occasional; and his physical condition at the same time, in so far as it may affect his mental ability to discharge his duty to his clients if his reinstatement be ordered, or to perform generally the labors of the profession.

While in this catalogue we have stated matters which in particular cases may turn out to be trivial, and others which in every case will require but a brief or casual examination, we do not pretend to have exhausted the subject. In individual cases, other considerations may be discovered which will aid in determining whether there is a question as to the applicant's possession of the mental qualifications requisite to the acceptable performance of the duties of the legal profession. We do not intend that the rule *ejusdem generis*, or any other restrictive tenet of construction, shall be invoked against the above bill of particulars to prevent a full examination into every subject which may aid in weighing the mental qualifications of any applicant for reinstatement who may come before us. And if we appear to descend to trivialities in considering the various phases of the general subject with which we deal, let it be remembered that the subject is one of transcendent import, even to its every ramification, and that we endeavor to treat it in such fashion that what rules we lay down may serve as guides, in the degree of completeness with which our ingenuity may invest them, for our future labors in cases like the three which now give us such great concern.

Having premised so much concerning both the moral and the mental qualifications of applicants for reinstatement, let us say something as to principles which in a great measure should influence the ascertainment of the moral attributes of such a petitioner, returning again later to the subject of mental qualifications. The Supreme Court says, in the prevailing opinion in *Re Stevens*, supra, "The law is interested in the regeneration of erring attorneys, and in the enforcement of a sound discipline its disposition ought not to be to place unnecessary burdens upon them"; and language to the same effect is found in a dissenting opinion filed by two of the justices. It is to be observed that the expression just quoted from the majority opinion of the court was employed in the course of a discussion as to the correctness of the contention that a petitioner for reinstatement must undergo an examination for the ascertainment of his mental qualifications, but in form it would seem to apply to the question of the determination of moral qualifications as well. To the extent that a disbarment is disciplinary or punitive, the courts, in removing the ban, should exercise a clemency which in some measure may be like unto that residing in the exercise of the pardoning power by the executive. If the erring practitioner be viewed as a culprit, and his fate alone be regarded, we may treat him with the last degree of leniency. We understand the expression of the Supreme Court so to operate, and no further. After all, however, the real question to be determined, even under the language employed by the court, is as to where shall be drawn the line between "unnecessary burdens" upon the petitioner for reinstatement and those requirements which, while they may be onerous upon him, are imperatively necessary to the protection of those who so greatly outnumber him that his fate, as compared with their interest, is dwarfed into insignificance. The Supreme Court has said, in dealing with the right of the Legislature to authorize the disbarment of lawyers who have shown the possession of a bad moral character:

"It requires no argument to prove that the possession of this prerequisite," a good moral character, "to the receipt of and continued exercising of the right or privilege of engaging in the practice of the law is a matter of such paramount public interest as to entirely justify the Legislature in prescribing that the commission of crime involving moral turpitude by one either seeking to obtain this right or privilege or thereafter exercising it should constitute sufficient ground for its original denial or for its subsequent revocation." *In re Collins*, 188 Cal. 701, 206 P. 990, 32 A. L. R. 1062.

This paramount public interest of course demands the tender care of the courts when reinstatements are asked, as imperatively as it requires the solicitude of the Legislature in providing for admissions or for disbarments.

"When a member of the profession has been found lacking in the requisites which go to make him a helper to his clients and has been discovered to possess aims, views, and purposes which indicate a moral obliquity in him, and which might make his clients his victims, it is well that he were removed from the possibility of doing them harm. When he has been once disbarred, a mistaken charity should not restore him to his position." *In re Shepard*, 35 Cal. App. 492, 170 P. 442.

A proceeding for reinstatement is "one in which the public has a large interest." *In re Thompson*, 37 Cal. App. 344, 174 P. 86.

"In truth, whether the legal profession is to be maintained as an honest and honorable calling is a matter of grave general concern." *In re Cate*, 60 Cal. App. 279, 212 P. 694.

"In proceedings of this character, the court owes a solemn duty to the community and to the legal profession which must be performed without regard to feelings of sympathy for the applicant." *In re O'Connell*, 64 Cal. App. 673, 222 P. 625.

It is for these reasons that a most searching investigation must be made into the moral qualifications of applicants for reinstatement. Each of the three petitioners who are now before us doubtless is convinced that he is entitled to be clad again in the robes of the profession, and each is deserving of credit for the effort he has made toward a rehabilitation of character. We, however, must be satisfied that the effort has been successful, to the end that the public shall not be called upon to suffer from a relapse of any of the petitioners into moral delinquency. What is plain to petitioners must be made plain to us.

When we turn again to the matter of mental qualifications, it seems that the same principles should govern. The public, in its dealings with the legal profession, deserves at our hands a protection from incompetency, as well as from knavery. The maintenance of that standing at the bar which the public interest requires demands, not alone a sterling honesty in the individual lawyer, but an intellectual capacity as well. The law is essentially a learned profession. It is because of this truth that we have attempted above to state with meticulous care the criteria whereby to determine whether there is reason to question the mental qualifications of a petitioner for reinstatement.

[5] From what we have said it is apparent that the ascertainment of an applicant's mental attributes may require the taking of two steps. The first branch of the inquiry may be stated in the form of a question: Are the circumstances in a given case such that the applicant should submit himself to an examination in order to test his qualifications? If this question is resolved in the negative, the issue as to mental qualifications is at once determined. If it is decided in the affirmative, the examination will then be taken, and this constitutes the second branch of the inquiry.

At present we are concerned only with the first of the two steps, and it is this first or preliminary step that is contemplated by the remark of the Supreme Court in *Re Stevens*, supra, as to those "concerning whose grasp of the law there is no question." Without descending to particulars, we cannot, from the evidence which is now before us, say that there is no question, in the case of any of the present petitioners, as to his grasp of the law. The determination of the first branch of the issue as to the mental qualifications of each of the three applicants will therefore require further and special consideration.

What machinery shall be employed as to each of petitioners, as a means whereby to determine the issue as to his moral qualifications and the first branch of the issue as to his mental qualifications? The taking of evidence upon disputed questions of fact doubtless is being confided, in an increasing degree as time passes, to referees, by the District Court of Appeal. Certainly, that method is being more and more pursued by this division of the court. It seems feasible to adopt that means in the present instance. In fact, in a very recent case in which a reinstatement was asked (*In re O'Connell*, 49 Cal. App. Dec. 160 ¹) one of the justices was designated as a "commissioner" to take evidence upon the issue as to moral qualifications. This particular form of reference has its advantages, but it has also its disadvantages. We think a more satisfactory means of solving, preliminarily at least, the two questions with which we now deal, is by reference to the state board of bar examiners, a body ready at hand and which has the machinery necessary to a proper performance of the work of taking evidence and of making findings upon it. We have lately said, in a case in which was assailed the constitutionality of the sections of the Code of Civil Procedure providing for the creation of the state board of bar examiners and prescribing its functions:

"Bar examiners, or law examiners, as they are termed in some states, have been provided for in many jurisdictions as aids to the courts in the discharge of the duty of ordering admissions to the bar. These bodies are so helpful to the courts, and the laws concerning them trench so little upon the rightful exercise of the judicial power to admit, that the new instrumentality practically everywhere has been put into operation without apparent thought as to an unconstitutionality upon the grounds suggested by the present applicant." *In re Chapelle*, 234 P. 906.

It is provided by section 279 of the Code of Civil Procedure, an enactment prescribing the rules for admission to the bar, on motion, of attorneys coming from other states and countries:

"Before admitting any such person to practice, the court shall require an investigation and report by the board of bar examiners as to his

¹ Hearing pending in Supreme Court.

moral and other qualifications, unless the court shall otherwise direct in a particular case."

The wisdom of this requirement long has been evident. The board has proven its efficiency in the discharge of the duty imposed upon it by the section, and we anticipate the same happy result from the practice of confiding to that body a similar line of work in those cases in which, in the exercise of a sound discretion, we may think a searching inquiry should be made into the alleged moral regeneration or into the mental qualifications of those who, having been disbarred, may petition for a reinstatement as attorneys at law.

It is perhaps not proper for us to lay down in advance the rules of evidence which are to govern the board of bar examiners in the conduct of the three references which we are about to make to that body, or which are to guide ourselves later, except to the very limited extent which will be specified in a succeeding paragraph of this opinion. Those matters have not been argued in the briefs, and we should not make a decision upon them in the absence of an opportunity to the parties to be heard. We shall, however, cite the various cases in this state which deal, more or less thoroughly, and with greater or less directness, with those questions, and which cite earlier decisions touching the general subject, to the end that the decided cases may be found in one place for the benefit of all concerned in these or in future proceedings of a like character. They are *In re Shepard*, 35 Cal. App. 492, 170 P. 442; *In re Thompson*, 37 Cal. App. 344, 174 P. 86; *In re Hahn*, 56 Cal. App. 702, 206 P. 473; *In re Stevens*, 59 Cal. App. 251, 210 P. 442; *In re Cate*, 60 Cal. App. 279, 212 P. 694; *In re O'Connell*, 64 Cal. App. 673, 222 P. 625; *In re Morton* (Cal. App.) 243 P. 32; *In re O'Connell*, 49 Cal. App. Dec. 160 2.

[6, 7] One rule stands out so clearly from these cases, although they do not specifically announce it, and it is apparently so correct that we do not hesitate here to declare it. The burden of proof is upon one who seeks, after disbarment, to accomplish a restoration to the ranks of the legal profession. Accordingly, in each of the present proceedings, the petitioner will first produce his evidence, that of respondent will then be presented, and the petitioner will close. As individuals may always be found who will cast aspersions upon the integrity or the ability of those situated as are petitioners—and by this remark we would not discourage in the least degree the production of legitimate evidence contrary to their desires—each of the petitioners will be given the fullest opportunity, within a reasonable time, to meet in his closing case all affirmative evidence which respondent shall have produced against him. We refer spe-

cially to this matter because of the difficulty which is often experienced in an endeavor to meet evidence derogatory to character or standing.

[8, 9] If it shall be determined finally that any of petitioners must undergo an examination to test his mental qualifications, a question will naturally arise as to what shall be the extent and character of the examination. In the opinion *In re Stevens*, supra, the Supreme Court has said that, in a case calling for an examination to ascertain mental fitness, "the same procedure may be followed as in the case of an original applicant seeking admission." We are of the opinion that the word "may" in this extract is intended to be directory and not mandatory, and, whether that be so or not, we are of the further opinion that the Supreme Court, by the employment of the expression "the same procedure," did not intend to say that the character of examination to which an applicant for admission is subjected is to be required of an applicant for reinstatement. For the purposes of the present references, therefore, and until report upon them, we shall say that a special character of examination may be provided for any applicant for reinstatement, the nature of the examination in each instance to depend upon the exigencies of the particular case. This matter, however, will in its entirety be left for our final determination in any of these proceedings in which it shall be found that an examination is necessary.

The references about to be made to the board of bar examiners are several and not joint; that is to say, while we have treated the three proceedings together in this opinion for convenience, they cannot be so handled by the board. Each of the proceedings will therefore be conducted and reported upon by the board independently of the other two.

[10] After completing its investigation in each proceeding, the board of bar examiners will report the evidence by filing a transcript or copy of it with the clerk of this court, together with its findings upon each and every one of these issues, except that a finding may be omitted upon the third if the finding upon the second is in the negative: (1) Whether or not the applicant is possessed of such moral qualifications as to entitle him to a reinstatement. (2) Whether or not there is such doubt as to the mental qualifications of the applicant that an examination is necessary to test them. (3) The character and extent of the examination to which the applicant should be subjected.

[11] In each proceeding either the petitioner or the respondent may take exceptions to any or all of the findings of the board. The exceptions shall be presented in a manner similar to that followed in *Re Ryzek* (Cal. App.) 232 P. 473, and in *Re Scott* (Cal. App.) 234 P. 128.

Each of these matters is referred to the

² Hearing pending in Supreme Court.

state board of bar examiners for proceedings in accordance with the foregoing opinion.

I concur: FINLAYSON, P. J.

CRAIG, J. (concurring). Since the opinion rendered by our Supreme Court in *Re Stevens*, 241 P. 86, it must be accepted as the law in this state that, upon an application for reinstatement of a disbarred attorney the question of the mental qualifications of the applicant is one which may properly be made the subject of inquiry. I find nothing in that decision which permits a question to be raised concerning the existence of such qualifications previous to or upon the date of admission. A fact once existing is presumed to continue to exist. It is true that there are many conditions any of which might result in a lawyer ceasing to possess this faculty, but it would be quite infrequent that the circumstances of the transaction which resulted in disbarment would alone overcome the presumption above mentioned to the extent of requiring proof to be taken as to the existence of such mental qualifications. I doubt if such circumstances are shown by the records in the petitions involved in this decision. However, as the matter is not one involving an issue of jurisdiction, but is addressed to the sound discretion of the court, it may be that the facts here disclosed are sufficient to raise such a doubt in the judicial mind as to warrant further inquiry, and hence I concur in the order.

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CURRAN v. EARLE C. ANTHONY, Inc., et al.
(Civ. 5458.)

(District Court of Appeal, First District, Division 1, California. April 15, 1926. Hearing Denied by Supreme Court June 14, 1926.)

1. Negligence ⚡135—Evidence held not to raise inference of joint enterprise between deceased and automobile salesman demonstrating automobile to prospective purchaser.

In action for death of occupant of automobile being driven by defendant's automobile salesman who was demonstrating automobile to friend of deceased, evidence that one of purposes of deceased was to aid salesman, latter at all times operating car, and that deceased suggested route to be followed during demonstration, is insufficient to raise inference that deceased controlled operation of car or conduct of salesman, rendering rule of joint enterprise applicable.

2. Negligence ⚡93(1)—Joint enterprise involves community of interest in objects of undertaking and equal right to direct and govern movements and conduct.

Parties cannot be said to be engaged in joint enterprise within meaning of law of negligence, unless there is a community of inter-

est in objects or purposes of undertaking, and an equal right to direct and govern movements and conduct of each other with respect thereto.

3. Master and servant ⚡316(1)—"Independent contractor" is one who exercises independent employment and represents employer only as to results of work and not as to means.

An "independent contractor" is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to results of work, and not as to means whereby it is to be accomplished.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.]

4. Master and servant ⚡318(1).

Chief consideration which determines one to be independent contractor is fact that employer has no right to control as to mode of doing work.

5. Automobiles ⚡244(4) — Evidence held to sustain inference that automobile salesman was employee and not independent contractor.

In action for death of occupant of automobile while being driven by defendant's automobile salesman, evidence that it was salesman's duty, in addition to selling cars, to demonstrate cars to prospective buyers, and that use of cars for such purposes was limited to fixed hours each day, supports inference that salesman during working hours was subject to direction and control of defendant, and sustained finding of jury that salesman was employee of defendant, and not an independent contractor.

6. Automobiles ⚡244(4) — Evidence held to show automobile salesman, in inviting deceased to accompany him while demonstrating automobile to prospective purchaser, was acting within scope of authority.

In action for death of occupant of automobile while being driven by automobile salesman, who was demonstrating it to friend of deceased, evidence held to sustain finding that salesman, in inviting deceased to accompany him during demonstration, was acting within scope of his authority.

7. Principal and agent ⚡124(1)—Nature and extent of agent's authority, and whether particular act was within its scope, is for jury, where evidence is conflicting.

Where nature and extent of authority conferred orally on agent are to be determined on conflicting evidence or to be implied from facts or circumstances, question is for jury, unless but one conclusion can be reasonably drawn from the evidence.

8. Automobiles ⚡181(2)—One accompanying automobile salesman partly for purpose of rendering service to buyer held invitee (Civ. Code, § 2338).

Deceased who, at authorized invitation of defendant's automobile salesman, accompanied salesman and friend of deceased during demonstration of automobile, not only for his own pleasure, but for purpose of rendering service to buyer, held to be an invitee, in view of Civ.

Code, § 2338, for whose safety defendant was bound to use ordinary care, rendering defendant liable for damages resulting from its omission.

9. Witnesses ⚡321—Defendant cannot impeach his own witness by inquiring whether he had been convicted of a felony and offering to prove that he had pleaded guilty to charge of burglary (Code Civ. Proc. § 2049).

Where testimony of witness was taken by deposition, at which time he was cross-examined by defendant, and his deposition was read at trial by plaintiff, *held* that, in view of Code Civ. Proc. § 2049, defendant could not, after plaintiff had rested, and after swearing and examining witness as a defendant witness, impeach him by inquiring whether he had been convicted of a felony, and offering to prove that he had previously pleaded guilty to charge of burglary.

10. Automobiles ⚡224(5)—Whether passenger, by failing to remonstrate against excessive speed or withdraw from vehicle, was wanting in ordinary care is dependent on circumstances.

Passenger's duty to remonstrate against excessive speed or to withdraw from motor vehicle, reasonable opportunity therefor being afforded, is not absolute; question whether by failure to do either he is wanting in ordinary care being dependent on circumstances of particular case.

11. Automobiles ⚡245(13) — Contributory negligence of occupant of automobile held for jury.

Although one knowing that driver of car is carelessly operating it must use ordinary care for his own safety, whether his failure to protest against course pursued by driver or to leave vehicle constituted want of ordinary care proximately contributing to his injuries is question for jury, unless from evidence but one conclusion might reasonably be drawn.

12. Negligence ⚡82—Fault of injured person does not affect right of action, unless it proximately contributed to injuries.

The fault of an injured person does not affect his right of action, unless it proximately contributed to his injuries, and it must be proximate in same sense in which defendant's negligence must have been proximate in order to give right of action.

13. Trial ⚡194(16)—Refusal of requested instruction in action for death of automobile occupant to find for defendant, if deceased, knowing that driver was careless or reckless, failed to remonstrate and withdraw, held properly refused, where question was for jury under the evidence.

In action for death of automobile occupant, refusal of requested instructions that, if deceased knew that driver was careless or reckless, and failed to remonstrate with him or withdraw from vehicle, verdict should be for defendants *held* not error, where such question was under the evidence for jury, and instructions correctly stated duty of passenger under conditions as shown by the evidence.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Edna A. Curran against Earle C. Anthony, Inc., and another. Judgment for plaintiff, and defendant named appeals. Affirmed.

Thomas, Beedy & Lanagan, James P. Sweeney, and Geo. El. Stoker, all of San Francisco, for appellant.

Harry I. Stafford and Cyril Appel, both of San Francisco (Ivores R. Dains, of San Francisco, of counsel), for respondent.

CASHIN, J. An action by Edna A. Curran, the surviving wife of Daniel M. Curran, to recover damages for the death of the latter, alleged to have resulted from the negligence of appellant, Earle C. Anthony, Inc., a corporation, and Almond Houston, co-defendants in the action. A verdict was returned by a jury, on which judgment was entered against both defendants, and from which the corporation has appealed.

Appellant was, on July 22, 1922, a dealer in new and used automobiles, with its place of business in San Francisco; defendant Houston being in its employ. Among the duties of the latter was that of demonstrating to prospective purchasers the used automobiles for sale by appellant, occasionally rendering assistance at its place of business in appraising used cars; his compensation, however, being limited to commissions on the price of cars sold by him. Curran, who had formerly been in the employ of appellant, was acquainted with Houston, and from time to time communicated to him the names of prospective buyers; his services in that connection being gratuitous. On the date mentioned Curran informed Houston that one O'Doan was desirous of acquiring an automobile, and an appointment was made with the latter for the evening of the same day. At the appointed time and place Curran, O'Doan, and Houston met; the latter having in his possession a car owned by appellant, the characteristics of which Curran had already discussed with O'Doan. The three, with two others who happened to be present, but who were not in the employ of appellant, entered the car, and rode therein, Houston driving, to a point on an avenue leading over Twin Peaks, in the city mentioned, where, due to the negligence of the latter in his operation of the car, Curran was killed.

Appellant urges as ground for reversal that the deceased was engaged in a joint enterprise with Houston, and that the latter was an independent contractor; that, assuming him to have been the agent of appellant, his invitation to the deceased to ride in the car was beyond the scope of his authority; and further assigns as error certain rulings by

the court as to the admissibility of evidence and its refusal to give certain instructions offered by appellant and its modification of others.

[1-4] In the instant case, though it appears from the evidence that one of the purposes of the deceased was to aid the salesman, the latter at all times operated the car; and, other than the fact that the former suggested the route which should be followed during the demonstration, it cannot reasonably be inferred from the testimony that the deceased had an equal or any right to direct or control its operation or the conduct of the driver. As held in *Bryant v. Pac. Elec. Ry. Co.*, 164 P. 385, 174 Cal. 737, 741, parties cannot be said to be engaged in a joint enterprise within the meaning of the law of negligence, unless there is a community of interest in the objects or purposes of the undertaking and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management. *Pope v. Halpern*, 223 P. 470, 193 Cal. 168. An independent contractor is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished. *Barton v. Studebaker Corporation*, etc., 189 P. 1025, 46 Cal. App. 707; *Green v. Soule*, 78 P. 337, 145 Cal. 96, 99. As was said by the court in the latter case, the chief consideration which determines one to be an independent contractor is the fact that the employer has no right to control as to the mode of doing the work contracted for.

[5] In the case at bar, while Houston's compensation was limited to a percentage of the price of cars sold by him, it appears from the evidence that it was his duty, in addition to that of soliciting business, to demonstrate to prospective buyers the various cars owned by appellant; that, although allowed a wide discretion as to his movements and time while so engaged, unless otherwise specially permitted, the use of cars for these purposes was limited to fixed hours each day. It further appears from his testimony that on the day of the accident, the manager of the department with which he was connected being absent, he was engaged at the place of business of appellant "in doing the appraising of used cars and trade-ins." This evidence reasonably supports the inference that Houston was during working hours as to his duties and the mode of their performance subject to the direction and control of appellant, and sustains the finding of the jury on the issue as to the character of his employment.

[6, 7] The evidence further shows that the deceased was invited by Houston to accompany O'Doan, the prospective buyer, during the demonstration; and it was impliedly

found by the jury that the salesman in doing so was acting within the scope of his authority. In this connection it was testified by Houston that, upon the arrival of the deceased and O'Doan at the place appointed, the latter expressed his purpose to buy the car then in the salesman's possession, provided it possessed the qualities represented by the deceased; that both requested that a demonstration be then given, further testifying that the deceased, being a friend of the buyer, was "doing the talking" after the trip commenced, for the reason, as expressed by the witness, that "naturally being a friend of the man who was purchasing the car he would have confidence in him, that is, more than in me, because he knew I was trying to sell the car—in fact he was selling him the car, you could put it that way, he was selling the car. The man had more confidence in him than he had in me naturally, and, if I would be telling him what the car was, and the kind it was, and one thing and another, he would figure that was my business." While it is evident that the deceased desired to assist the agent to make the sale, the testimony also supports the inference that his purpose was to advise the buyer as well, and that it was the wish of the latter that he should so act. A request, expressed or implied, by a prospective buyer that a qualified third person be present when property for which he is negotiating is to be examined or tested is not unusual; and where, as here, the invitation to accompany the prospective purchaser at the latter's implied request did not necessarily involve risks which would negative the conclusion that the employer contemplated that his employee should in a proper case extend such invitation, the finding by the jury that the employee in doing so was acting within the scope of his authority is reasonably sustained by the evidence. Where the nature and extent of the authority conferred orally upon an agent are to be determined upon conflicting evidence, or to be implied from facts and circumstances the question as to the nature and extent of the agent's authority, and whether the particular act in question was within its scope, is, unless but one conclusion can reasonably be drawn from the evidence, one for the jury. 2 Corp. Jur. (Agency) p. 962; *Earl Fruit Co. v. Curtis*, 48 P. 793, 116 Cal. 632.

[8] The authority of the agent being shown, and that the deceased participated in the demonstration, not alone for his own pleasure, but for the purpose of rendering a service to the buyer in a transaction in which the latter and the employer had an interest in common, the deceased was an invitee, for whose safety the employer was bound to use ordinary care, and was liable for the damage resulting from its omission. *Foster Lumber Co. v. Rodgers* (Tex. Civ. App.) 184 S. W. 761; *Royal Indemnity Co. v. Platt*, etc.,

Co., 163 N. Y. S. 197, 98 Misc. Rep. 631; Adams v. Tozer, 149 N. Y. S. 163, 163 App. Div. 751; Civ. Code, § 2338.

[9] It is contended that the court erred in sustaining objections to appellant's inquiry of the witness Houston as to whether the latter had been convicted of a felony, and to its offer to prove that he had previously pleaded guilty to a charge of burglary in this state. The testimony of the witness was taken by deposition, which was read by respondent at the trial. At the time the deposition was taken, the witness was cross-examined by appellant; no foundation being then laid for impeachment upon the ground thereafter urged. This deposition was offered and read in evidence by respondent at the trial; the witness not being called to testify, though present in court. Respondent having rested, Houston was sworn and examined as a witness for appellant, and was asked as to certain statements made by him at a hearing before the coroner of the city and county of San Francisco held after the death of Curran, which tended to contradict his testimony contained in the deposition. This evidence having been admitted, appellant then for the first time sought to impeach the witness upon the ground mentioned. Though the witness was a party to the action, no appearance therein was made by him, and no evidence offered on his behalf. The question asked as the foundation for the impeachment was one which properly should have been asked at the time the deposition was taken, or by recalling the witness for further cross-examination before the close of respondent's case. The effect of the course pursued by appellant was to make Houston its own witness, and, while subject to impeachment by contradictory evidence, he could not be impeached in the manner proposed (Code Civ. Proc. § 2049), and the objection thereto was properly sustained.

[10-13] It is further contended by appellant that the court erred by refusing the following instructions:

"You are instructed that, if a driver be careless or reckless in his conduct, and this is known to the passenger, and there be reasonable opportunity to do so, it would be the passenger's duty to caution the driver and remonstrate with him, and, if the driver persisted in his improper conduct, leave the vehicle.

"You are instructed that a passenger in an automobile may be negligent in continuing to ride with a driver who is manifestly incompetent or inattentive to his duty. If you find from the evidence that the defendant Houston was driving negligently or carelessly, or was manifestly incompetent or inattentive to his duty, and that the said Daniel M. Curran knew, or should have known, that such was the case, I instruct you that it was his duty to remonstrate with said Houston concerning the operation of the car, and to have insisted upon the automobile being stopped, so that he, the said Cur-

ran, might remove himself therefrom, if the said Houston continued to operate the automobile negligently or carelessly.

"I therefore instruct you that, if you find that the defendant Houston was manifestly incompetent or inattentive to his duty, and that this was known, or should have been known, by Daniel M. Curran at the time, and that the said Curran failed to remonstrate with said Houston, your verdict should be for the defendants."

The duty of a passenger to remonstrate against excessive speed or to withdraw from the vehicle, a reasonable opportunity therefor being afforded, is not absolute, the question whether by failing to do either he is wanting in ordinary care being dependent upon the circumstances of the particular case. *Dowd v. Atlas T. & A. Service Co.*, 202 P. 870, 187 Cal. 523. While one who knows, or should know, that the driver is carelessly operating the car must use ordinary care for his own safety, and it is incumbent upon him to take proper steps for his own protection, still whether by failing to protest against the course being pursued by the driver, or to leave the vehicle, constituted a want of ordinary care which proximately contributed to his injuries was a question of fact to be submitted to the jury, unless from the evidence but one conclusion might reasonably be drawn. *Nichols v. Pac. Elec. Ry. Co.*, 174 P. 319, 178 Cal. 630; *Thompson v. Los Angeles & San Diego Beach Ry. Co.*, 134 P. 709, 165 Cal. 748; *Parmenter v. McDougall*, 156 P. 460, 172 Cal. 306; *Fujise et al. v. Los Angeles Railway Co.*, 107 P. 317, 12 Cal. App. 207. The fault of the injured person does not affect his right of action, unless it proximately contributed to his injuries. It must be proximate in the same sense in which the defendant's negligence must have been proximate in order to give a right of action. *Richmond v. Sacramento Valley R. R. Co.*, 18 Cal. 351; *Flynn v. S. F. & S. J. R. R. Co.*, 40 Cal. 14, 6 Am. Rep. 695; *Fernandes v. Sacramento City Ry. Co.*, 52 Cal. 45.

In the instant case it cannot be said as a necessary conclusion from the evidence that the deceased was wanting in ordinary care in any of the particulars specified in the proposed instructions, the effect of which would have been to withdraw from determination by the jury the question whether deceased was wanting in ordinary care in failing to remonstrate or withdraw from the vehicle under the circumstances stated, and whether such want of ordinary care proximately contributed to the injury.

On the question of the duty of a passenger to use care for his own safety the following instruction was given by the court:

"I further instruct you that a passenger in an automobile operated by another not for hire is required to use ordinary care for his own safety. If he is aware that the operator is carelessly operating the automobile, or is carelessly rushing into danger, it is incumbent upon

him to take such steps as an ordinarily prudent person would take under the same circumstances for his own safety.

"I therefore instruct you that, if you find from the evidence that said Daniel M. Curran, while a passenger in the automobile in which he met his death, by the exercise of ordinary care could have avoided the injuries which he received, then your verdict should be for the defendants."

This instruction, with the exception of the words "not for hire," which were inserted therein by the court, was offered by appellant, and, as modified, correctly stated to the jury the duty of a passenger under the conditions shown by the evidence in the instant case.

The evidence being sufficient to sustain the verdict, and no error being shown, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

77 Cal. App. 525

TAYLOR et al. v. BUNNELL. (Civ. 3069.)

(District Court of Appeal, Third District, California. April 22, 1926. Hearing Denied by Supreme Court June 21, 1926.)

1. Trusts $\hookrightarrow$ 86—In determining if evidence shows that defendant is involuntary trustee of land conveyed to him by wife, with alleged agreement to convey remainder to plaintiff, evidence must be viewed favorably to plaintiff.

In determining whether evidence is sufficient to show that defendant is involuntary trustee of property conveyed to him by his wife with alleged agreement to reconvey to plaintiff, evidence must be viewed in light most favorable to plaintiff.

2. Trusts $\hookrightarrow$ 89(1)—Evidence held to show that defendant was owner of only life estate in land conveyed to him by wife, with alleged agreement that he would convey remainder to plaintiff, and that he held legal title to remainder in trust.

In action to establish title under deed alleged to have been made by defendant conveying remainder interest to plaintiff at time defendant's wife conveyed property to him, evidence held to show that defendant was owner of only life estate and held legal title to remainder in trust.

3. Trusts $\hookrightarrow$ 99—Breach of promise to spouse, after obtaining absolute deed without consideration other than parol promise to convey or hold land to carry out trust in favor of grantor, is constructive fraud, making grantee involuntary trustee for grantor.

If one spouse, without consideration other than parol promise to convey or to hold land for purpose of carrying out trust in favor of grantor, obtains absolute deed from other, breach of promise is constructive fraud, and makes grantee involuntary trustee for grantor,

although at time there was no intention not to perform.

4. Evidence $\hookrightarrow$ 236(3)—Declarations of deceased wife, after execution of deed to her husband, not made in his presence and in disparagement of title, held erroneously admitted in action against him.

In action to establish trust in property conveyed to defendant by his deceased wife, admission of evidence of declarations of deceased wife after execution of deed, and not in defendant's presence, in disparagement of title, held erroneous.

5. Evidence $\hookrightarrow$ 278—Evidence of declarations of deceased wife that deed to husband was absolute, held erroneously admitted on question whether there was agreement by husband to convey to another (Code Civ. Proc. §§ 1853 and 1870, subd. 4).

Evidence of declarations of deceased wife after execution of deed, that she had made deed of gift absolute to husband, held inadmissible, where plaintiff claimed husband agreed to convey to her, as Code Civ. Proc. §§ 1853 and 1870, subd. 4, relating to declarations of deceased person against interest had no application, interest of plaintiff if any, being created by deed conveying property to husband.

Appeal from Superior Court, Glenn County; J. O. Moncur, Judge.

Action by Alma Taylor and husband against Edwin Bunnell. Judgment for defendant, and plaintiffs appeal. Reversed.

Preston & Duncan, of San Francisco, and R. M. Rankin, of Willows, for appellants.

George R. Freeman, of Willows, and Arthur C. Huston and Arthur C. Huston, Jr., both of Woodland, for respondent.

FINCH, P. J. The defendant is a physician and surgeon, and for many years has been engaged in practice in San Francisco. In the year 1906 he and Margaret A. Peterson married, and they thereafter lived together as husband and wife until the death of the latter on the 30th day of May, 1921. Both had been married before, and, at the time of their intermarriage, Margaret Peterson was childless and the defendant had two daughters, who were then young girls, and were living with and thereafter continued to live with their grandmother. No children were born of the second marriage. The defendant owned property in San Francisco, the extent and value thereof not appearing. At the time of and prior to her marriage to defendant, Mrs. Peterson owned 926 acres of land in Glenn county, which she had received from her father's estate. At the time of the trial it was of the value of \$25 an acre. W. H. Taylor is joined as a party plaintiff, for the sole reason that he is the husband of Alma Taylor, and the latter therefore will be referred to as the plaintiff. The plaintiff is a daughter of a deceased sister of

Mrs. Bunnell. In June, 1920, Mrs. Bunnell underwent a serious operation and was thereafter an invalid until her death. On the 26th day of April, 1921, she executed and delivered to defendant a deed conveying her Glenn county land to him. Immediately thereafter, on the same day, the defendant signed and acknowledged a deed purporting to convey the same land to the plaintiff. The defendant never delivered this deed to the plaintiff, or to any person for her, but, on the day following the signing and acknowledgment thereof, he placed both deeds in his and his wife's safe deposit box.

The complaint alleges that Mrs. Bunnell "desired to leave a life interest in said property to her husband, the defendant, in the event of her death, and that plaintiff, Alma Taylor, should have the remainder interest in the same after her husband's death; * * * that during the month of April, 1921, the said defendant stated to his wife, * * * while she was ill and confined to her home and unable to interview or obtain advice from any other person or persons, that the proper procedure or method for the said Margaret A. Bunnell, in carrying out her wishes, would be to execute and deliver a deed of gift to him, * * * and that he * * * would thereupon deliver to the plaintiff, Alma Taylor, a deed conveying said remainder interest to her, the plaintiff; that the said Margaret A. Bunnell, * * * relying upon said statements of the defendant, * * * did, on or about the 26th day of April, 1921, make, execute, acknowledge, and deliver to the defendant a deed of gift, purporting to and which did convey the property herein described to the defendant, and, at the same time and concurrently with the making, execution, and delivery of said deed, * * * defendant did make, execute, and acknowledge a deed of gift conveying the remainder interest in said property after his life estate, to the plaintiff herein, Alma Taylor, and directed said defendant to deliver said deed of gift to the said plaintiff, Alma Taylor, and the said defendant did accept from the said Margaret A. Bunnell the said deed of gift so made, executed, and acknowledged by her for the said plaintiff herein, Alma Taylor, and did promise the said Margaret A. Bunnell that the defendant would fulfill, carry out, and perform her (the said Margaret A. Bunnell's) wishes in that particular;" that after the death of Mrs. Bunnell the plaintiff "demanded of the defendant that the said defendant deliver to her * * * the said deed conveying to her the remainder interest in said property," but that the defendant refused to do so, and "informed said plaintiff that he had destroyed said deed from defendant to plaintiff, and that she (the plaintiff) would have no interest in said property whatever. In this behalf plaintiff * * * states * * * that the said de-

fendant, subsequent to the death of his wife, the said Margaret A. Bunnell, conceived the idea and intention of fraudulently evading his obligation to carry out, on his part, her wishes, and to vest in plaintiff the remainder interest in said property after defendant's life estate." The complaint states a second cause of action in the usual form of an action to quiet title. The prayer is for a decree adjudging that the defendant holds but a life estate in the land and that the plaintiff is the owner of the remainder. The answer does not deny the execution and delivery of the alleged deed from Mrs. Bunnell to defendant or the signing and acknowledgment of the alleged deed from defendant to plaintiff, but denies the other aforesaid allegations of the complaint. The court found all controverted matters against the plaintiff, and entered judgment in favor of defendant, adjudging "that the plaintiffs have no right, title, or interest of any kind or nature in or to the real property described in plaintiffs' complaint, and that the defendant is the owner thereof in fee simple." The plaintiffs have appealed from the judgment.

There is testimony to the effect that Mrs. Bunnell so disliked the defendant's daughters that "she did not want them to have anything to do with the property or even to put their feet on it." On the other hand, the defendant testified that the relation between Mrs. Bunnell and his daughters was "cordial," and that between her and the younger daughter was "affectionate." Witnesses for the plaintiff testified that Mrs. Bunnell often said that she intended her husband to have the land during his lifetime, but that she desired it to go to her blood relatives at his death. Witnesses for the defendant testified that Mrs. Bunnell often stated that she intended to leave the land to defendant alone.

A witness for the plaintiff testified:

That, two or three days before the deeds were executed, Mrs. Bunnell "said that she wanted to make a will whereby she could leave the doctor the ranch during his lifetime, and then it was to go to her family, and asked me to find out how that could be done. * * * The same day or the day after, * * * in Dr. Bunnell's office, * * * I said, 'Dr. Bunnell, * * * Marge wants to make a will, and she does not know how to do it.' * * * Would you tell me what to do?' He said, 'What does she want?' I said, 'She wants to leave you the ranch during your lifetime and at your death it is to go to her family.' He said, 'Here is a piece of paper. Tell her to write out, "I declare this to be my last will and testament, and I hereby leave my ranch and all my personal property to my husband, Edwin Bunnell," and sign it.' * * * I went into Mrs. Bunnell's room and told her. I said, 'Here is a piece of paper. You can write this and then the doctor will get what you want him to have, and everything will be all straight,' * * * and she said, why, she would not think of writing it. That is not what she wanted. * * * She said, '* * * I want him to

have it during his lifetime, and to go to my family after his death.' * * * When I went out I met the doctor, and I said she would not not do it because there are so many things she wants changed. * * * He did not say anything."

The defendant denied that this witness told him that Mrs. Bunnell desired him to have the land during his lifetime and that it should go to her family after his death. The remainder of such testimony of the witness stands uncontradicted, the defendant expressly admitting his part in the facts narrated. He testified:

"Early on the 26th day of April my wife said to me, * * * 'I want to make a deed to you, Bunny, of this property. Will you have that deed made?' I said, 'Yes.' In this conversation she said to me, 'I want my ashes, when I die, dear, spread upon the Hayes Valley hills in the springtime when the flowers are out.' She also told me that she wanted to be cremated when she died. * * * And when she told me these things, I replied to her, 'That then consecrates that land to me as long as I live, spreading your ashes there, and it should be held consecrated to your memory after my death. Now, who have we got that will hold that land?' And she says, 'I don't know.' I went over all our relatives, including Billy Raterath, who was her favorite niece, Alma Prentice (Taylor), Edna Prentice, Francis Prentice, and she rejected them all. She said, 'They won't keep that land.' 'Well,' I said, 'now you ain't going to die anyway, dear. Alma is just as good as any of them. I will make a deed to her, to take effect at my death.' She says, 'I don't want you to.' I went out of the room crying. * * * And then that same day I obtained those blanks from Crocker & Co., with instructions from the partner of my brother-in-law, Albert H. Elliott, to take them to a public stenographer, * * * with the old deed that I had, and she would fill out those forms, which was done. * * *

"Q. What time of day was the deed from Mrs. Bunnell to you executed? * * * A. Signed and witnessed before Mr. Samuels in the evening, after 6 o'clock. Q. In the bedroom of your home? A. Yes. * * * Q. Now, at the time that she executed that deed, * * * did she make any statement to you, or to Mr. Samuels, about the deed? * * * A. Mr. Samuels asked her if she knew it was a gift deed, and she said certainly she did. * * * She was sitting up in bed. * * * Q. Was the other deed, from yourself to Alma Taylor, signed by you? A. It was, * * * in my office, the same night. * * * Q. Did Mr. Samuels take the deeds away from the house at all? * * * A. He went upstairs and put his seal on them and brought them back. * * * Q. Did he deliver them both to you? A. Yes, sir. Q. And what did you do? A. Put them in my pocket. * * * The next day I took them to the safe deposit box and deposited them. Q. Whose safe deposit box was that? A. Mine—that is, a joint deposit box of mine. My wife had access to it. * * * Two or three days afterwards my wife, Margaret, * * * said to me, 'Have you told Alma Taylor about that deed which you made?' I said, 'No; I haven't.' She says, 'I haven't, and I am not going to.' She says, 'Where is that deed?' I says, 'It is

in the safe deposit box.' She says, 'Get it and destroy it. I don't want Alma Taylor to have a thing of mine.' * * * Q. Did you destroy the deed? A. I did. * * * With reference to the conversation, it was the same day. * * * Q. You never had delivered anybody that deed, had you? A. No, sir; * * * Q. After that * * * did you have any further or additional conversation with your wife about this deed * * * to you? A. No, sir. Q. Did you ever have any further or other conversation with her about the deed which you had made and which you destroyed? A. No, sir. * * * Q. Now when you said to your wife, 'I will make it to Alma,' why did you say, 'I will make it to Alma?' A. To get rid of the conversation and have the conversation over with, and to stop talking about death before my sick wife. * * * Q. When did you intend to tell Alma Taylor that you * * * had made a deed to her? * * * A. Never. I expected her to find it in my safe deposit box at my death."

A witness for the plaintiff testified:

"He (defendant) said that he wished she (Mrs. Bunnell) would leave him the ranch. He asked me why I did not talk to her about it. * * * It was some little time before she died, a matter of weeks probably."

Referring to the day after the deeds were executed, the witness testified:

"I went into the doctor's office, and he said, 'Last night Marge called me in and told me she wanted to arrange her * * * property. I asked her what she wanted to do with it and I would tell her how to do it. * * * She said, 'I want you to have my ranch for your lifetime, but after your death I want it to go to Alma because I never want your daughters to inherit my property.' * * * And he said, 'I will tell you what we will do; you make out a deed to me and I will make out a deed to Alma, and in case of your death I will immediately turn over the deed to Alma;' also his wife said that she wanted him to pay her mother \$50 a month for life; and he said, 'I explained to her that if she put the property in trust or something it might be difficult for me to pay the \$50 a month to her mother always because they would interfere; and she seemed satisfied with this, and we signed the deeds.'"

The defendant denied having made the foregoing statements, but testified that, referring to the land, on the day after the execution of the deeds, he said: "She has deeded it to me, and I have deeded it to Alma, to take effect at my death." Witnesses for plaintiff testified that "some days" after the deeds were executed Mrs. Bunnell stated, in substance, that the deeds were executed pursuant to an understanding between her and the defendant that he was to take a life estate in the land and the plaintiff the remainder. A witness for defendant testified that Mrs. Bunnell, a few days before her death, said that "she had deeded the ranch to Bunny, the doctor; that she was leaving it to him without any strings on it." Another witness for defendant testified that, at

a time subsequent to the execution of the deeds, Mrs. Bunnell said "that she had made a deed of gift absolute to her husband of the ranch, without any strings on it." Each party made appropriate objections to the evidence introduced by the other relative to such statements.

[1-3] The trial judge filed a written opinion in which he said:

"The defendant's testimony concerning the conversations which took place between him and Mrs. Bunnell just prior to, at the time of, and shortly subsequent to the time of the making of the deeds referred to, is to me not very convincing, but if it be entirely disregarded there is no evidence as to what took place between them or was said by either of them to the other at said times and the statements and admissions testified to by the various witnesses * * * are in themselves insufficient in my opinion to create an inference that any promise was made by Dr. Bunnell to Mrs. Bunnell, or that any understanding was had between them, and which, by reason of any failure of the defendant to perform, or by the imposition of any fraud, either actual or constructive, by him, a constructive trust was thereby created."

In determining whether the evidence is sufficient to show that the defendant is an involuntary trustee, it must be viewed in the light most favorable to the plaintiff. So viewing the evidence, it appears that Mrs. Bunnell expressed a desire to leave the land to defendant for life and the remainder to her family; that such desire was communicated to defendant; that he thereupon prepared the draft of a will leaving him the property absolutely; that Mrs. Bunnell refused to execute the instrument so prepared; that a few days later Mrs. Bunnell told defendant that she desired to so dispose of her land that he would have a life estate therein and the plaintiff the remainder; that the defendant then promised his wife that if she would make a deed of the property to him he would convey the same to plaintiff, to take effect at his death; and that Mrs. Bunnell thereupon conveyed the property to defendant, and that at the same time and as a part of the same transaction he signed and acknowledged a deed thereof to plaintiff, but never delivered it to her. In view of the confidential relation of husband and wife and the further fact that the defendant was the active adviser of his wife in the transaction, and that, pursuant to his suggestion and advice, he was placed in a position which afforded him every opportunity to perpetrate a fraud upon the plaintiff, it seems clear that the evidence is sufficient to show that defendant is the owner of only a life estate in the land, and that he holds the legal title to the remainder in trust for the benefit of the plaintiff. The court certainly was not bound to accept defendant's explanation that he did not promise to convey the land to

plaintiff and that his wife instructed him to destroy his deed to the plaintiff.

"If one spouse, without consideration other than a parol promise to convey or to hold land for the purpose of carrying out a trust in favor of the grantor, obtains an absolute deed from the other, the breach of promise is constructive fraud, and makes the grantee an involuntary trustee for the grantor, although at the time there was no intention not to perform." 13 Cal. Jur. 869, and cases there cited; Cooney v. Glynn, 157 Cal. 583, 587.

See, also, Logan v. Ryan, 229 P. 993, 68 Cal. App. 448.

"The authorities fully bear out the assertion that in such cases a constructive trust arises, and that the statute of frauds has no application." Brison v. Brison, 17 P. 689, 691, 75 Cal. 525, 530 (7 Am. St. Rep. 189).

Respondent contends that:

"As to the alleged admissions of defendant, it is well settled that the admissions of a trustee cannot be used for the purpose of proving a trust."

In answer to a similar contention, the Supreme Court said:

"The declarations of the defendant which were made to the children of the deceased, Mrs. Cooney, a few days after the execution of the conveyance, were not declarations constituting a promise made at that time to hold the property in trust, but they were statements by him admitting that at the time the deed was executed he had made these promises. They constituted evidence therefore of what had occurred at the very time of the transaction and were not subsequent promises made by him." Cooney v. Glynn, 108 P. 509, 157 Cal. 589.

[4] It was error to admit evidence of the declarations of Mrs. Bunnell, made after the execution of her deed and not in the presence of defendant, in disparagement of the title thereby conveyed to him. Bollinger v. Bollinger, 99 P. 196, 154 Cal. 695, 705; Kershaw v. Madsen, 216 P. 55, 62 Cal. App. 11, 15; McGehee v. Curran, 193 P. 277, 49 Cal. App. 186, 199; Steinberger v. Young, 165 P. 432, 175 Cal. 81, 90. By delivery of his deed to the grantee, a grantor parts with his title, and he will not be permitted thereafter to disparage the title so conveyed. Fisher v. Oliver, 164 P. 800, 174 Cal. 781, 788. There is no contention that the deed was not delivered to defendant or that it did not convey the legal title to him. The complaint alleges that the deed was delivered, and that it "did convey the property herein described to the defendant." The case therefore is unlike that of Williams v. Kidd, 151 P. 1, 170 Cal. 631, 649, Ann. Cas. 1916E, 703, where the question in issue was whether or not the deed there involved had been delivered. In that case it is said:

"Of course it is true that after such delivery no acts or declarations of the grantor in derogation of his grant will be received."

[5] It was also error to admit evidence of declarations of Mrs. Bunnell, made after the execution of the deed to defendant, "that she had made a deed of gift absolute to her husband, without any strings on it," and other similar evidence. Prior to the time those declarations were made, Mrs. Bunnell had conveyed the land to defendant, either absolutely or impressed with a trust in favor of plaintiff. In either case she parted with all her pecuniary interest in the property upon the delivery of her deed to defendant. Sections 1853 and 1870, subd. 4, of the Code of Civil Procedure, relating to evidence of declarations of a deceased person against his pecuniary interest, therefore, have no application. Plaintiff is not claiming as successor to any interest remaining in Mrs. Bunnell after the execution of the deed to defendant, but she claims an interest conveyed by that deed. Her interest in the land, if any, and that of the defendant were created by the same instrument, and there is no more reason for admitting proof of Mrs. Bunnell's declarations in favor of the one party than the other. Such declarations were purely hearsay and therefore inadmissible. *Hannah v. Canty*, 167 P. 373, 175 Cal. 763, 770; *Thaxter v. Inglis*, 54 P. 86, 121 Cal. 593, 594; *Estate of Baird*, 223 P. 974, 193 Cal. 225, 241. In view of all the circumstances, it is clear that the error of admitting such testimony was prejudicial.

The judgment is reversed.

We concur: HART, J.; PLUMMER, J.

77 Cal. App. 558

INTERSTATE REALTY & IMPROVEMENT CO. v. CLARK. (Civ. 5559.)

(District Court of Appeal, First District, Division 2, California. April 26, 1926.)

1. Taxation ⇨796(2)—Plaintiff held not estopped from disputing validity of tax deed pleaded in answer on any other ground than genuineness and due execution, though he did not controvert it by affidavit (Code Civ. Proc. § 448).

Plaintiff held not estopped by Code Civ. Proc. § 448, from disputing validity of tax deed pleaded in answer, on any other ground than genuineness and due execution, though he did not controvert it by affidavit.

2. Taxation ⇨734(3)—Tax deed held valid, though property was assessed to one who was not record owner, where it correctly recited name of person assessed (Pol. Code, §§ 3628, 3785).

Tax deed held valid, though property was assessed to one who was not record owner, where it correctly recited name of person assessed, in view of Pol. Code, §§ 3628, 3785.

3. Taxation ⇨734(9)—Valid title held to pass at tax sale held more than 28 days after last day for publication of notice, where designated day of sale was within stipulated time, and it was continued from day to day (Pol. Code, §§ 3764-3767, 3771a).

Valid title held to pass at tax sale held more than 28 days after last day for publication of notice of sale notwithstanding Pol. Code, §§ 3764-3767, where designated day of sale was within stipulated time, and sale was continued from day to day under section 3771a.

Appeal from Superior Court, Los Angeles County; M. L. Short, Judge.

Action to quiet title by the Interstate Realty & Improvement Company against S. A. D. Clark. Judgment for plaintiff, and defendant appeals. Reversed.

Catherine A. McKenna and J. Irving McKenna, both of Los Angeles, for appellant.
L. B. Stanton, of Los Angeles, for respondent.

NOURSE, J. Plaintiff sued to quiet title to certain real property situated in Los Angeles county. The defendant answered, setting up in *hac verba* a tax deed from the state covering the same property. The plaintiff did not controvert the deed by affidavit or further pleading and the parties went to trial on the complaint and answer. Judgment was rendered for the plaintiff upon findings that the tax deed was void on its face, and from the judgment the defendant has appealed on a typewritten record.

The tax deed was executed on July 21, 1922, and recited that the property was regularly assessed for taxation in the year 1916 to Bernard Hiss, and was sold on July 5, 1922, to the defendant for nonpayment of taxes which had been levied in the year 1916. At the trial, the plaintiff offered evidence to show that title to the property passed from Bernard Hiss to Citizens' Trust & Savings Bank on October 3, 1913, by deed which was duly recorded on October 31, 1913. The plaintiff urges that the tax deed was void on its face because it appeared from the recitals therein that the property had not been assessed to the true owner, that it was sold for a delinquency of 1916, upon an assessment of 1915, and that the date of sale was not within the time fixed by the Political Code. The defendant insists that plaintiff's failure to attack the deed by affidavit under section 448, Code of Civil Procedure, is an admission that the tax deed was valid.

[1] If under our rules of procedure the respondent could attack the validity of the tax deed upon any of the grounds noted, and if any one of these grounds is sufficient to invalidate the deed, then the judgment must be sustained. Section 448, Code of Civil Procedure, provides that, when a written instrument is pleaded in the answer, the plain-

tiff is deemed to admit its genuineness and due execution, unless he controverts it by affidavit. This, however, does not estop the plaintiff from disputing the invalidity of the deed upon any other ground than "its genuineness and due execution." *Moore v. Copp*, 119 Cal. 429, 432, 51 P. 630, 631; *Bublitz v. Reeves*, 40 Cal. App. 75, 79, 180 P. 28; *Munro v. Whitlow*, 54 Cal. App. 448, 451, 201 P. 964.

[2] Turning to the tax deed, we find that the property was assessed for the year 1916 to Bernard Hiss. The proof is that Hiss was not the record owner at that time—that he had conveyed all his title to another by a conveyance recorded in October, 1913. For this reason the respondent insists that the tax deed is void. The answer is that the statute, section 3628, Political Code, expressly provides that:

"No mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid."

In interpreting this section, our Supreme Court has said:

"The assessment is not against the owner, but is of the property, and that must be correctly described. The name of the owner of the property assessed is an incidental provision for the sake of convenience, but a failure to give the correct name of the owner is declared by the statute not to impair the assessment." *Klumpke v. Baker*, 131 Cal. 80, 82, 63 P. 137.

This rule has been universally followed, and numerous cases might be cited to the same effect, the last in point of time which has been called to our attention being *Hanson v. Goldsmith*, 170 Cal. 512, 517, 150 P. 364. The authorities cited by the respondent are not in point. They involve the question of an error in the name of the person "assessed" appearing on the tax deed as distinct from an error in the name of the owner in the assessment itself; that is to say, that, as section 3785 of the Political Code requires the tax deed to recite the name of the person assessed, an error in this respect was held to render the tax deed void because the requirement of the section cited was a naming of the person assessed as that name appeared upon the assessment roll. But here there is no claim that the deed does not correctly recite the name of the person assessed.

The second point of attack is based upon a misconception of the record. In one of the printed briefs it was stated that the land was sold for delinquency of 1916 upon an assessment of 1915. Reference to the transcript discloses, however, that the assessment was for the year 1916, and that the original deed correctly recited that fact.

[3] The last point of attack is that the sale was not made within the time fixed by

sections 3764 to 3767 of the Political Code. The argument is that, as the delinquent tax list must be published on or before June 5 and must designate a day for the sale, which must not be less than 21 nor more than 28 days from the time of publication, the sale of the property in suit on July 5 was outside the limits fixed by the statute. The answer is that the record does not disclose the date of publication of the notice of sale or the date of sale designated therein. Invoking the presumption of regularity in the proceedings in the absence of a direct attack to the contrary, we must assume, therefore, that the publication was had on June 5, the last day permitted by the statute, and that the date of sale was fixed as of July 3, which would have been within proper time. It appears from the tax deed that the sale was made on July 5, and that this was a continuance from day to day of the sale of July 3 in accordance with section 3771a of the Political Code. The propriety of a continuance of a tax sale, regularly noticed within the time prescribed by the statute, was expressly determined by this court in *Bell v. Brigrance*, 240 P. 50, where the court said:

"Reading all of the provisions of the statute together, it does not seem to be doubtful that the sale should commence within the time mentioned, not less than 21 days and not more than 28 days after the date of the first publication of the notice, but that it is within the contemplation of the statute that the sale may be continued from day to day if additional time is required."

Judgment reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

77 Cal. App. 587

PEOPLE v. WHITHOLT. (Cr. 1337.)

(District Court of Appeal, Second District, Division 1, California. April 27, 1926.)

1. Infants $\S$ 20—Conviction of committing lewd and lascivious acts held supported by victim's and police officers' testimony (Pen. Code, $\S$ 288).

Victim's positive testimony as to commission of acts charged by defendant, and police officers' corroborating testimony, held sufficient to support conviction of committing lewd and lascivious acts inhibited by Pen. Code, $\S$ 288.

2. Witnesses $\S$ 240(1).

Asking leading questions of prosecuting witness is not necessarily error as matter of law.

3. Criminal law $\S$ 1036(2).

Defendant not objecting during trial to leading questions asked of prosecuting witness cannot complain on appeal.

4. Witnesses — 383.

Witness cannot be impeached on collateral statement first made by him on cross-examination.

5. Criminal law — 382—Evidence not presenting facts favorable to party introducing it, nor contradicting facts apparently established by opponent, is immaterial or collateral.

Evidence not presenting any fact favorable to cause of party introducing it, nor contradicting fact apparently established by opposing party, is immaterial or collateral to inquiry.

6. Witnesses — 383—Reading of prosecutrix's testimony at preliminary examination held improper to impeach her testimony on cross-examination as to similar acts committed by defendant before those charged.

In trial for committing lewd and lascivious acts, reading to prosecuting witness of transcript of her testimony at defendant's preliminary examination was improper to impeach her testimony, first brought out on cross-examination, as to similar acts committed by defendant before those charged; the matter being a collateral one.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Tony Whitholt was convicted of committing lewd and lascivious acts, and he appeals. Affirmed.

Dana Ong, of Los Angeles, for appellant.
U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

HOUSER, J. Defendant appeals from a judgment of conviction of the crime of the commission of lewd and lascivious acts as inhibited by the provisions of section 288 of the Penal Code.

[1] In contending that the judgment should be reversed, appellant urges that the evidence was insufficient to support the verdict. Without a recital of the details of the evidence, it will suffice to state that the transcript on appeal discloses that the victim of defendant's assault testified positively to the commission by defendant of the acts of which he was accused in the information. In addition thereto, each of two police officers gave testimony which strongly tended to corroborate the testimony given by the prosecuting witness. Appellant's contention, therefore, cannot be sustained.

[2, 3] Prejudicial error is also suggested by appellant, in that the court permitted the prosecution to ask leading questions of the prosecuting witness. But, even though it might be conceded that the asking of such questions was erroneous (which, as a matter of law, does not necessarily follow), it appears that no objection by defendant was made thereto at any time during the course of the trial. It is too late now for him to complain.

[4-6] Appellant also specifies error in that he was unduly restricted in his cross-examination and attempted impeachment of the prosecuting witness. The record discloses the fact that on such cross-examination, in response to questions asked by defendant's counsel, the prosecuting witness testified that on an occasion preceding that specified in the information defendant had been guilty of conduct in connection with the prosecuting witness similar to that for which he had been placed on trial. Thereupon defendant's counsel directed the attention of the witness to the transcript of testimony given by her at the preliminary examination of defendant, and, after many questions with the respective answers thereto had been read to the witness from such transcript, an objection by the prosecution to further reading therefrom was sustained by the court. Appellant makes no claim that, so far as the testimony read to the witness was concerned, any contradiction or any inconsistency appeared between it and the statement which was under attack. Nor was it either suggested by defendant at the trial, or is it by appellant here, that, if permission had been granted to read further of the testimony given by the witness on the preliminary examination of defendant, any such variance would be discovered. From a practical standpoint, therefore, it is difficult to perceive in what manner defendant was harmed by the ruling of the court. But, viewing the situation from another aspect, it is a rule of long standing that a witness cannot be impeached on a collateral statement first made by him on cross-examination. Greenleaf on Evidence (16th Ed.) vol. 1, § 449; *People v. Chin Mook Sow*, 51 Cal. 597, 600; *People v. Furtado*, 57 Cal. 345; *People v. Webb*, 70 Cal. 120, 11 P. 509; *People v. Dye*, 75 Cal. 108, 16 P. 537; *People v. Smith*, 189 Cal. 31, 35, 207 P. 518. In the case of *Faulkner v. Rondoni*, 104 Cal. 140, 148, 37 P. 883, quoting from *People v. Devine*, 44 Cal. 458, it is said:

"A recognized rule, or rather qualification of the rule, governing the impeachment of the credit of a witness by proof of contradictory statements elsewhere made by him, is that the matter involved in the supposed contradiction must not itself be merely collateral in its character, but must be relevant to the issue being tried."

In a case of the character of that here involved, assuming the admissibility on the part of the prosecution of evidence of acts of a defendant of a nature similar to that charged in the information tending to establish his proneness to commit the particular act of which he is accused, it does not necessarily follow that the same evidence would likewise be admissible on the part of the defendant. The purpose of evidence is to present some fact favorable to the cause of the party introducing the evidence, or to contra-

dict a fact apparently established by the opposing party. If the offered evidence tends to do neither the one nor the other, it is immaterial or collateral to the inquiry. In the instant case evidence produced by defendant of the fact that on some occasion other than that specified in the information the defendant had been guilty of an act similar to that of which he was accused would in no sense be favorable to the cause of defendant; neither would it tend in any way to controvert the case made by the prosecution. Therefore, so far as the defense was concerned, evidence of such former acts by defendant was collateral to the question of whether at the time and place set forth in the information he had performed the acts therein specified. The rule, then, forbidding impeachment on collateral facts first brought out on cross-examination would apply to the situation here presented, from which it would result that no error was committed by the trial court.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

77 Cal. App. 578

PORTER et al. v. GESTRI. (Civ. 3072.)

(District Court of Appeal, Third District, California. April 26, 1926.)

1. Sales $\S$ 261(6)—Contract held to contain express warranty that grapes sold were of black variety.

Clause, "Whereas the seller covenants and warrants that he is the owner of a certain lot of * * * dried black grapes," held an express warranty that grapes sold were of black variety.

2. Appeal and error $\S$ 1039(2)—Defect of complaint in failing to allege facts which prevented discovery of breach of warranty at time of delivery of goods sold, if any, held not prejudicial.

In action for breach of contract to sell dried black grapes, defect of complaint, if any, in failing to state facts which prevented discovery of breach of warranty at time of delivery, held not prejudicial, in view of allegations of answer that buyer inspected grapes, and undisputed testimony showing no effective inspection was made, but warranty placed in contract in lieu thereof.

3. Sales $\S$ 284(1, 2).

Where there is an express warranty, buyer is under no obligation to inspect or examine goods purchased.

4. Sales $\S$ 442(4)—Damages for breach of warranty that dried grapes sold were black grapes held properly based on prices at place to which grapes were shipped in reliance on seller's warranty.

Where buyer, while loading grapes on steamer for shipment to New York became suspicious, but was assured by seller that grapes

were black, as warranted, held, buyer was justified in proceeding with shipment, and damages were properly based on New York prices.

5. Sales $\S$ 441(4).

In action for breach of warranty that dried grapes sold were black grapes, evidence of market value of such grapes in New York held sufficient to sustain recovery.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by D. H. Porter and others, copartners, doing business under the firm name and style of D. H. Porter & Sons, and the partnership D. H. Porter & Sons, against A. Gestri. Judgment for plaintiffs, and defendant appeals. Affirmed.

Frank L. Simons, of Fresno, for appellant. Williams & Fenstermacher and Chester O. Hansen, all of Fresno, for respondents.

FINCH, P. J. On the 7th day of June, 1923, the parties entered into a written contract of sale by defendant to the plaintiffs of a certain lot of grapes. The parts of the contract material to the questions raised by the appeal are as follows:

"Whereas, the seller covenants and warrants that he is the owner of a certain lot of 2,400 twenty-five pound boxes of dried black grapes, principally Zinfandel and Mission variety. * * * The said seller * * * does hereby sell said dried black grapes, and all of them to the buyer, and the buyer * * * does hereby buy the same from the seller for the price of 11¼ cents per pound net f. o. b. cars * * * Fresno, California, loading to commence not later than the 8th day of June, 1923, or as soon thereafter as the transportation company can furnish cars suitable for loading. The buyer agrees to pay said seller the sum of * * * \$6,750 as follows, to wit: Net cash and acceptance, Fresno."

Admittedly, on the 8th day of June, 1923, 3,561 25-pound boxes of dried grapes were, by agreement of the parties, "delivered by defendant to plaintiffs under and by virtue of the terms of the written contract," for which the plaintiffs paid the defendant the agreed price of 11¼ cents per pound. The complaint alleges that the plaintiffs, in reliance upon the warranty contained in the contract, received the grapes and shipped them to New York City, believing that the grapes were of the kind mentioned in the warranty; that upon their arrival in New York the plaintiffs ascertained that the lot of grapes purchased "contained dried white grapes, as well as dried black grapes"; that the "defendant well knew that plaintiffs purchased said dried grapes for shipment to Eastern markets"; that if the grapes had been as warranted they would have been of the value of \$16,000 in New York, but that, by reason of the white grapes contained therein, they were of the value of only \$6,000. The answer de-

nies the foregoing allegations and alleges that the plaintiffs inspected the grapes before the execution of the contract and inspected and accepted them upon their delivery at Fresno. The court found the facts in accordance with the allegations of the complaint except as to the value of the grapes. In that respect it found that had the grapes been as warranted they would have been of the value of \$14,021.43 in New York, but that, by reason of the mixture of white grapes with the black, they were of the value of but \$7,789.68 in that city. Judgment was entered in favor of the plaintiffs for the difference. The defendant has appealed from the judgment.

Plaintiff S. A. Porter, who made the purchase for the plaintiffs, testified: That the plaintiffs are wholesale jobbers, located in San Francisco. That defendant called at plaintiffs' place of business and stated that he "had about a car" of black grapes at Fresno and asked witness to go to Fresno and "look the lot over and he could probably sell them" to plaintiffs. That witness went to Fresno a few days later "for the purpose of examining the black grapes." That he and defendant "looked at part of the pile, examining 15 or 20 boxes, and they seemed to be apparently all black grapes." That the witness later examined 7 or 8 more boxes. That "the pile was stacked so we couldn't break into it all, and I took Mr. Gestri's warranties that they would be black grapes." That he and defendant then went to a lawyer's office to have a contract drafted and executed. That in the lawyer's office "I told Mr. Gestri that as long as they were all black grapes, that I was satisfied. Mr. Gestri said they were all black grapes. I said, 'As long as you will warrant that, we will take them.'" That the "contract was then drawn up. I said I had to rely on him that they were to be all black grapes; that I was in a hurry to get them on the boat and I didn't have time to look them all over. * * * I told Mr. Gestri that they had to make the steamer of the American-Hawaiian line." That he told defendant at that time that plaintiffs expected to ship the grapes to New York and had cargo space reserved for that purpose. That after the grapes arrived in San Francisco, and three-fourths or more of them had been loaded in the steamer's hold, "I noticed the spillage on the dock, and that it was a little bit off at the time. * * * We spoke to Mr. Gestri about it, and he said they were all right, so I thought it could be settled with very little adjustment." That at that time the boxes were strapped, "two boxes to a bundle, wire strap on each end so it was almost impossible to break the wires on those cases, and there was a few cases yet unstrapped, and I looked at five to seven cases. * * * I told Mr. Gestri we thought we might have trouble with the raisins, * * * that they were not all black grapes, and Mr. Gestri said they were all right. He said: 'They

will go through. They are all black grapes. You won't have any trouble.' * * * And then I relied on it more than ever, because he said there might be a few cases like that, but they were all black grapes. * * * I opened a few cases that were still unstrapped, and there I noticed a little difference from what I had purchased. * * * I relied solely on Mr. Gestri's warranties, more than I did on the inspection." The witness further testified that the New York buyer rejected the whole lot of grapes because they were not black grapes; that an inspection in New York disclosed that only 20 per cent. of them were black grapes; that plaintiffs sold the grapes, after such rejection, for 8¾ cents a pound; that that was the "very best" price that could be obtained for them; that the market price of black grapes in New York at that time was from 16 to 17¼ cents a pound; and that before shipment to New York the plaintiffs had contracted to sell the grapes at 16 cents a pound for a part thereof and 16½ cents for the remainder. Most of the grapes purchased were of the crop of 1920. The contract is silent as to the year grown. The evidence shows that in 1923 black grapes of the 1922 crop were of the market value of from 15 to 16 cents a pound f. o. b. at Fresno; those of 1921, 14½ to 15½ cents; and those of 1920, 14 to 15 cents. Witnesses for the defendant testified that about half of the grapes were of white varieties. The defendant testified that the boxes were labeled "dried black grapes"; that at the time of the execution of the contract he did not know, and that Porter did not tell him, where the grapes were to be shipped, except that they were to be sent to San Francisco. In other respects Porter's testimony stands uncontradicted.

[1] Appellant contends that "the general demurrer should have been sustained because there is no allegation in the complaint * * * that the defendant did not deliver to the plaintiff the goods specified in said contract." The theory of the complaint, however, is not that the plaintiffs did not receive the particular lot of grapes purchased, but that the grapes contained in such lot were not of the kind warranted. It is clear that the clause of the contract first quoted herein constitutes an express warranty that the grapes mentioned therein were of black varieties. *Burge v. Albany Nurseries, Inc.*, 176 Cal. 313, 319, 168 P. 343; *Rauth v. Southwest Warehouse Co.*, 158 Cal. 54, 60, 109 P. 839; *Newhall Co. v. Hogue-Kellogg Co.*, 56 Cal. App. 90, 95, 204 P. 562; *Firth v. Richter*, 49 Cal. App. 545, 548, 196 P. 277; *Barrios v. Pacific States Trading Co.*, 41 Cal. App. 637, 639, 183 P. 236. The uncontradicted evidence shows that the parties intended it to be such.

[2-4] It is next urged that "there should have been a statement of specific facts which prevented the discovery of the breach at the time of the delivery." If it be conceded that

the complaint is defective in the particular mentioned, the answer alleged that the plaintiffs did in fact inspect the grapes prior to the execution of the contract and at the time of delivery, and the undisputed testimony, admitted without objection, shows that no effective inspection was made and that by reason thereof the warranty was inserted in the contract. Under such circumstances, the alleged defect in the complaint did not prejudice the rights of the defendant. "Where there is an express warranty the buyer is under no obligation to inspect or examine the goods purchased, but may rely on the warranty. The main purpose of a warranty is often to excuse examination and render examination unnecessary." 35 Cyc. 378; *Morris v. Fiat Motor Sales Co.*, 32 Cal. App. 315, 317, 162 P. 663, 664. "Even if the buyer does make an examination of the goods, this does not necessarily do away with the effect of the warranty." 35 Cyc. 378; *W. R. Grace & Co. v. Levy*, 30 Cal. App. 231, 236, 156 P. 626. The defendant knew that the grapes were to be shipped to New York. On the arrival thereof in San Francisco, and after the greater part of them had been loaded on the steamer, plaintiffs discovered facts which created a doubt as to whether the grapes were of the kind mentioned in the warranty. The defendant thereupon assured plaintiffs that, with a few exceptions, the boxes contained only black grapes. Under the circumstances, and in view of the express warranty contained in the contract, the plaintiffs were justified, under the authorities cited, in proceeding with the shipment without further inspection. It follows that the damages awarded plaintiffs were properly based upon New York prices. *W. R. Grace & Co. v. Levy*, 30 Cal. App. 231, 234, 156 P. 626; *Krasnikoff v. Dundon*, 8 Cal. App. 406, 409, 97 P. 172. See, also, *Burge v. Albany Nurseries, Inc.*, 176 Cal. 313, 318, 168 P. 343; *Germain Fruit Co. v. Armsby Co.*, 153 Cal. 585, 590, 96 P. 319; *Shearer v. Park Nursery Co.*, 103 Cal. 415, 419, 37 P. 412, 42 Am. St. Rep. 125.

[5] It is contended that there is no evidence to show the market value of black grapes produced in 1920. The plaintiff testified that the market price of black grapes in New York was from 16 to 17½ cents a pound. Another witness testified that black grapes have a higher market value than white grapes; that "they want a grape to make claret wine * * * as a rule in the Eastern cities"; that in 1923, about the time of the sale herein involved, black grapes grown in 1922 were of the market value of 15 to 16 cents, f. o. b. Fresno; and that as to those grown in 1920 "there would not be a difference in value of over a cent a pound on them." There is no other evidence bearing upon the question of value. In the absence of any evidence to the contrary, it may be inferred that there was the same difference in

value in New York as in Fresno between grapes grown in 1920 and those grown in 1922. The court found that if the grapes had all been black grapes as warranted, they would have had a market value in New York of 15¼ cents a pound. The evidence fully supports this finding.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

77 Cal. App. 599

JOHNSON v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR FRESNO COUNTY et al. (Civ. 5594.)

(District Court of Appeal, First District, Division 1, California. April 28, 1926. Hearing Denied by Supreme Court June 24, 1926.)

1. Courts ⇨198—Superior court sitting in probate held without jurisdiction to make order affecting testamentary trust or its administration after decree of final distribution in estate of testator (Code Civ. Proc. § 1699).

Superior court sitting in probate held without jurisdiction to make order affecting testamentary trust or its administration after decree of final distribution in estate of testator, since by such decree court was divested of all jurisdiction over trust found except to settle accounts of trust under Code Civ. Proc. § 1699.

2. Guardian and ward ⇨123—Probate court held without jurisdiction in guardianship proceeding to hear and determine guardian's claim against testamentary trust for support and education of ward after decree of final distribution in estate of testator (Code Civ. Proc. §§ 1757, 1770, 1771; Civ. Code, §§ 201, 726).

Probate court held without jurisdiction in guardianship proceeding to hear and determine guardian's claim against testamentary trust for support and education of ward after decree of final distribution in estate of testator, notwithstanding Code Civ. Proc. §§ 1757, 1770, 1771; Civ. Code, §§ 201, 726, authorizing court to provide for support, maintenance, and education of ward.

3. Certiorari ⇨5(1)—Certiorari held to lie to review order of probate court in guardianship proceeding directing trustee of testamentary trust to pay monthly allowance for support and education of minor ward (Code Civ. Proc. § 963, subds. 1, 3).

Certiorari held to lie to review order of probate court in guardianship proceeding directing trustee of testamentary trust to pay monthly allowance for support and education of minor ward, since order is appealable under Code Civ. Proc. § 963, subd. 3, not being order for payment of "claim," and subdivision 1 is not applicable to probate matters.

4. Appeal and error ⇨1166—Court's want of jurisdiction to enter order directing trustee of testamentary trust to pay monthly allowance to certain minor held not cured by Constitution (Const. art. 6, § 4½).

Probate court's want of jurisdiction to enter order directing trustee of testamentary

trust to pay monthly allowance to certain minor held not cured by Const. art. 6, § 4½.

Application for certiorari by J. A. Johnson, trustee under the will of Oliver Moline, deceased, to review an order of the Superior Court of California in and for Fresno County; Denver S. Church, Judge. Order annulled.

L. N. Barber, of Fresno, for petitioner.

James Gallagher, of Fresno, for respondents.

KNIGHT, J. This is a proceeding for a writ of review whereby petitioner, J. A. Johnson, seeks to have reviewed and annulled an order made by the superior court in and for the county of Fresno, in the matter of the guardianship of the estate of Marie Elizabeth Moline, a minor, directing petitioner to pay to the guardian of said minor, for the latter's support and education, a continuing monthly allowance of \$40 out of funds which had been distributed to petitioner as testamentary trustee under a decree of final distribution in the matter of the estate of Oliver Moline, deceased, the grandfather of said minor.

The will of the decedent contained the following provisions:

"First, I give, devise, and bequeath all the property, real and personal, of which I die possessed, to my beloved granddaughter Marie Elizabeth Moline.

"Second, I nominate J. A. Johnson of Kerman, county of Fresno, state of California, to be the executor of this my last will and testament, without bonds.

"Third, I direct my said executor to keep all moneys which may be realized from the collection of notes, securities and other obligations belonging to my estate, in the First National Bank of Kerman until my said granddaughter shall reach the age of eighteen years."

The residue of said estate, consisting of \$5,530.99 in cash and a note secured by a mortgage in the sum of \$2,500, was distributed on November 20, 1920, "to J. A. Johnson, as trustee for Elizabeth Moline," and said trustee was "directed to collect all securities belonging to said estate, and upon collection of any thereof to keep the proceeds, together with all cash belonging to said estate and hereby distributed to him, in the First National Bank of Kerman until said Marie Elizabeth Moline shall reach the age of eighteen years."

In June, 1925, Anna M. Moline, the mother of said minor, obtained letters of guardianship of the estate of her daughter, and in October, 1925, upon petition, procured and thereafter served upon the said J. A. Johnson as trustee an order requiring him to show cause why he should not pay the sum of \$40 a month from the trust fund for the support and education of said minor. In response to said order, Johnson, besides appearing in court personally and by attorney, filed a writ-

ten appearance setting forth that he appeared specially for the purpose of objecting to the hearing of said petition "upon the ground that the court had no jurisdiction over the subject-matter of said petition or of the person of said trustee," and that he appeared "for no other purpose." The court proceeded with the hearing, and after receiving oral and documentary evidence granted the guardian's petition, and on November 20, 1925, entered an order directing Johnson as trustee to pay to the guardian of said minor the monthly sum of \$40, commencing on October 1, 1925, and to continue until the further order of the court. At that time the minor was 14 years of age.

[1] We are of the opinion that, as petitioner contends, the respondent court sitting in probate was without jurisdiction to make any order affecting the trust mentioned or the administration thereof for the reason that upon the rendition of the final decree of distribution in the estate of Oliver Moline, deceased, which has long since become final, the custody and control of the trust fund were definitely set apart and distributed to petitioner and that thereby the probate court was divested of all further jurisdiction over the same (*More v. More*, 133 Cal. 489, 65 P. 1044, 66 P. 76; *Mackay v. San Francisco*, 128 Cal. 678, 61 P. 382), excepting, as provided in section 1699 of the Code of Civil Procedure, it may settle the accounts of the trust. In the case last cited in referring to the effect of the distribution of an estate to trustees it was said:

"The administration was closed, the accounts of the executors allowed, and the property distributed to them in a different capacity. By their discharge as executors they were as completely separated from the business of the estate as if they had been dead. (*Willis v. Farley*, 24 Cal. 502.)"

In California Jurisprudence (11 Cal. Jur. 248) the treatise upon the subject of the jurisdiction of the probate court clearly points out that the superior court derives its jurisdiction from the Constitution, the grant of powers in matters of probate being contained in the general definition of the jurisdiction of that court; and that such court is not therefore, while sitting in probate, a statutory tribunal, deriving its power from the act of the Legislature, but a court of general jurisdiction. "Yet," says the author, "its probate jurisdiction is separate and distinct from its jurisdiction in a civil action, or in equity, and differs from them in that it is essentially a jurisdiction under the control of the Legislature. The proceedings being statutory in their nature, the court has no other powers than those given by statute and such incidental powers as pertain to it and enabling the court to exercise the jurisdiction conferred upon it, and can only determine those questions or matters arising in the estate which it is authorized to do. Thus, in the exercise of the powers conferred upon it, its

jurisdiction is limited and special, or limited and statutory, in the sense that its jurisdiction is limited by the mode and procedure prescribed by the statute. Not only the character and extent of the jurisdiction, but the procedure by which that jurisdiction may be invoked, are under legislative control; and that procedure must be followed, or relief under the jurisdiction cannot be secured. It is said that the Code is the chart and compass of the court, which cannot amplify its jurisdiction nor arrogate to itself any power beyond that given to it by the statute. And whenever the acts of the court are shown to have been in excess of the power conferred, such acts are nugatory and have no binding effect even upon those who have invoked its authority or submitted to its decision."

[2] There appears to be no statutory authorization for the probate court to hear and determine a proceeding like the one under review. The Code provisions, it is true, confer upon that court in a guardianship proceeding power to provide for the support, maintenance and education of the ward (Code Civ. Proc. §§ 1757, 1770 and 1771; Civ. Code, §§ 201 and 726), but in the exercise of that power it may deal with only such persons and subject-matter as are under its control.

The proceeding instituted by the guardian here to obtain said allowance was not directed against the estate of the minor, which admittedly was subject to the control of the probate court, but against a testamentary trust which, by the rendition of the decree of final distribution, as we have seen, had been permanently removed from the jurisdiction of the probate court for all purposes excepting the settlement of the accounts of the trust; consequently neither the property belonging to the trust nor the trustee thereof were any longer amenable to the orders of that court. The controversy which the probate court presumed to adjudicate was, therefore, in effect, one between adverse claimants to the trust fund; and "it is hardly necessary to cite authorities to the point that a probate court has no jurisdiction to determine controversies between the estate in hand and adverse claimants where there is no provision of law conferring such jurisdiction; but the principle is declared in the following cases: *Theller v. Such*, 57 Cal. 459; *Barnard v. Wilson*, 74 Cal. 512, 517 [16 P. 307]; *Bath v. Valdez*, 70 Cal. 360, 361 [11 P. 724]; *In re Burton*, 93 Cal. 464 [29 P. 36]; *Chever v. Ching Hong Poy*, 82 Cal. 68 [22 P. 1081]; *Smith v. West-erfield*, 88 Cal. 374 [26 P. 206]." *In re Guardianship of Breslin*, 135 Cal. 22, 66 P. 962.

[3] Respondent claims, however, that notwithstanding the probate court may have exceeded its jurisdiction in determining the

proceeding in question, the writ of review should be denied upon the ground that petitioner has a remedy by appeal. This claim is based mainly upon two assumptions: First, that the order directing the allowance to be paid was in effect one for the "payment of a claim" in the matter of the guardianship proceeding, and therefore appealable under subdivision 3 of section 963 of the Code of Civil Procedure; secondly, that said order amounted also to "a final judgment" from which an appeal may be taken. We think the contentions are without merit. The word "claim" as employed in the subdivision of the section mentioned "is limited to debts and claims which can be allowed, rejected, or ordered paid." 2 Cal. Jur. 193. Manifestly the order under consideration was not based upon such a claim, but to all intents and purposes constituted an adjudication of a matter pertaining to the operation of a trust, over which the jurisdiction of the probate court had ended; and as to respondents' second point, assuming that the order assailed was "a final judgment," admittedly it was rendered in probate, and the right of appeal in probate, being purely statutory, is confined to such orders and judgments as are enumerated in subdivision 3 of said section 963 (*Wrynn v. Superior Court* [Cal. Sup.] 241 P. 849), which does not include the particular kind of a final judgment here contended for. It may be conceded that an appeal lies from "a final judgment" under subdivision 1 of said section 963, but that subdivision has no application to probate matters, which are provided for in a different category, by subdivision 3. *Estate of Franklin*, 133 Cal. 584, 65 P. 1081; *Estate of Winslow*, 128 Cal. 311, 60 P. 931.

The case of *Murphy v. Superior Court*, 84 Cal. 592, 24 P. 310, cited by respondent, we believe is not in point for the reason that there the petitioner *Murphy*, who was appointed trustee by deed, was by the same instrument appointed guardian. In the latter capacity he was subject to the jurisdiction of the probate court, and therefore the order directing him to pay an allowance for the ward's support was construed as a probate order for the payment of a claim, which gave him the right of appeal under subdivision 3 of said section 963.

[4] The want of jurisdiction herein cannot in our opinion be cured by the application of the provisions of section 4½ of article 6 of the Constitution.

For the foregoing reasons the order under review is annulled.

We concur: TYLER, P. J.; CASHIN, J.

77 Cal. App. 605

In re CRYER.

ALLEN v. CRYER.

(Civ. 5199.)

(District Court of Appeal, Second District, Division 1, California. April 28, 1926. Hearing Denied by Supreme Court June 24, 1926.)

1. Elections — 291.

Under Code Civ. Proc. § 1963, counting ballot in favor of candidate other than one for whom it was cast is presumed to be result of innocent mistake, and throwing out ballots is presumed to be result of honest judgment.

2. Elections — 285(3)—Statement on Information in election contest that judges in all precincts were guilty of misconduct held insufficient to support contest (Code Civ. Proc. § 1111 et seq., and sections 1115, 1117).

Under Code Civ. Proc. §§ 1115, 1117, statement on information in election contest that judges in all precincts in city were guilty of misconduct, in that they counted ballots for contestee cast for other candidates and threw out ballots of other candidates, does not allege intentional misconduct sufficient to support an election contest under section 1111 et seq.

3. Elections — 271.

Under Code Civ. Proc. §§ 1111 and 1112, "malconduct" is intended to include erroneous conduct without wrongful intention, and is sufficient to support an election contest if candidate not receiving highest number of votes is declared elected.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Malconduct.]

4. Elections — 285(3).

Code Civ. Proc. § 1111 et seq., requires some definite particularity in charge of malconduct of election officers to support an election contest.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Petition by Edna Allen, contesting the election of George E. Cryer for Mayor of the City of Los Angeles. From a judgment of dismissal, petitioner appeals. Affirmed.

Hearing denied by Supreme Court; CONREY, Justice pro tem., not participating.

Gesner Williams and Morris R. McLaughlin, both of Los Angeles, for appellant.

Clarke & Bowker, of Los Angeles, for respondent.

CONREY, P. J. Section 328 of the charter of the city of Los Angeles, relating to primary nominating elections, provides as follows:

"In the event that any candidate for nomination to any office for which only one person is to be elected shall receive a majority of the votes cast for all the candidates for nom-

ination to such office at such primary nominating election, the candidate so receiving such majority of votes shall be deemed to be and declared by the council to be elected to such office. * * *

On the 5th day of May, 1925, at the regular primary nominating election, George E. Cryer was one of six candidates for nomination for the office of mayor. Thereafter in due course the city council canvassed the returns of said election and declared that George E. Cryer was elected at said election as such mayor of the city. Thereafter the contestant, Edna Allen, an elector of the city, filed in the superior court a written statement of contest of said purported election. The court having thereafter sustained a demurrer to the statement of contest, and having at the same time granted a motion to dismiss said statement, judgment of dismissal of the proceeding was entered. The contestant appeals from the judgment.

Section 1115 of the Code of Civil Procedure prescribes the facts necessary to be set forth in a statement of election contest. Without question, the statement of contest shown in the record here was sufficient, except that it is claimed that it did not comply with the requirement that such statement shall set forth "the particular grounds of such contest." Section 1117 of the Code of Civil Procedure reads as follows:

"No statement of the grounds of contest will be rejected, nor the proceedings dismissed by any court for want of form, if the grounds of contest are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which such election is contested."

The amended statement of contest in this proceeding sets forth the grounds of contest in the following paragraph, numbered IV:

"That petitioner herein, said elector, is informed and believes and states on information and belief, that in each of said precincts set forth and mentioned in said Exhibit A, at which voting was had on said May 5, 1925, for the office of mayor, there was malconduct on the part of the board of judges and of each member thereof, in that they and each of them counted ballots which were cast at said election for the said George E. Cryer for mayor, which were not intended to be cast for him, which said ballots had been at said election lawfully cast for such other candidates; and, furthermore, disqualified and threw out ballots and failed to count the same for other candidates, which said ballots had been at said election lawfully cast for such other candidates; and thereby procured the said George E. Cryer to be declared elected to the office of mayor of the city of Los Angeles, when he had not received the number of votes necessary and proper for him to have received to have been so declared."

In the bill of exceptions it was stipulated that Exhibit A of the statement (the ordi-

nance calling the election) need not be copied into the bill of exceptions, but that the same may be exhibited to this court if required. Without actually examining said exhibit, we shall assume, according to the undenied statement in the brief of counsel for respondent, that said ordinance shows that at the time of said primary election, there were 1,026 election precincts within the city of Los Angeles. Presumably, votes were cast in each of said precincts. The grounds of contest permitted by the law as stated in section 1111 of the Code of Civil Procedure include the following: "1. For misconduct on the part of the board of judges, or any member thereof." In the statement of contest herein, there was no attempt to state any recognized ground of contest, unless that part of the statement which we have quoted can be construed as stating in some one or more particulars the fact of misconduct of the board of judges in some precinct or precincts. It is alleged by petitioner on her information and belief that in each of said precincts "there was misconduct on the part of the board of judges and of each member thereof." Under the rule that a demurrer admits the truth of the pleading against which it is directed, we are asked to assume, extraordinary though the fact may be, that each and all of the 1,026 boards of judges at said election, and each and all of the members thereof, were guilty of misconduct, and that the industry of petitioner was such that prior to filing her petition she obtained information upon which to found and declare her belief in such universal misconduct. Yet, notwithstanding such amazing prevalence of guilt or incompetency, the statement of contest contains no charge of corrupt or otherwise willful wrongdoing on the part of any judge of election. There are two, and only two, varieties of alleged misconduct stated. The first of these is that in each precinct ballots were counted in favor of Cryer which were not intended to be cast for him and which had been lawfully cast "for such other candidates." The second is that said judges "threw out ballots and failed to count the same for other candidates, which said ballots had been at said election lawfully cast for such other candidates."

[1] It needs no argument to show that the counting of a ballot in favor of a candidate other than the one for whom it was cast may be the result of an innocent mistake in the reading, or may result from an innocent clerical error in marking the tally sheets. It is equally true that when an election board "throws out" ballots, and thereby fails to count the same for the candidates in whose favor they were cast, such action of the board may be the result of an honest and fair, even if erroneous, opinion of the judges, that for some sufficient rea-

son the ballots were illegal in form or were illegally cast. It is one of the presumptions of law, although a disputable presumption, and is so declared in section 1963 of the Code of Civil Procedure: "(1) That a person is innocent of crime or wrong; * * * (15) That official duty has been regularly performed."

[2, 3] We are satisfied that the statement filed by petitioner did not allege any intentional misconduct on the part of any judge or board of judges of the election. We are of the opinion, however, that the word "misconduct," as used in section 1111, Code of Civil Procedure, was intended to broadly include erroneous conduct without wrongful intention. This is made clear by section 1112, Code of Civil Procedure, which reads as follows:

"No irregularity or improper conduct in the proceedings of the judges, or [of] any of them, is such misconduct as avoids an election, unless the irregularity or improper conduct is such as to procure the person whose right to the office is contested to be declared elected, when he had not received the highest number of legal votes."

From this we infer that it was intended that if by irregularity and error in the counting of the votes a person has been declared elected "when he had not received the highest number of legal votes," such election may be contested by the mode of procedure outlined under the title "Contesting Certain Elections." Section 1111 et seq., Code Civ. Proc. If this were not so, the apparent purpose of the statute would be frustrated in all cases of mere error resulting in the awarding of an election certificate to a person who in fact was not elected.

[4] Although the provisions of the statute relating to the statement of contest should be liberally construed, it remains true that the law contemplates that there shall be at least some definite particularity in the charge of misconduct by election officers. It is absurd to suppose that a single elector, without any information on which to base his complaint, is entitled to impose on the superior court the burden of recounting the entire vote cast by the electors, in a great city in which there are hundreds of thousands of voters. To the contest of such an election we may well apply the rule stated by this court in *Thorner v. Hart*, 29 Cal. App. 234, 155 P. 90:

"While section 1117 of the Code of Civil Procedure, provides that no statement of the grounds of contest will be rejected for want of form, if the grounds [of contest] are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which such election is contested, it does seem clear that the contestee in such cases is entitled to have stated the particulars in which it is charged that misconduct was committed on the part of the officers conducting the election."

The statement of contest in this case does not come up to the standard of the rule above stated. Without the slightest emphasis on any part of the conduct of the boards or officers of election, the statement distributes its accusation evenly across the whole field of more than a thousand precincts. It is not anything other than a general charge that the election count was irregular and erroneous. As well might the contestant say, without more extended phraseology: "The entire count by the boards of election was wrong; Mr. Cryer was not elected; I demand a recount by the superior court." The statute never was intended to authorize any such obstruction of public business.

For the foregoing reasons, we think that the appeal is without merit.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

77 Cal. App. 610

DE MOTTE et al. v. ARKELL. (Civ. 3064.)

(District Court of Appeal, Third District, California. April 28, 1926. Hearing Denied by Supreme Court June 24, 1926.)

1. Associations ☞16—Under lease of premises to lodge, requiring lessee to keep premises in repair, all members of lodge are tenants, bound by lease.

Lease of premises by lodge, providing that lessee keep premises in good repair, makes all members of lodge tenants obligated to keep premises in repair, though lessee may have sublet premises for public purposes.

2. Landlord and tenant ☞167(1).

Leasing premises to lodge does not bring it under rule applying to injuries arising where premises are leased for amusement purposes.

3. Landlord and tenant ☞164(1)—Rule relieving landlord of liability to tenant due to defective condition of premises, in absence of fraud, concealment, or covenant, held not changed by Code (Civ. Code, § 1941).

Rule that, in absence of fraud, concealment, or covenant, landlord is not liable to tenant for injuries due to defective condition or faulty construction of demised premises, held not changed by Civ. Code, § 1941.

4. Landlord and tenant ☞164(6)—Lessee's duties under lease expressly obligating him to repair held not altered by landlord's implied knowledge of defective condition of premises.

Implied knowledge by landlord of defective condition of demised premises, arising by reason of fact that examination would have disclosed defect, held not to alter duties of lessee under lease expressly obligating him to keep premises in repair, and hence landlord is not liable for injuries due to defective railing.

5. Landlord and tenant ☞164(2).

Landlord, if under duty to repair balcony railing, to be liable for injury from its defective condition, its use at time of injury must have been such as was contemplated at time of lease and for which it was constructed.

6. Landlord and tenant ☞164(2).

Platform and railing in rear of hall leased by lodge held not intended to be used for lounging or social purposes, and hence landlord was not liable for death of member of lodge leaning against railing and falling from platform while smoking there.

7. Landlord and tenant ☞169(11)—If platform is being used for intended purpose, reasonableness of pressure against railing thereon, in action for injury due to defective railing, is for jury.

If rear platform of leased premises is being used for purpose for which it was erected, or if there is any conflict whether contemplated use is being made thereof, reasonableness of pressure against railing on platform in action for injury from defective railing is for jury.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by Mertie O. De Motte and others against Joseph Arkell. Judgment for plaintiffs, and defendant appeals. Reversed.

William P. Hubbard, of San Francisco, and L. J. Maddux, of Modesto, for appellant.

R. R. Fowler and Vernon F. Gant, both of Modesto, for respondents.

PLUMMER, J. Action by plaintiffs for damages on account of the death of William H. De Motte alleged to be due to the negligence of the defendant. Plaintiffs had judgment, and the defendant appeals.

The record shows that some time during the year 1913 the defendant became the owner of a certain building situated in the city of Turlock, county of Stanislaus, state of California, commonly known as "Broadway Hall"; that on or about the 1st day of October, 1920, the defendant leased the second story of said building, together with the appurtenances thereto to the Turlock lodge of Independent Order of Odd Fellows for a term of three years from the said 1st day of October 1920. Said lease contained among other things, the following provision:

"That the said party of the first part (being the defendant) shall not be called upon to make any improvements or repairs whatsoever upon the said demised premises, or any part thereof, but the said party of the second part agrees to keep the same in good order and condition, at (its) his own expense."

The lease covered the entire second floor of the building, together with all its appurtenances. There was a large entrance and stairway to the hall leading from a street, known as Broadway street. From this entrance a

stairway led to the second story of the building where the hall mentioned was situated. This stairway led up into a wide passageway. Leading down from this passageway was a narrow passageway continuing to the rear side of the building. At the end of this narrow hallway was a door leading to a passageway or platform on the rear of the building. From this platform are stairs leading down to an alleyway. Adjoining the narrow passageway just described was a small room used as an anteroom for the accommodation of candidates awaiting initiation into the secrets of the orders using the assembly hall. The assembly hall was well lighted; there were a number of windows in the side of the wall over the alleyway. These lighted the platform at the rear of the building; there was also a light in the small passageway which led to the rear platform. This threw light on the platform when the door was opened. The platform was about 19 feet in length, 5 or 6 feet in width, was constructed of Oregon pine supported by upright posts 4 inches by 6 inches in size, and extending above the platform some 3½ feet. To these posts were toe-nailed two guard rails 2 inches by 4 inches in size and about 9 feet in length. The upper guard rail was about 31 inches from the floor of the platform; the lower of the guard rails was about 12 inches from the upper rail. The platform was about 12 feet above the alleyway. On the evening of June 30, 1922, William H. De Motte, deceased, entered the Broadway building by the main stairway entrance and ascended the main stairway to the second floor for the purpose of attending a meeting of the Odd Fellows Lodge, of which he was a member, and for the purpose of taking one of the degrees for which he was a candidate. While waiting in the anteroom he suggested to another person in the anteroom that they go outside to get some fresh air, and opened the door leading onto the platform, passed out onto the platform, accompanied by one Tony Smith. A short time afterwards the said William H. De Motte fell to the alleyway below, sustaining injuries which resulted in his death.

The amended complaint sets forth the cause of action in the following language:

"That on said 30th day of June, 1922, and for a long time prior thereto, said guard rails inclosing said porch or platform were not in good or safe repair, but were insufficient, insecure, and unsafe, and in want of repair, in this: That said guard rails in and about said porch or platform consisted of two pieces of 2x4 lumber placed horizontally and approximately parallel with the floor of said porch or platform, one of said rails being approximately 16 inches above said floor, and one of said rails being approximately 30 inches above said floor, said rails being supported by wooden posts at each end of said rails. That said rails were not nailed or fastened to said posts except insecurely at the extreme ends thereof, and were loose at said

ends. That said rails were so short that they did not rest, as to their ends, upon said posts. That said rails were composed of warped, shrunken, decomposed, and rotten wood and were for the reasons aforesaid unsubstantial and insufficient, and would not hold nails or spikes, and that said defects were of such a degree that said rails were unfit, unsafe, insecure and dangerous to lean against by persons using due care.

"That said defendant knowingly, carelessly, and negligently maintained, kept, and permitted, and knowingly, carelessly, and negligently caused to be maintained, kept, suffered and permitted, said guard rails to be and remain in said unfit, unsafe, insecure, and dangerous condition on the 1st day of October, 1920, and for a long time prior thereto and thereafter to and including the 30th day of June, 1922, notwithstanding the said defendant had during all of said time complete and full knowledge and notice of said insufficiency and want of repair of said guard rails at said place, and said defendant carelessly and negligently wholly failed to caution or warn the persons present in said Broadway Hall that said platform or the rails inclosing the same were dangerous, or to provide or place, or cause to be provided or placed, any signs or notices of any kind, warning or notifying the users of said porch or platform that said porch or platform or the guard rails inclosing said porch or platform were unfit, unsafe, insecure and dangerous, and did negligently and carelessly permit, suffer, and allow human beings to use and occupy said porch or platform."

There were two eyewitnesses to the occurrence, to wit: Antone Smith and W. A. O'Hara. Antone Smith gives the following version:

"It was in the Broadway Hall on the balcony platform about half past 9 in the evening; I was waiting in that room, and they declared a recess to get ready for the ceremony for the first degree, and a few of the brothers come out and also Mr. De Motte come out; yes, sir, come in through the door. Then I was going to stand in the anteroom, and he told me, he says, 'Tony, there is a door here; let's see what is out here.'

"Q. See what is out here? A. Yes. After he opened the door, he noticed the balcony there, or platform. He says, 'Well, it is a platform here; we better be out here; it is a little cooler out here.' We got outside, then we went first the rail— Q. (Interrupting): Now, what rail; where was the rail that you referred to in regard to this platform, where was the rail that you referred to? A. The rail right straight from the door.

"Q. What were you and Mr. De Motte doing at that time? A. Leaning up against the rail backwards.

"Q. Now, in what manner were you leaning? A. We were leaning backwards, this way.

"Q. Now, when you say 'leaning,' what do you mean, throwing your whole force against it? * * * A. If you will permit, I will show you.

"Mr. Fowler: Show us. A. He was leaning this way against the rail. I was this way, cross-legged, talking, Mr. De Motte on my left, leaning about the same way, and Mr. Thompson introduced Mr. O'Hara, and Mr. De Motte kind

of start to make himself acquainted with him, because he was running for auditor, and he stepped ahead just a few steps.

"Q. Show what he did. A. He was this way, and he stepped ahead and shake hands with Mr. O'Hara, and then he pulled out his card and showed him.

"Q. Who did? A. Mr. De Motte.

"Q. What did he do with the card? A. He gave it to Mr. O'Hara.

"Q. What did he say, if anything? A. He says, 'If you mind to take one of my cards. Can you read it?' He says, 'Yes.'

"Q. What did Mr. O'Hara do? A. He says, 'I saw your card in the paper, and I keep the card,' and talking there just a few moments, and Mr. De Motte came right back to the rail, and as soon as he strike the rail, he dropped back down. I was leaning this way (showing).

"Q. At the time he fell, are you prepared to state how he was leaning, or how he touched the rail? A. I wouldn't swear how he was leaning, but what I know, he had both feet on the floor.

"Q. He had both feet on the floor? A. Yes, sir.

"Q. Did you observe him at any time that evening, sitting on the rail? A. No, sir. * * *

"Q. Did he sit on the rail? A. No, sir.

"Q. Was there a light out there? A. There was a light; yes, sir.

"Q. If Mr. De Motte had been sitting on that rail, would you have seen him? If he had been sitting on it, could you have seen him? A. No, sir—of course, I believe I would have seen him if he was sitting on it.

"Q. Now, how long were you and Mr. De Motte out there on the platform, leaning against the rail as you have told us, before Mr. O'Hara came out. A. About five minutes.

"Q. About five minutes. And how was he leaning at that time; how was Mr. De Motte leaning? A. He was leaning back this way.

"Q. Just take this—this is the rail here? A. Yes, sir.

"Q. Will you tell us about how far the rail was from the floor? A. Striking me about here. * * *

"Q. Just show us about how you leaned. A. I was leaning this way.

"Q. Leaning that way? A. Yes, sir.

"Q. Just the weight on one foot and the other crossed over? A. Yes.

"Q. How, about, was he leaning, if you recall? A. Well; I wouldn't swear the way he was leaning, because he stepped ahead and speak to Mr. O'Hara.

"Q. Well, during the few minutes you were there? A. He was leaning this way.

"Q. He was leaning that way? A. Yes, sir.

"Q. I see. Now, during the time that you and he were in that position, the rail stood your weight all right? A. Yes, sir. Of course we wasn't pressing no weight against there.

"Q. In other words, the three of you, you and Mr. De Motte still leaning against the rail, talking to Mr. O'Hara? A. Yes.

"Q. Four or five minutes after he got out there before he fell over? A. Yes sir.

"Q. That would make it about nine or ten minutes in all? A. Yes.

"Q. That you and Mr. De Motte were out there? A. Yes.

"Q. Leaning against the rail before he actually fell over? A. Yes, sir."

Mr. O'Hara's testimony, so far as it relates to the incident in question, is as follows:

"A. And he just handed me the card, and I stepped back like that; the light was shining; and I stepped back to read his card, and just as I glanced at his card, why, he stepped—he handed it to me and I stepped back and he was gone!

"Q. From the time that he stepped back after handing you his card, from the moment he stepped back, what interval of time elapsed before he was gone, as you state? A. Well, I just held the card, like—he just handed it to me, and he stepped back like that, and I just glanced at the card, didn't have a chance to read it or anything; he just stepped back like that and he was gone!

"Q. I see. Now, when you say he was 'gone,' you mean what? A. He went over backwards.

"Q. And did anything occur to any portion of the platform at the time he went over? A. Well, the rail, you could hear it, the end of it. Well, what drew my attention to it, Mr. Smith, he jumped forward like that; that is, he jumped forward, I noticed, and I went to grab Mr. De Motte.

"Q. Grabbed him, you say? A. I tried to reach him; I tried to catch his hands. He threw his hands up like that and I tried to catch him, but he was too far from me.

"Q. And what became of the rail, if you know, at that time? A. The rail went first; he followed the rail down.

"Q. Did you hear anything to indicate before Mr. De Motte fell that the rail was going; was there any noise? A. Well, there may have been a little, but not enough to—just might have been a splinter or something like that. Of course, when it started, I heard it, that is what drew my attention to it."

The testimony further shows that the witness, Antone Smith, was a man of ordinary size, and the deceased was a man weighing from 225 to 260 pounds. The testimony further shows that the rear stairway and platform were used for the purpose of taking in refreshments and supplies when the lodge was giving banquets, and taking out garbage, also, that a piano box was stationed at one end of the platform, and used by the lodge as a coal bin; that the door leading from the narrow passageway onto the rear platform was equipped with what one of the witnesses called a thumb lock and was supposed to be kept locked at all times, which was not always done; that the door could be opened from the inside by turning a knob on the lock. It does not appear from the transcript that the rear platform was used for any other purposes than as herein stated, though some of the witnesses testified that they occasionally saw people go up and down the back stairs, but such use was infrequent. The main entrance to the hall and the upper floor of the building where the hall was situated was from the Broadway side of the building, and was the one in general use for reaching the hall used by the Odd Fellows. It further appears from the record that the deceased was

not a member of the Odd Fellows' Lodge at the time the premises in question were leased from the defendant, but became a member a short time thereafter. There is some testimony in the record that at the time when the Carpenters' Union occupied the hall members of the union would occasionally go out on the balcony for the purpose of smoking. It also appears from the record that the lessees of the hall in question permitted other organizations to hold meetings in the hall.

As to the condition of the hand rails or guard rails, the testimony is conflicting; that introduced on the part of the plaintiff is to the effect that the rail which gave way was loose, defective; that the porch or platform had warped so that the ends of the guard rail had drawn away from the posts to such an extent that the guard rail was loose and would shake when taken hold of. On the other hand, there is testimony to the effect that the guard rail was secure and sufficient at least for all the purposes for which it was intended. The testimony also shows that during the time the premises were under lease to the Odd Fellows, and that the Odd Fellows procured the services of a carpenter to repair the back porch and stairway; that the carpenter so employed repaired the underpinning of the posts which we have described, made other repairs thereto, made some repairs to the floor of the platform, noticed the condition of the guard rail, that it was not in what he considered a safe condition, but that he made no repairs thereto; that he simply repaired that portion of the structure in question which he was directed to repair by the lessee. There was testimony to the effect that the posts were decayed at the nail holes where the guard rails were nailed to the posts. The record shows also that at the time of the execution of the lease, October 20th, the defendant and a Mr. Ferguson, the representative and person acting for the Odd Fellows' Lodge, made an examination of the premises, including the back stairway and platform, and also the suitability of the platform for the location of a coal box. The testimony on the part of the plaintiff was to the effect that the back porch, including the guard rails, was in a defective condition as described at the time of the lease, and remained so during all the period of time embraced in the controversy. At the conclusion of the plaintiff's case, the defendant moved for a nonsuit upon the ground of contributory negligence, that the use made of the platform and guard rail was not such as was intended at the time of the lease, that the premises were leased to and under the control of the Odd Fellows' Lodge, of which the deceased was a member under a written lease which expressly provided for the making of repairs and the keeping of the same in good condition by the lessee. The defendant's motion for a nonsuit was denied, after which the defend-

ant introduced testimony tending to show that the guard rail was in good condition and suitable for the purpose for which it was intended at the date of the lease.

It is contended upon this appeal that the defendant's motion for a nonsuit should have been granted, and, further, that the judgment against the defendant is unwarranted by the facts.

[1] While the complaint alleges negligence on the part of the defendant in maintaining a defective guard rail during all the period of time elapsing between the execution of the lease until the date of the death of the deceased, there is nothing in the complaint alleging, nor is there anything in the record showing or tending to show, either fraud or concealment on the part of the defendant at any time. If the allegations of the complaint are true, a clear case of obvious defects is established, even though it is alleged that the deceased was unaware of such defects. The complaint does not allege any latent defects, but is based solely upon the fact of the continuing defects which we have mentioned, and the lack of knowledge thereof on the part of the deceased. The complaint omits mention of the fact that the premises in question, including the porch and stairway, were under lease to the Odd Fellows' Lodge, of which the defendant was a member, but apparently counts upon the fact that the Broadway hall, as alleged in paragraph 4 of the complaint, was "used for human occupancy and at divers times and with great frequency during said period of time last aforesaid, with defendant's knowledge, consent and permission, divers persons gathered, assembled and met therein, and public and semipublic gatherings, audiences, meetings, congregations, and assemblages of human beings were, with defendant's knowledge, consent, permission, and approval, had and held in said rooms, compartments, apartments, and/or halls on said second story or upper floor of said Broadway building," and invokes the rule applicable to injuries of third persons where the premises have been leased for amusement or public purposes. That the lessee may have let the premises for some public purpose or purposes does not alter the situation here. The premises were leased to the Odd Fellows' Lodge, of which the deceased was a member, which renders all members of the Odd Fellows' Lodge leasing the premises tenants under obligation to repair the premises and keep the same in good condition. This is not a case involving injury to any one other than a tenant, and we need not discuss the law relative to the rights of third persons where halls leased for amusement or public purposes, in fact, may be involved. The lessee in this case was a private fraternal organization composed of a limited, known, and accepted membership, each one having equal rights and liabilities, and the hall was not a place and was not at the time

used as a place for the assembling of the general public. This is not a case of the visiting by a patron of a public amusement place, but is a case of a use thereof, which was for the private convenience of the tenants for a limited purpose. If it were a case where the premises were leased for a public use, then the rule would apply that the lessor of property intended for a public use is not liable for injuries received on account of the defect in that portion of the premises intended only for private use. There is nothing in the record in this case that shows that the back stairs and balcony were intended for public use, in the sense of the word in which that word is ever used in applying to a place or premises leased for public or amusement purposes. The wide stairway leading from Broadway street is shown to be the only one intended for general use in reaching the hall in question, irrespective of the purpose for which the hall at the particular time was being used. See note to *Morong v. Spofford*, L. R. A. 1915B, 387.

[2] That the leasing of premises to a lodge does not bring it under the rule applying to injuries arising where the premises are leased for amusement purposes, see note to *Feeley v. Doyle*, L. R. A. 1916F, pp. 1123-1129. See, also, *Jordan v. Sullivan*, 181 Mass. 348, 63 N. E. 909, in which the action was based upon an allegation of a failure to properly light the entrance of a public hall, and the defendant was injured by falling over a step therein. The Supreme Court of Massachusetts thus states the law. We quote from the syllabus:

"Where an owner of a building let a hall for the installation of a lodge, agreeing to light and heat the same, and a party, in entering the building to attend the ceremonies, fell, and was injured, owing to the insufficient lighting of the entrance thereto, she could not recover for her injury from the owner, being at most an invited guest of the lodge, and as such having only the rights against the owner which the lodge itself would have had, and the lodge not having any right to complain that a gas jet should have been put in to light the entrance, it having rented the building without such jet being in."

[3] The allegations of the complaint setting forth the substance of section 1941 of the Civil Code that the building was intended for human occupation does not present a situation where the common law in relation to the duties and liabilities of landlords to tenants does not apply. As set forth in 15 Cal. Jur. 704:

"In the absence of fraud, concealment, or covenant in the lease, a landlord is not liable to a tenant for injuries due to the defective condition or faulty construction of the demised premises. This is the rule at common law, and it has not been changed by section 1941 of the Civil Code." *Willson v. Treadwell*, 81 Cal. 58, 22 P. 304; *Van Every v. Ogg*, 59 Cal. 563.

In *Gately v. Campbell*, 124 Cal. 520, 57 P. 567, the Supreme Court, having to do with a similar question, thus states the law:

"The controlling question left in this case is whether or not the landlord, in the absence of fraud, concealment, or covenant in the lease, is liable to the tenant for an injury suffered by him during his occupancy by reason of the defective condition or faulty construction of the leased premises. At the common law the lessor is not liable for such injury. *Keates v. Earl of Cadogan*, 10 C. B. 591; *Howard v. Doolittle*, 3 Duer [10 N. Y. Super. Ct.] 464; *Taylor on Landlord and Tenant*, §§ 175a, 382. And this court has often laid down the same rule. *Brewster v. De Fremery*, 33 Cal. 341; *Van Every v. Ogg*, 59 Cal. 565; *Sieber v. Blanc*, 76 Cal. 173 [18 P. 260]; *Willson v. Treadwell*, 81 Cal. 58 [22 P. 304]; *Daley v. Quick*, 99 Cal. 181 [33 P. 589]."

In *Robinson v. Leighton*, 122 Me. 309, 119 A. 809, 30 A. L. R. 1386, a case involving liability between landlord and tenant, the rule is similarly stated as follows:

"A rule similar to that of caveat emptor applying, it certainly may be defined as a general proposition applicable to premises actually let, that the lessor, in his relation to the lessee, does not warrant their condition, and that he is not liable for any injury suffered by the tenant during his occupancy by reason of defects. There must be proof of exceptional circumstances to make the landlord liable in such cases; some proof of fraud or misrepresentation, or direct concealment of a fact known to the lessor, which the lessee did not have any reasonable opportunity of discovering. There must be proof of some direct omission by the lessor, of the performance of a duty which he owed to the lessee, in order to make the landlord liable. *Libbey v. Tolford*, 48 Me. 316, 77 Am. Dec. 229; *McKenzie v. Cheetham*, 83 Me. 543, 22 A. 469; *Whitmore v. Orono P. & P. Co.*, 91 Me. 297, 39 A. 1032, 40 L. R. A. 377, 64 Am. St. Rep. 229; *Bennett v. Sullivan*, 100 Me. 118, 60 A. 886; *Hill v. Day*, 108 Me. 467, 81 A. 581, Ann. Cas. 1913C, 971."

In the note to *Hill v. Day*, Ann. Cas. 1913C, 971, following the decision in that case setting forth the rule in accordance with what has been said, in commentator used the following language:

"It is held in the reported case that unless there is an express covenant, the lessor does not warrant that the premises are fit for use and he is not obliged to keep them in repair, 'but the tenant, on the principle of caveat emptor, and in the absence of any fraud on the part of the landlord, takes the property in the actual condition in which he finds it,' and therefore the plaintiff cannot recover damages for personal injuries caused by the fall of a ceiling. The case of *Kabus v. Frost*, 50 N. Y. Super. Ct. 72, supports the principle laid down in the reported case. In that case it appeared that a written lease provided for certain repairs, but there was no reference made as to repairing the ceiling. The plaintiff brought an action to recover damages for personal injuries caused by the fall of the ceiling, and the court, dismissing the action, said: 'There is no implied warranty or obligation on the part of the landlord that the premises were in a safe condition for use, or that they would not become unsafe.' See, also,

Ross v. Pizer, 132 App. Div. 696, 117 N. Y. S. 404; Miller v. Rinaldo, 21 Misc. Rep. 470, 47 N. Y. S. 636; Kennedy v. Fay, 31 Misc. Rep. 776, 65 N. Y. S. 202; Garcewich v. Ascherman [Sup.] 129 N. Y. S. 418."

[4] In the case at bar there is not only an absence of a covenant to repair, but an express covenant in the lease that the tenant shall make all repairs and that the landlord shall not be called upon to make any repairs during the continuance of the lease. The implied knowledge of the defective condition on the part of the landlord in this case is supported by the argument that an examination would have readily disclosed the condition of the guard rail and the necessity for repairs. This, however, does not change the situation. In *Toner v. Meussdorffer*, 123 Cal. 462, 56 P. 39, the court, speaking through Justice Temple, answers said argument:

"The assertion is little more than what would be called simplex commendatio, rather than a representation, had defendants themselves been the landlords. The duty of making an examination rested as much upon the lessee as upon the landlord, and to all such transactions the rule of caveat emptor applies. It is not averred that the lessee abstained from making an examination because of the representations, and clearly he would not have been justified in refraining from so doing in reliance upon such an assertion."

In *Daley v. Quick*, 99 Cal. 179, 33 P. 859, the court quoted from *Baxter v. Roberts*, 44 Cal. 187, 13 Am. Rep. 160, and sets forth the duty of the lessee to make an examination, as follows:

"It is as much the duty of the lessee to satisfy himself that the premises are safe as it is of the lessor to make them so; and when it would appear from an examination, such as an ordinarily prudent man would make before venturing to reside in or upon the premises, that they were unsafe, and the defect rendering them so discernible, the lessee is presumed to have had notice of such defect and accepted the risks incident thereto if he occupies the premises."

From the fact that the deceased was a member of the tenant lodge and thus one of the tenants, we do not deem it necessary to discuss or review the cases having to do with injuries sustained by third persons, and, also, in view of the further fact that the landlord surrendered control of the platform and stairway to the lessee, it is not necessary to review the cases relating to the landlord's liability under such circumstances. We will, however, cite a few of the cases having to do with the misuse of platforms and guard rails in cases where the landlord actually retains control. In the case of *Kelley v. Lawrence*, 195 Mo. 75, 92 S. W. 1158, where a servant was injured by leaning against the guard rail along the side of a four-foot viaduct which was used as a passageway, the court considered the question in this manner:

"The floor of this viaduct was four feet wide, and it was such floor that was designed as the passageway or walkway for the use of employees in going to the buggy room or returning therefrom, and so long as plaintiff was walking upon this floorway or standing upon it he was entirely safe, and it was not until he undertook to improperly use the banister or railing which were placed on either side of this walk, for a purpose for which such banister or railing was not intended or designed, that he was in any danger of being injured. That this railing or banister on either side of this viaduct was not placed there to be used as a seat or resting place for employees in using such viaduct, is too plain for discussion. No one will seriously contend that in the placing of that railing or banister on either side of the viaduct that it was designed for any other purpose than simply a guard rail and to prevent those who should use the viaduct in an ordinarily careful manner from being hurt."

In that case the plaintiff and another person started to cross the viaduct, and after proceeding a short distance stopped, engaged in conversation, and the plaintiff started to sit down on the railing, which gave way and precipitated him to the ground beneath, causing serious injuries, for which suit was instituted. It was held that the defendants were not liable. In *Offutt v. O'Leary*, 204 Ky. 726, 265 S. W. 296, the Supreme Court of Missouri states the rule as to the use of premises for a different one than intended, as follows:

"It is equally clear that the liability of the landlord does not extend to injuries occasioned by defects in the portions of the premises not intended to be used as an entrance, exit, or passageway. * * * This rule would not, however, apply to a hidden defect so contiguous to a path as to form a trap for the unwary traveler using it in the ordinary manner."

To the same effect is *Morong v. Spofford*, 218 Mass. 50, 105 N. E. 454, L. R. A. 1915B, 387, where the injured person used a back stairway instead of a front stairway, which was the one provided for giving access to the part of the building sought to be entered. In the case of *Pavlovchik v. Lupariello*, 101 Conn. 567, 127 A. 18, the testimony showed that a woman weighing 200 pounds leaned forward at the edge of a porch against a railing and pulled on a clothesline. The railing gave way, and the plaintiff fell and was injured. The landlord was held not liable by reason of the misuse being made of the railing by the plaintiff. In *Glain v. Sparandeo*, 119 Ia. 339, 44 So. 120, the plaintiff attempted to lower a dresser from a platform or balcony at the rear of a building, leaned against a guard rail, which gave way, resulting in a fall and injury to the plaintiff. The defendant was held not liable. In the case of *Kinney v. Onsted*, 113 Mich. 96, 71 N. W. 482, 38 L. R. A. 665, 67 Am. St. Rep. 455, the Supreme Court of Michigan held that the defendant was not liable where the plaintiff had leaned

against a guard rail on a passageway and was injured by reason of the guard rail giving way, on the ground that the plaintiff was putting the guard rail to a use which was not intended. In deciding that case the court refers to the case of *Stickney v. Salem*, 3 Allen, 374, as follows:

"In *Stickney v. Salem* the action was against the city for injuries resulting to deceased caused by leaning against a fence or railing which marked the terminus of the street, and was built upon the top of a seawall. The plaintiff, in company with a friend, had walked to this point to view the sea, had turned his back to and leaned against this railing, which gave way, because of defects, and he received serious injuries. The court says: 'The fact that the railing was defective and would have proved an insufficient barrier in case it became necessary for a traveler to use it for a legitimate object is wholly immaterial. It is a sufficient answer to the plaintiff's case that the defendants were not bound to keep the railing in repair for the purpose for which it was used by the deceased at the time of the accident'"—citing *Orcutt v. Kittery Point Bridge Co.*, 53 Me. 500.

[5, 6] In *Robinson v. Leighton*, supra, the plaintiff was injured in making use of a fire escape in a manner other than that intended and for a purpose other than for which it was constructed. Judgment was for the defendant. The notes to that case collect a number of cases supporting the rule above stated. It thus appears that if the duty had devolved upon the defendant to make repairs to the balcony, stairway, and guard rail, the use at the time of the injury must have been such as was contemplated at the time of the lease and for which the back porch, balcony, and guard rail were constructed. At the time that the guard rail gave way, the witness, Tony Smith, was leaning against one portion thereof. Prior to the time that the deceased stepped forward to give the witness O'Hara a campaign card, both the deceased and the witness Smith had been leaning against the guard rail. Each was standing, as described by a witness, upon one foot, with the other crossed over, and had been in such position for some minutes, when two others appeared upon the porch and the deceased was introduced to O'Hara and again stepped back to the railing. Just what force was exerted by him against the railing does not appear. The witness Smith does state that they were not leaning heavily against the railing, and that the deceased did not sit down upon the railing. The weight of the witness Smith does not appear in the record further than he is stated to be a man of average weight. The weight of the deceased was given at between 225 and 260 pounds. It thus appears that two men weighing together in the neighborhood of 400 pounds were standing leaning against the railing for some minutes, that one of them remained leaning against the rail until it gave

way, and that the other stepped back against it just preceding the instant of time when the railing broke loose. Irrespective of the actual pressure exerted by the two men against the railing, it is clear that the guard rail was not intended to be used for leaning against, nor was the platform or balcony erected as a place to be used for lounging or social purposes.

[7] Where it is shown that a back porch or balcony is being used for the purpose for which the same was erected, then the weight or pressure brought against a guard rail as to whether it was reasonable or unreasonable, or any greater than should have been anticipated, becomes purely a question for the jury; also, in cases where there is any conflict in the evidence as to whether the intended and contemplated use is being made of the stairway and balcony. The facts appearing in the transcript, in view of the law which we have cited, show that the defendant's motion for a nonsuit in this case should have been granted. The appellant argues error on the part of the trial court in the giving and refusing of instructions. As the judgment must be reversed, from the fact that we have fully set forth the law applicable to this case, it becomes unnecessary to review each assignment of error. However, in view of what we have said, we think the trial court will experience no difficulty as to any further questions relating to instructions. The judgment is reversed.

We concur: FINCH, P. J.; HART, J.

77 Cal. App. 556

WALLACE v. CLOTHIER.

(District Court of Appeal, First District, Division 2, California. April 24, 1926.)

1. Divorce $\S$ 127(4)—Considerable number of important and material facts relied on by plaintiff in divorce action must be corroborated, although it is not necessary that there be corroboration of every act testified to (Civ. Code, $\S$ 130).

Under Civ. Code, $\S$ 130, providing divorce may not be granted on uncorroborated testimony of parties, there must be corroboration of considerable number of important and material facts relied on, although it is not necessary to have corroboration of every act testified to by plaintiff.

2. Divorce $\S$ 127(3).

Uncorroborated testimony of plaintiff in divorce action as to cruelty and desertion held insufficient under Civ. Code, $\S$ 130.

Appeal from Superior Court, Los Angeles County; Walter J. Wood, Judge.

Action for divorce by Albert C. Clothier against Flora M. Clothier; R. Boyd Wallace,

guardian of Albert C. Clothier being substituted as plaintiff on plaintiff's being declared incompetent. Interlocutory decree of divorce, and defendant appeals. Reversed.

J. W. Satterwhite, of Los Angeles, for appellant.

D. H. Donnelly, of Stafford, Kan., for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment granting the plaintiff a divorce. Since the interlocutory decree of divorce was entered, plaintiff has been judicially declared to be an incompetent person, and his guardian has been substituted in his place and stead in this action.

[1, 2] Appellant contends that the record contains no corroboration of the plaintiff's testimony upon which the divorce was granted. A reading of the record convinces us of the correctness of this contention. The plaintiff testified that, just prior to the separation of himself and wife, they were living together at Long Beach, Cal. He was not working because of illness and had never worked during the period of the marriage. His wife assisted in maintaining the household by keeping boarders and taking in washing. One of these boarders was a man named Miller. Mrs. Clothier sold the house in which they were living, and, when she was about to move, she asked her husband to make arrangements for hauling the furniture. He did so, protesting that he did not wish Miller to continue as a boarder or move into the new house. Mrs. Clothier said Miller was to move with them, and, according to plaintiff, suggested that Mr. Clothier might go elsewhere. The separation occurred at this time. Plaintiff testified to several other incidents which would have had a cumulative value in sustaining his case had they been corroborated; but they were not corroborated. On the other hand, defendant contradicted plaintiff's testimony in all important particulars, and was corroborated in her statements that plaintiff used intoxicating liquors to excess over a long period of time. The trial judge appreciated the weakness of plaintiff's case, and several times during the trial impressed upon the parties that there was no corroborating evidence of either cruelty or desertion, the offenses alleged. The matter was finally taken under advisement by the court, and the decree granted. Section 130, Civil Code, provides that a divorce may not be granted upon the uncorroborated testimony of the parties, and the decisions in this state, while holding that it is not necessary that there be corroboration of every act testified to by the plaintiff, nevertheless lay down the rule that there must be corroboration of a considerable number of important and material facts relied upon. Avery v. Avery, 148 Cal. 239, 82 P. 967; Blanchard v.

Blanchard, 10 Cal. App. 203, 101 P. 536; Johnston v. Johnston, 17 Cal. App. 241, 119 P. 403; Percy v. Percy, 188 Cal. 765, 207 P. 369. The record in the instant case does not meet this test.

The judgment is reversed.

We concur: NOURSE, J.; STURTEVANT, J.

77 Cal. App. 535

GOLDBERG, BOWEN & CO. v. DEMICK
et al. (Civ. 5215.)

(District Court of Appeal, First District, Division 1, California. April 23, 1926. Hearing Denied by Supreme Court June 21, 1926.)

1. Limitation of actions $\S$ 172—Parties claiming through grantee of fraudulent conveyance cannot set up statute of limitations, after being joined as parties to suit by defrauded creditor to subject property to judgment against grantor.

Parties claiming through grantee of fraudulent conveyance cannot raise question of limitations, after being joined as parties to defrauded creditor's action to subject property to satisfaction of judgment, not being parties to original action, nor related, by privity or otherwise, to grantor, who owed them nothing.

2. Limitation of actions $\S$ 173, 175.

Statute of limitations is plea personal to debtor, who may waive it.

3. Fraudulent conveyances $\S$ 181(1)—Grantee takes grantor's interest, qualified only by interest of grantor's defrauded creditors, and is entitled to surplus after satisfaction of their claims.

Grantee takes grantor's interest in property, qualified only by interest of grantor's creditors, as to whom conveyance was fraudulent, and is ordinarily entitled to surplus after satisfaction of their claims.

4. Fraudulent conveyances $\S$ 179(2)—Limitation of actions $\S$ 172.

Creditors of grantee under fraudulent conveyance may reach his interest by execution and plead limitations for him, in suit by grantor's defrauded creditor to subject property to judgment against grantor.

5. Limitation of actions $\S$ 172—Grantee's creditors, after conveyance of his interest, and grantor's acquisition thereof as owner of corporation succeeding to it, could not plead statute for grantee, in suit by grantor's defrauded creditor to subject property to judgment against grantor.

Where grantee conveyed interest acquired, and grantor secured it by reason of his ownership of corporation which succeeded to it, grantee's creditors had no interest, and could not plead statute for him, in suit by grantor's defrauded creditor to subject property to judgment against grantor.

6. Trusts $\Leftrightarrow$ 95—Grantee acquiring record title after conveying interest by virtue of directorate in defunct corporation, which took over grantor's property, and allowing forfeiture of mining claims, which he subsequently relocated without aid of funds advanced by grantor for assessment work, was mere trustee for grantor, and creditor, knowing of claim of grantor's creditor, could not subject property to grantee's debts.

Where grantee, after conveying his interest in property, acquired record title as statutory trustee by virtue of directorate in defunct corporation, formed to take over grantor's property, and failed to perform assessment work on mining claims for purpose of allowing forfeiture, after which he relocated them, with aid of funds advanced by grantor for assessment work, in name of one who subsequently conveyed them to him, he was mere trustee for grantor, and his creditor, having full knowledge of claim of grantor's creditor, could not subject property to grantee's debts.

7. Execution $\Leftrightarrow$ 265—Purchaser at execution sale of property held by judgment debtor as mere trustee took no title.

Purchaser at execution sale under judgment against debtor holding record title as mere trustee for another took no title, as such purchasers take only debtor's title.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by Goldberg, Bowen & Co., a corporation, against J. K. Demick, H. H. Blood, the Security Trust Company, and others. From a judgment quieting title of defendant Blood in certain mining claims, defendants Trust Company and others appeal. Affirmed.

J. W. Wiley and Wiley & Harvey, all of Bakersfield, for appellants.

Mervyn R. Dowd and Dowd & Reagh, all of San Francisco, for respondent.

TYLER, P. J. This action is one brought to set aside certain conveyances of real property claimed to have been made for the purpose of defrauding creditors. It is in the nature of a creditors' bill in equity.

The record is involved and voluminous, and contains many facts which do not affect the questions here presented. We will therefore confine ourselves to a recital of such facts only as are necessary to discuss the points relied upon for a reversal.

On November 1, 1907, defendants Demick and Blood executed certain promissory notes to plaintiff, Goldberg, Bowen & Co., a corporation. These notes were subsequently merged in a judgment rendered in the superior court of the city and county of San Francisco on December 22, 1911, which was for the sum of \$3,094.08 and costs. An appeal was taken therefrom, but the judgment was affirmed February 8, 1915, and a remittitur was issued to the court below 30 days thereafter. For some unexplained reason, but probably for failure to pay the fee, the remittitur was not filed by the clerk until

September 16, 1919. On March 6, 1919, less than 5 years after the affirmance of the judgment, an execution was issued out of the superior court, which was subsequently returned wholly unsatisfied. On November 8, 1919, an alias execution was issued to the sheriff of Kern county, but no return was ever made thereon. Thereafter, in November, 1919, supplementary proceedings were had under section 715, Code of Civil Procedure, at which time defendant H. H. Blood was examined, but the hearing failed to disclose the ownership of any property in him, and the order of examination was discharged. The examination did reveal, however, that he had disposed of his property through mesne conveyances to a corporation known as the Sterling Development Company. Blood was the president of this corporation, and owned all of its stock. Plaintiff thereupon, on the 28th day of March, 1921, commenced this action against such corporation and the other defendants, among whom was C. C. Little and his wife, to obtain a decree establishing and determining that certain mining claims, the property here involved, held by them belonged to defendant Blood, and had fraudulently been conveyed by him to Little and by mesne conveyances to the corporation to defeat plaintiff's judgment. A lis pendens was recorded against the mining property. After the filing of this complaint, and on June 8, 1921, another corporation known as the Security Trust Company, a defendant herein, recovered a judgment against Little for the sum of \$3,462, and on the 6th day of December following it sold the mining claims to defendant Lee Rankin. On March 30, 1922, plaintiff herein filed an amended complaint joining appellants and the mining claims sold by the sheriff to defendant Lee Rankin as parties to the action.

The prayer of the amended complaint was that the conveyance by Blood to Little be declared fraudulent, and that Rankin be decreed to have no interest against the plaintiff or defendant Blood by reason of any certificate of sale or deed which defendant Rankin may have acquired at the sheriff's sale, and that Blood be decreed to be the owner of the property and entitled to the possession; that Rankin be required to surrender such possession unto defendant Blood.

To this complaint the appellants filed a general denial. They also set up the defense that the cause of action against them, if any, was barred by the statute of limitations. The other defendants, including Blood and Little, defaulted. The trial court found, in substance, that the Littles were relatives of Blood and his confidants in all of his business transactions; that shortly after the time of the commencement of the original action the Sterling Development Company, a corporation, was formed with Blood as its president, for the purpose of holding all the

assets of Blood; that all of the stock in the corporation was owned by him; that prior to the formation of the corporation, and after the commencement by plaintiff of their original action, Blood had conveyed the mining property to C. C. Little; that Little conveyed the same to Blood's attorney, who, in turn, conveyed to the Sterling Development Company; that this corporation forfeited its charter for failure to pay its franchise and license taxes; that the property of the corporation was thereafter held by Blood, Little, and others as trustees; that the transfer by Blood to the corporation of his assets was made without consideration, and for the specific purpose of defrauding plaintiffs. It further found that, after the corporation mentioned had forfeited its charter, Blood sent to C. C. Little the sum of \$1,700 to be utilized by him in performing assessment work on the mining claims; that Little failed to perform the work; and that his purpose in so doing was to allow the claims to be forfeited, so that the same could be relocated; that Little induced defendant Raney, who was his uncle, to relocate the claims, which he did, and subsequently delivered to Little a quitclaim deed to the same. Under these circumstances the court found that Little held the property as trustee of the defunct Sterling Development Company in trust for the creditors of Blood. Other findings are to the effect that the claims of Rankin and the judgment of the Security Trust Company arose subsequent to the filing of plaintiff's complaint. In conformity with these findings it was ordered that the conveyance by Blood to Little, made to defraud his creditors, be canceled, and it was also ordered that the conveyances made under the execution sale to Lee Rankin be likewise canceled. From the judgment quieting the title of Blood in the mining claims, the appellants Security Trust Company, Lee Rankin, W. A. Rankin, and the sheriff, D. B. Newell, who made the sale, have appealed. No appeal has been taken by Blood or any of the other defendants; they having defaulted.

The point relied upon for a reversal of the judgment is that the executions issued out of the superior court of San Francisco in the original judgment were void, and had no force or validity, for the reason that they were issued after the expiration of 5 years from the docketing of such judgment. In support of this claim it is argued that, since the execution of the judgment had not been stayed pending appeal, and since more than 5 years had elapsed from its docketing, it could only be carried in force by leave of the court upon motion made under the provisions of section 685 of the Code of Civil Procedure, and, no such motion having been made, the judgment obtained by plaintiff against Blood and Demick had no force or validity at the time of the commencement of this action.

[1-4] We do not think that we are at all

here concerned with any question relating to the statute of limitations, for we are of the opinion that appellants are in no position to raise any such question. They were not parties to the original action, nor were they in any manner concerned therewith. Blood was never indebted to any of the appellants. The judgment obtained by the Security Trust Company was against Little. The statute of limitations is a plea personal to the debtor which he may use or waive as he pleases. It is true that, where some privity exists between parties, a different question may be presented. But the facts here involved, as we understand them, present no such question. The action was one against Blood by his creditor to subject certain property fraudulently conveyed by him to the satisfaction of a judgment secured by such creditor against Blood. Appellants herein are in no manner related to Blood by privity, nor in any manner whatsoever, as he at no time owed them anything. Blood failed to plead the statute of limitations against this action, but he was under no legal obligation to do so on behalf of appellants, for he owed them nothing. This being so, appellants who claim through Little are in no manner concerned with any plea that Blood may or may not have made. It is none of their affair so far as he is concerned. The only manner in which they might be affected is through their relation to Little. As a grantee under the fraudulent conveyance, Little took whatever interest Blood had in the property, as the conveyance to him was perfectly valid. *Huellmantel v. Huellmantel*, 49 P. 574, 117 Cal. 407. The interest that he acquired was limited or qualified only by the interest of the creditors of Blood; the conveyance as to them being fraudulent. As to them only, his interest was subordinate. If, after their claims were satisfied, there remained any surplus, Little would ordinarily be entitled to that surplus. *Loosemore v. Baker*, 166 P. 26, 175 Cal. 420; *Estate of Vance*, 75 P. 323, 141 Cal. 624. And this interest was one that his creditors might reach by execution, for as to this interest they might be said to stand in his shoes by relation or privity, and, if he failed to plead the statute, they might do so for him. *Brown v. Campbell*, 35 P. 433, 100 Cal. 635, 38 Am. St. Rep. 314.

[5-7] But at the time this action was brought Little had some 10 years previously, as above recited, conveyed whatever interest he may have acquired under the fraudulent conveyance, and the defendant Blood had secured the same by reason of his ownership of the Sterling Development Company which succeeded to the interest. At the time this action was commenced, Little owned no interest whatsoever. The interest which he acquired under the fraudulent conveyance had passed out of his hands, and no question is here raised concerning the validity of Little's transfer. So far, therefore, as this in-

terest was concerned, Little having none at the time of this suit, his creditors had none by relation to him, and they could not interpose the statute in his behalf. Having none against Blood, they could not therefore plead the statute on behalf of any one. At the time of the commencement of this action, however, the property stood in the name of Little. This record title was acquired by him in the following manner: Little was chosen by Blood as one of the directors of the Sterling Development Company which was formed to take over the title to all of Blood's property. That company failed to pay its license and franchise tax, and in consequence became a defunct corporation, resulting in Little's acquiring an interest in its property as one of the statutory trustees to wind up its affairs. Thereafter, in December, 1916, Blood sent the sum of \$1,700 to his nephew, Little, to perform certain assessment work on the mining claims. Little received this sum, but failed to perform the work within the time required by law, with the express and fraudulent purpose of allowing title to the claims to become forfeited, and he thereafter, in the following year, with the aid of the funds so advanced, caused the property to be relocated in the name of his uncle J. E. Raney. Thereafter, in 1918, Raney conveyed the claims by a quitclaim deed to Little. In June, 1921, appellant Security Trust Company obtained its judgment against Little, and levied upon and sold under execution the property so acquired by Little as trustee. At this time, and long prior thereto, the trust company had full knowledge of plaintiff's claim to the property by reason of its action against Blood and the lis pendens which was recorded. Under these circumstances the trial court found that the judgment of the trust company was subordinate to plaintiff's claim, and that Little was a mere trustee of defendant Blood. The interest of Little in the property being that of a mere naked trustee, of which fact the trust company had notice, it was not subject to the debts of Little, and could not be reached or affected by any act of his creditors. *De Cellis v. Porter*, 59 Cal. 464. This being so, the purchaser at the execution sale took no title to the property, as purchasers at such sales take only the title the debtor has; no more, no less. 16 R. C. L. 138.

Under all the circumstances of the case, the trial court rightfully held that title to the property was in Blood and not in Little, and, this being so, the defense relied upon by appellants is one that they are in no position to make. They being complete strangers to Blood, they are not concerned with any defense that he might or might not make. There is no merit in the appeal.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

DETWILER v. CLUNE (two cases).
(Civ. 4444, 4316.)

(District Court of Appeal, Second District, Division 1, California. April 26, 1926. Rehearing Denied May 26, 1926. Hearing Denied by Supreme Court June 24, 1926.)

1. Contracts — 309(1).

Obligation is discharged where performance depends on happening of event over which neither party has control and which never occurs, or on existence of specific fund not realized.

2. Joint adventures — 5(2).

In action on contract providing for payment out of net profits of a venture, complaint fails to state cause of action unless it alleges profits were realized.

3. Money received — 6(4)—If by promisor's fault consideration paid to him wholly fails, payment may be recovered.

Damages for some failure in performance of express contract is limited to loss sustained by breach, but if, by promisor's fault, consideration paid to him wholly fails, payment may be recovered.

4. Corporations — 30(1) — Conditions under which contracts were obtained, and methods used by defendant, held to impose on him responsibilities of promoter of corporation.

Conditions under which contracts, whereby plaintiff and his assignors contributed to cost of motion picture film and were to share in profits and receive stock when corporation was formed, were obtained, and methods used by defendant to obtain subscriptions, held to impose on him responsibilities of promoter in formation of proposed corporation.

5. Corporations — 30(1)—Promoter held obligated to retain property rights which were to constitute principal assets of proposed corporation, to organize corporation within reasonable time, and turn over such rights to it.

Producer of motion picture film, who received contributions to its cost under agreement that contributors should share in profits, and receive stock in corporation when formed, held obligated to retain in his hands rights in such picture which were to constitute principal assets of corporation, to cause corporation to be organized within reasonable time, and to transfer such rights to it, and his transfer thereof to others was breach of contract which could not be made good by his subsequent belated offer to organize corporation at time when he no longer owned all of such rights.

6. Money received — 6(4)—Where there is total failure of consideration, law raises promise to repay money received without previous request.

Where there is total failure of consideration for which money was paid, law raises promise by receiver to repay it without any previous request.

7. Judgment — 585(1), 713(1).

Judgment may be used as bar to action of identical nature or as an estoppel to proof of any fact established thereby.

8. Judgment ~~587~~—Judgment in action to rescind contract adverse to plaintiff held bar to action by same plaintiff to recover amount paid on contract on theory of failure of consideration (Code Civ. Proc. § 580; Civ. Code, § 1689).

In view of Code Civ. Proc. § 580, and Civ. Code, § 1689, judgment in action to rescind contract which determined issues of fraud and failure of consideration adversely to plaintiff, barred subsequent action by same plaintiff to recover money paid on such contract on theory of failure of consideration.

Appeals from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by A. K. Detwiler against W. H. Clune for damages for breach of contract. From a judgment for plaintiff not granting all the relief demanded in the complaint, both parties appeal. Affirmed.

Hearing denied by Supreme Court; CONREY, Justice pro tem., not participating.

Hunsaker, Britt & Cosgrove, of Los Angeles, for plaintiff.

Nathan Newby, of Los Angeles, for defendant.

CONREY, P. J. These are appeals by the several parties from one and the same judgment. The defendant appeals from all of the judgment "except that portion of said judgment in favor of the defendant and against the plaintiff as to the first and second counts of the complaint therein, alleging causes of action in favor of the plaintiff on his personal claim against said defendant." The plaintiff appeals from that part of the judgment which was excepted from the defendant's appeal; that is to say, that part of the judgment which reads as follows:

"It is further ordered, adjudged, and decreed that the causes of action alleged by plaintiff in the first and second counts of his complaint herein, and therein alleged to have accrued to him in virtue of sundry transactions between himself personally and the said defendant, are barred by the force and effect of the judgment in the former action (No. B-50816 in the clerk's register of actions in this court) wherein the said A. K. Detwiler was plaintiff and said W. H. Clune was defendant, which judgment was duly entered in that action on the 4th day of June, 1918, in favor of the defendant therein, and against the said plaintiff, and that the plaintiff in the present action take nothing by reason of the causes of action alleged in the said first count and in the said second count of his complaint in the present action, respectively."

The judgment in the present action was entered on the 31st day of October, 1921, and the action itself was commenced by the filing of the complaint on the 11th day of July, 1919.

The causes of action of the plaintiff are set out in sixteen separate counts of the

complaint. Eight of these counts are alternative (common count) forms of pleading of the several demands stated in the odd-numbered counts. The first two counts are based upon a contract of date November 22, 1915, made between plaintiff and defendant. The others consist of assigned causes of action arising out of similar contracts made between the defendant and persons other than the plaintiff.

It is alleged in the complaint that theretofore, between the 1st day of August, 1915, and the 1st day of February, 1916, the defendant was engaged in promoting the production and manufacture of a motion picture film called "Ramona," and in promoting the formation and organization of a corporation for the purpose of owning the negative of said film and exhibiting prints thereof, and effecting the sale of stock in such corporation. The contract between the plaintiff and defendant was in writing, as follows:

"Los Angeles, Cal., 11-12-15.

"Ramona to cost about \$55,000.00.

"A limited number of investors—all to share alike. Investors to receive their money back, dollar for dollar, first out of net profit. California alone should pay investors back. Investors to receive 60 per cent. of net profit after receiving original investment back. Investors to own Ramona motion picture negative for entire world. Ramona should make a minimum profit of \$400,000 in the entire world.

"Respectfully,

W. H. Clune.

"Received from A. K. Detwiler \$2,500 (twenty-five hundred dollars) to be applied towards the complete making of the moving picture production Ramona. When Ramona corporation is perfected, A. K. Detwiler receives his pro rata of stock; the same being based on the amount of money herein subscribed.

"[Signed] W. H. Clune."

Generally speaking, the other contracts were made under similar circumstances and in like terms as the contract with the plaintiff. But the Crisp contract (count 15) and two of the Poole contracts (amended count 13) did not contain the closing sentence, "when Ramona corporation is perfected," etc. The effect of this omission as to those contracts will be considered later herein. The expected cost of the picture, as stated in four of the contracts, was \$55,000, and in the others was stated in varying sums, running from \$40,000 up to \$90,000. In its findings the court determined that it was the true intent and meaning of the terms of each of these several contracts that the defendant would form and perfect a corporation, for the purpose of owning said motion picture film and the negative thereof and exhibiting prints of the same, and would cause stock in such corporation to be issued to the several persons with whom the contracts were made, proportionate to the amounts of money paid to the defendant by said investors respectively,

as shown by the terms of the said several contracts.

The court further found that no part of the said several sums of money has been repaid to the plaintiff or his assignors, except certain small sums specified in the findings, and that defendant has never paid to any of said persons any part of the net profits, but no net profits of the production or exhibition of said motion picture were made or derived by defendant before this action was begun; and defendant has never caused plaintiff or any of his assignors to own any interest in the Ramona picture negative. The proposed corporation never was formed.

The court found that the plaintiff and his assignors, respectively, have sustained damages in the several stated sums set forth in the findings, and accordingly caused to be entered a judgment against the defendant for the several amounts which the plaintiff was found to be entitled to recover, viz. the unpaid balances of moneys paid to the defendant.

Concerning the demand of the plaintiff arising out of his own contract with the defendant as set out in the first and second counts of the complaint, the court held that, by reason of the effect of the judgment entered on June 4, 1918, in the above-mentioned action No. B-50316, which was pleaded by defendant as another and further defense to the plaintiff's action in the present case, the plaintiff could not recover on these counts of his complaint. Said action No. B-50316 was an action in which Detwiler as plaintiff sued Clune as defendant to enforce an attempted rescission by Detwiler of said contract of November 22, 1915. Judgment in that action having been entered in favor of the defendant Clune he pleaded the same in bar of plaintiff's demand upon his contract in this action.

We will take up these appeals in their order, giving prior consideration to the case (Civil No. 4444) in which defendant, Clune, is appellant.

[1, 2] The argument on behalf of appellant, Clune, is based chiefly upon the claim that the only obligation assumed by him in favor of Detwiler and his assignors was the obligation created by his promise that they should be repaid out of the net profits of the enterprise, and should further share in those profits, and upon the fact that there were no net profits. From these premises it is quite logically argued that the plaintiff has not established any right of recovery herein. The rule undoubtedly is, as stated by counsel, that where the performance of an agreement depends upon the happening of an event over which neither party has control, or upon the existence of a specific fund, and where the contingent event does not occur or the fund is not realized, then the obligation is discharged. And in less general terms, it

must be accepted as true that in an action upon a contract providing for payment out of net profits of a venture, the complaint fails to state a cause of action unless it is alleged therein that such profits were in fact realized.

[3] Having thus maintained, at least to their own satisfaction, that no cause of action was alleged or proved in relation to the counts upon the express contracts, counsel for appellant, Clune, further contend that the plaintiff has likewise failed to establish any right of recovery upon the counts which rest in assumpsit. The contention is that, since in each instance there was a specific contract, that contract limits the measure of damages that may be recovered. Without doubt the rule is as stated. 5 Corp. Jur. "Assumpsit," § 91; Palmer v. Guillo, 224 Mass. 1, 112 N. E. 493. And if it were true that the established right of action herein is only a right to recover damages for some failure in the performance of those contracts, then it would follow that the measure of damages is limited by the amount of loss sustained by the breach. But this rule is doubtless subject to the qualification that, where, by fault of the promisor, the consideration paid to him has wholly failed, the amount so paid may be recovered.

The case for the plaintiff, as his counsel seek to maintain it, rests upon a construction of the contracts, wholly different from that of the defendant, and upon breaches of those contracts, amounting to an entire failure of the consideration upon which the money was received by defendant. It is the theory of the plaintiff that, although in the contracts as written there was no direct statement that Clune promised and agreed to form a corporation for the ownership and exhibiting of the picture film, nevertheless the language used in the contracts, when taken together with the circumstances under which the contracts were made, was sufficient to establish the interpretation of the contracts for which the plaintiff contends.

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Civ. Code, § 1636.

"A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Civ. Code, § 1647.

"If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." Civ. Code, § 1649.

"In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party." * * * Civ. Code, § 1654.

In conformity with plaintiff's theory of the action as above indicated, plaintiff in each

of the several counts of the complaint in which the several written contracts were set forth, pleaded the intent and meaning of the terms of the contract as follows:

"It was the true intent and meaning of the terms of said contract, and by its terms the said defendant agreed and undertook that he would form and perfect a corporation for the purpose of owning said motion picture film and the negative thereof and exhibiting prints of the same, and would cause stock in such corporation to be issued to said (naming the investor) proportionate to the amount of money paid by said (naming the investor), as above alleged, estimated at the time of such contract at (naming the alleged proportion) of the total amount of the stock of such corporation."

[4] The findings of the court affirm the truth of these allegations of the complaint. The evidence received in support of the issues thus tendered (all of which were denied by the answer of the defendant) covers very fully the circumstances which led up to the execution of the contracts and the various transactions connected therewith. In July, 1915, defendant, Clune, had entered into an agreement with Little, Brown & Co. of Boston, publishers of the novel called "Ramona," whereby that company granted to Clune the motion picture rights appertaining to the picture (with an exception not material here), and granted to him the exclusive right, license, and privilege to make photographic reproductions of that book and the theme thereof, for the term of the copyright of such book, and with the privilege of exhibiting, licensing, and trafficking in motion pictures thereof throughout the world. Defendant also owned a studio at Los Angeles equipped for the manufacture of motion picture negatives and films. In his testimony, the defendant admitted that he intended that a corporation would be formed to handle the Ramona picture.

Proceeding under the rights thus obtained, defendant, Clune, commenced the manufacture of negatives and films of the proposed motion picture. In order to obtain some of the capital necessary for the enterprise, he undertook to obtain from various persons such sums of money as they were willing to subscribe. It was in connection with this effort to obtain capital for the stated purpose that defendant, Clune, received from the plaintiff and his assignors the several sums of money stated in the complaint, and executed the several written contracts which are set forth in the complaint.

There is evidence quite sufficient to sustain the findings to which we have referred, concerning the meaning and intention of the contracts, as understood by the parties thereto. One or two examples will suffice. In conversation with Ahmed Abdullah, one of plaintiff's assignors, defendant, Clune (so Abdullah testified), recommended to Abdullah to "buy some of this stock," stating that

the picture would cost \$50,000 or \$55,000 at the most, and that, "as soon as the picture completed, we issue stock to the stockholders." Accordingly Abdullah invested by paying money to Clune and by receiving therefor the contract shown in the complaint. Further, Clune said to Abdullah that, if Abdullah had any friends who would buy stock, it was a good thing. Accordingly, Abdullah broached the matter to Flint, another of plaintiff's assignors. "He asked me to go and see Flint right after I bought my stock." The conditions under which the contracts were obtained, and the methods used by defendant to obtain the subscriptions, were clearly sufficient to impose upon him the responsibilities of a promoter in the formation of a proposed corporation. *California-Calaveras Mining Co. v. Walls*, 170 Cal. 285, 149 P. 595.

[5] The position in which defendant, Clune, placed himself, by receiving the money of the "investors" (so designated by him in the contracts, which he prepared), under the circumstances as shown by the evidence, obligated him to retain in his hands, until the formation of the proposed corporation, the property rights which were to constitute the principal assets of that corporation. It was his duty to cause the corporation to be organized within a reasonable time, and to transfer to it the motion picture films and the right to use the same, as granted to him by Little, Brown & Co.

Instead of performing these obligations, the defendant by his voluntary acts, and without consent of the "investors," made such performance impossible. He changed the plan and scope of the work so that the cost of the picture was increased far beyond the amounts of estimated costs which he had represented to the investors. He transferred the picture rights as a whole to the Clune Film Producing Company, a corporation controlled by himself, in which the plaintiff and his assignors had no interest. The Clune Film Producing Company sold and transferred, to various purchasers, territorial rights to exhibit the Ramona picture in several portions of the United States. The subsequent attempted retransfer of the property by the Clune Film Producing Company to Clune was of course not effective to restore to him the rights which had been sold to others. We need not further extend the story of the defendant's conduct in relation to this business. Not only did he make useless the formation of the corporation which he had proposed to organize, but also he made it impossible for the investors to become, in any form, owners of the property and property rights for which they had paid their money to him. By this conduct he breached his contract, and in effect abandoned any attempt to perform the same.

The defendant repaid to the "investors" certain small sums, which he called "divi-

dends." There were not dividends to them as stockholders of a corporation, for the corporation did not exist. They were not dividends or shares in profits of the Ramona picture business, for no such profits ever were made. These payments therefore were nothing else than a partial return of money which the defendant in fact owed, and of which he should have repaid all.

[6] The defendant did make a belated offer to the plaintiff to form a corporation with a capital stock of \$100,000, in \$1 shares, and cause to be issued to plaintiff 2,500 shares. Under the conditions which then existed, this would not have been at all in compliance with the written agreement; nor would it have been of any value to the plaintiff, since the corporation would not have acquired the property which it was to have owned. It was, we conclude, clearly established that there was a total failure of the consideration upon which plaintiff and his assignors paid the several sums paid by them to the plaintiff.

"In such a case, the law raises a promise on the part of the receiver of the money that he will pay it to the person entitled thereto, and that, too, without any previous request." *Mathony v. Standard Gas Engine Co.*, 187 Cal. 399, 405, 202 P. 146, 149; *Gray v. Ellis*, 164 Cal. 481, 129 P. 791.

As has been noted above, the Crisp contract and two of the Poole contracts did not contain the sentence beginning, "When Ramona corporation is perfected," etc. Let it be assumed, therefore, that in those contracts there was no agreement to form a corporation. It remains true, however, that Crisp and Poole, as "investors," were to own an interest in the moving picture production Ramona, no different in its nature from the interest therein of the other investors. As to all of these investors, it was equally true that they received no consideration for the money paid by them.

We pass now to Civil No. 4316, the appeal of the plaintiff. As a separate defense to this action, the defendant alleged "that, on or about the 26th day of February, 1917, the said plaintiff served upon the defendant a notice of rescission of said contract set out in paragraph 1 of the first cause of action in said complaint, and that thereafter, to wit, on the 3d day of May, 1917, the said plaintiff commenced an action in the superior court of the state of California, in and for the county of Los Angeles, wherein A. K. Detwiler was plaintiff and W. H. Clune was defendant, being action No. B-50316, to enforce the said rescission of said contract; that thereafter said action was tried before said superior court and, after a trial thereof, judgment was duly entered therein on the 4th day of June, 1918, in favor of the defendant and against said plaintiff, which judgment was never appealed from, and the defendant pleads the judgment rendered in

said action in bar of the further prosecution of this action by the said plaintiff." Upon the issue thus tendered, the court made the following finding:

"But, by reason of the effect of the judgment entered on June 4, 1918, in the former action between plaintiff and defendant, No. B-50316, pleaded by defendant as another and further defense to the plaintiff's action in the present case, the particulars of which judgment are hereinafter more fully found, the defendant is not now indebted, and was not indebted at the beginning of this action, to the plaintiff in the sum of \$2,125, or any other sum, because of the matters hereinabove found or any of them, nor for money had or received by defendant on the 15th day of July, 1917, or at any other time, to the use or for the benefit of the plaintiff."

The court further found as follows:

"Upon the matter pleaded in said answer touching the effect of the judgment in the former action of A. K. Detwiler, Plaintiff, v. W. H. Clune, Defendant, No. B-50316, in the register of the clerk of this court, the court finds as follows: On or about the 2d day of March, 1917, the plaintiff in the present action served upon the defendant in the present action a notice of rescission of the contract set out in the first cause of action in the present complaint—the contract of date November 22, 1915, between defendant and plaintiff—and afterwards, to wit on the 3d day of May, 1917, said plaintiff commenced said action No. B-50316 in this court, wherein he (said A. K. Detwiler) was plaintiff and said W. H. Clune was defendant, to enforce the said rescission of said contract. Thereafter said action was tried before said superior court, and, after a trial thereof, judgment was duly entered therein on the 4th day of June, 1918, in favor of the defendant and against said plaintiff, which judgment has never been appealed from, and such judgment is a bar to the prosecution of the present action on the matters stated in the alleged first count or cause of action, and also the matters stated in the alleged second count or cause of action in the plaintiff's complaint in the present action, which counts respectively purport to allege causes of action in favor of plaintiff arising out of transactions had by him personally with the defendant; but such bar does not extend to or affect the plaintiff's other causes of action alleged in his pleadings here, wherein he sues as the assignee of other persons."

At the trial of this action, the defendant offered in evidence the judgment roll in said action B-50316. To this offer objections were made by the plaintiff, which objections were overruled, and the judgment roll (except certain omitted portions which both parties agreed were immaterial in the present case) was received in evidence. The plaintiff's objections were:

"That there is no sufficient plea here of a former adjudication—no special plea, that is, to justify the production or the introduction of the evidence. * * * There is no showing at all in this answer of any identity of issues. The mere fact that there was an action for re-

scission of the contract is no proof at all that issues were made or determined in that case, which are material to the present action.

"It appears here from the findings and decision offered in evidence, signed on the 29th day of May, 1918, 'that the written contract set out in the answer and in these findings is still in full force and effect, and that the plaintiff is entitled to take nothing by his said action'; that is, his action for rescission. We claim that a judgment which denied a rescission does not work an estoppel in the present case on any issue.

"It appears from the documents offered that the suit proceeded for rescission on the ground of alleged fraud by defendant in inducing the plaintiff in that suit, by false representations, to enter into it (the contract); and fraud is not the basis of the present action at all.

"That the judgment roll offered in evidence is incompetent, irrelevant, and immaterial, constitutes no defense to the present action; that if there are any issues in the present case which are claimed by defendant here to have been involved in that trial and determined in that case, the issues are not specified in his plea."

In its conclusions of law in the present action the court determined that, "by reason of the bar of the judgment in the former action of *Detwiler v. Clune*, No. B-50316, the plaintiff is not entitled to recover anything because of the matters alleged in the first and second counts or causes of action, respectively, alleged in his complaint." The judgment followed this "conclusion of law." It is from this part of the judgment that the plaintiff appeals.

In the former action, B-50316, the plaintiff sought to obtain a decree to enforce an attempted rescission by him of the same contract which is the subject of the first and second counts of the complaint in the present action. Plaintiff sought to rescind upon the ground that the defendant had obtained plaintiff's subscription and money by means of sundry promises and representations, of which certain of the representations of fact were false, and by the defendant well known to be false, and that the representations and promises were made for the purpose of cheating and defrauding the plaintiff, and without any intention of the defendant to complete or perform the said promises. A total failure of performance by defendant was alleged. The plaintiff sought to obtain a decree declaring the contract canceled and rescinded, and further to recover judgment against the defendant for the sum of \$2,500 subscribed and paid by him, etc. The answer of the defendant in that action, while admitting the making of the contract and the payment of the money by the defendant, denied very fully the allegations which constituted the gist of the action in relation to the right of rescission. There was also a plea of laches in serving the notice of rescission and also in relation to the time of commencement of the action to enforce the same. Pursuant to

its decision in favor of the defendant upon those issues (including the defense of laches), the court as conclusions of law therefrom determined "that the written contract set out in the answer and in these findings is still in full force and effect, and the plaintiff is entitled to take nothing by his said action." Thereupon judgment was entered that the plaintiff take nothing and that the defendant recover his costs.

Appellant, *Detwiler*, contends that the court erred in overruling his objections to the judgment roll in action B-50316 when offered as evidence in this action; that the difference in the nature of the two actions is such that the judgment rendered in the first action could not constitute a bar to the second action; that as to any matters of estoppel created by reason of the decision and judgment in the former case, such matters of estoppel were not pleaded herein by the defendant in such manner as to entitle him to make proof thereof.

[7] There is a clear difference between the effect of a judgment as a bar to a subsequent action of an identical nature, and the effect of a decision upon issues in controversy when such decision is pleaded, not as a bar to a subsequent action of an identical nature, but only as an estoppel against further litigation of those issues.

"In the application of the doctrine of res judicata there is sometimes a distinction to be made concerning the effect of the judgment in a former action. Thus (1) a former judgment may be conclusive evidence that no cause of action exists—that is to say, it may be offered, not as estoppel to proof of any fact, but as proof of the nonexistence of a cause of action at all—or (2) treated from the standpoint of its use as a piece of evidence, it may be produced when specifically pleaded as an estoppel, as was done in the instant case, as evidence of some material fact in the cause of action on trial, the truth of which both parties are estopped from denying. In the latter case the judgment gives an indefinite life and irrebuttable probative force to any fact found by the judgment to be true. The latter is the effect produced when the controversy is again raised in another suit upon a different cause of action." *Estate of Clark*, 190 Cal. 354, 361, 212 P. 622, 625.

"We should perhaps, in this connection, call attention to the distinction between a judgment operating by way of estoppel in a later action upon a different cause of action and one operating by way of bar against a second action upon the same cause of action. If in this case the other action had been upon the same cause of action as the present—that is, had been an action to abate the defendant's obstructions—a judgment for the defendant upon the merits would have been a bar to a second action for the same purpose, regardless of what different or various issues may or may not have been presented. But, as we are given to understand, the other action was not the same as the present. The judgment in it can therefore not operate as a bar to the present action, but at most only as a judicial determination

binding upon the parties of issues again involved between them. In order that it may so operate, it must of necessity appear that it did in fact determine those issues." *Horton v. Goodenough*, 184 Cal. 451, 461, 194 P. 34, 38.

[8] In the case at bar it appears that the former action was pleaded generally as in bar of the present action, and was so considered and sustained by the superior court (as to counts 1 and 2 of the complaint herein), in its decision in this action. Having in mind the distinctions noted in the next preceding paragraph, it is necessary to determine whether the cause of action in the action No. B-50316 was the same as the causes of action against which it has been interposed in the case at bar. Of course, in finding our answer to the question, the fact that one action was called an action to declare and enforce a rescission of the contract, while the other is nominally an action for damages, or nominally for recovery of money paid upon a consideration which has failed, is not a fact of very much importance. The gist, or gravamen, or substance (as variously we may try to designate the thought), of the several causes of action, must be ascertained and compared.

In the former action the right which the plaintiff sought to enforce was the right to have entered a decree of a court of equity, establishing the ultimate fact that for good and sufficient reasons the plaintiff had rescinded and put an end to the contract. And, by way of further relief, he sought to compel repayment of his money. Primarily the right so claimed was based upon grounds which, if sufficient, would have nullified the contract as one voidable from its beginning. Appellant, Detwiler, now argues, in effect, that the alleged existence of fraud in the inception of the contract, whereby the contract was, at the election of the plaintiff, subject to annulment, constituted the entire substance of that action. But there was something more. A party to a contract may also rescind for failure of consideration, "if such consideration, before it is rendered to him, fails in a material respect, from any cause." Civ. Code, § 1689. In action B-50316 the plaintiff relied upon this failure of consideration, and alleged facts showing the same, although he did also allege and rely upon the alleged fraudulent conduct and purpose of the defendant. Upon the issues thus presented, the court might have affirmed the plaintiff's right of rescission, even though at the same time the charges of fraud were not sustained. The court had power to grant to the plaintiff "any relief consistent with the case made, by the complaint and embraced within the issue." Code Civ. Proc. § 580. In that action, however—as inspection of the judgment roll very plainly shows—the court found against the plaintiff, not only upon the charges of fraudulent representations and the

charges of promises made by defendant "without any intention upon his part to keep or perform the same." The court also found in favor of the defendant upon the principal issues relating to the demands of plaintiff which rested upon the alleged failure of consideration. Placing its decision upon all of these grounds, the court determined that the written contract was "still in full force and effect," and adjudged that the plaintiff take nothing.

The judgment in that action having thus determined that the contract remained in force, it follows that Detwiler could maintain an action to recover damages, if any such accrued to him by reason of breaches occurring subsequent to the date of that judgment. The present action, however, is not an action to recover on account of any such subsequent breaches of the contract. The plaintiff here seeks to recover, on the ground of failure of consideration, the money paid by him. But, as we have seen, that failure of consideration, assuming that it occurred as found by the court from the testimony received in this action, is the same failure of consideration alleged in the former action, the existence of which is negated by the decision and judgment in that action. We conclude that the court did not err in overruling the objections to the judgment roll as evidence, or in holding that the plaintiff's right of action herein, as to said counts 1 and 2, is barred by the former judgment.

The judgment is affirmed.

We concur: YORK, J.; HAHN, Justice pro tem.

to pay any premium due under this policy, the mortgagee shall on demand pay the same," held not covenant which would require payment by mortgagee in action by insurer's assignee after insured failed to pay, in absence of express or implied promise.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Sydney L. Schmitt against Walter A. Gripton. Judgment for plaintiff, and defendant appeals. Reversed.

F. Walton Brown and Leet W. Bissell, both of Los Angeles, for appellant.

Edward J. Jose, of San Francisco, for respondent.

CASHIN, J. An action to recover the earned premiums upon certain policies of fire insurance from the mortgagee of the insured property.

The court found, in accordance with the allegations of the complaint, that three policies of insurance were executed and delivered by respondent's assignors to California Lumber Products Company, a corporation, insuring property owned by the latter in Mendocino county against loss by fire; that at the special instance and request of appellant there was attached to each a clause providing that any loss within the terms of the policy should be payable to the mortgagee, and that it was further provided therein that, should the corporation neglect to pay any premium on such policy the mortgagee would on demand pay the same; that the insured failed to pay; that demand was made therefor upon the mortgagee, and, upon his refusal, the policies were canceled.

Upon the findings, judgment for the aggregate amount of the earned premiums was entered against the mortgagee, and the appeal was taken by him therefrom.

The clause attached to each policy was the standard form of mortgage clause, the material portions of which are as follows:

"Standard Forms Bureau Form 371 (May, 1923).

"Mortgage Clause With Full Contribution.

"(Only for Policies Covering Buildings.)

"Loss or damage, if any, under this policy, on buildings only, shall be payable to Walter A. Gripton, mortgagee (or trustee), whose mail address is —, as interest may appear. Subject to all the terms and conditions hereinafter set forth in this rider, this insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagee or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy.

"Condition one—In case the mortgagee or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same. * * *

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SCHMITT v. GRIPTON. (Civ. 5355.)

(District Court of Appeal, First District, Division 1, California. April 14, 1926.)

1. Insurance —146(3).

Provision in fire policy for payment of premiums by mortgagee of insured property will be construed most strongly against insurers.

2. Insurance —182—Provision for payment of premiums by mortgagee of insured property, contained in "condition one" of fire policy, held not to be covenant to pay.

Clause attached to fire policy, "Condition one —in case the mortgagee or owner shall neglect

Appellant urges as the ground for his appeal that the paragraph of the mortgage clause, designated therein as "condition one," should not be construed as a covenant on his part to pay the premiums, but as a condition which, if not complied with, would prevent recovery by him under the preceding provisions thereof.

In the few cases wherein similar clauses have been considered, the word "provided" was used where in the instant case the word "condition" appears, the decisions following the determination from the use of the word in connection with the provision that, "in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall on demand pay the same," whether a condition or a covenant should be implied.

In *St. Paul Fire, etc., Ins. Co. v. Upton*, 2 N. D. 229, 50 N. W. 702, the clause mentioned was construed as an absolute agreement to pay the premiums; while in the later cases of *Home Ins. Co. v. Union Trust Co.*, 40 R. I. 367, 100 A. 1010, L. R. A. 1917F, 375, and *Coykendall v. Blackmer*, 161 App. Div. 11, 146 N. Y. S. 631, the same clause being under consideration, it was held that a condition and not a covenant was thereby created; and such was the view of the author of the opinion in *Johnson, Sansom & Co. v. Fort Worth State Bank* (Tex. Civ. App.) 244 S. W. 657, the question, however, not being decided in the latter case.

In *Boston Safe Dep. & Trust Co. v. Thomas*, 59 Kan. 470, 53 P. 472, the case principally relied upon by respondent, and which was distinguished upon its facts in the two cases last cited, the facts were that the agent of the mortgagee negotiated for the insurance and the mortgage clauses were attached at his request; these circumstances being considered by the court in construing the clause in question.

In *Home Ins. Co. v. Union Trust Co.*, supra, the court said:

"There is nothing in the context of this instrument which requires a construction of this clause as a covenant. The parties have used the technical word 'provided,' to which the courts in numerous cases have applied a certain well-known construction. The mortgage clause in question is in the standard form, and presumably was carefully worded by experienced lawyers who were familiar with the customary legal construction of the word. Had the intention been that the word 'provided,' as used in this clause, should not be given its primary legal meaning and effect, but that the clause should be construed as a covenant rather than a condition, any possible ambiguity could easily have been removed by the addition of a few words such as 'and it is agreed' or any similar phrase."

[1, 2] The language of the clause is to be construed most strongly against the insurers (26 Corp. Jur. "Fire Insurance," 72; *Welch v. British American Assurance Co.*, 148 Cal. 223, 82 P. 964, 113 Am. St. Rep. 223, 7 Ann. Cas. 396; *Pacific Heating, etc., Co. v. Williams-*

burgh, etc., Ins. Co., 158 Cal. 367, 111 P. 4; *Greer-Robbins Co. v. Insurance Co. of State of Pennsylvania*, 47 Cal. App. 63, 190 P. 187); and, if the word "provided" as used in the policies considered in *St. Paul Fire Ins. Co. v. Upton* and *Boston Safe Dep. & Trust Co. v. Thomas*, supra, might in the connection stated be held to be equivocal, and that a condition was not thereby expressed with certainty, the use of the word "condition" in the same connection fairly removed the ambiguity and clearly expressed the intention that the clause should be construed in the sense which the word implies, namely, as a condition, and not a covenant. While the court found that the mortgage clauses in the instant case were attached at the request of appellant, the evidence shows that, according to his agreement with the mortgagor, the latter was to procure insurance upon the mortgaged property, the loss to be payable to the former as further security; that the policies were procured through the agency of a broker, who, at the invitation of appellant's attorney, met at the latter's office in San Francisco the manager of the corporation mortgagor, at which conference the attorney was present. The broker was then advised as to the amount of insurance and the form of the policies required. Thereafter the persons mentioned, with an agent for one of the insurers, visited the property, following which the policies were issued to the broker and delivered to the attorney. Through an oversight on the part of the broker the mortgage clauses were not then attached, but were by him, at the request of the attorney, procured; these with the policies being subsequently delivered to the appellant in accordance with the original agreement with the insured. Had an ambiguity appeared in the expression of the intention of the parties in the mortgage clauses, this evidence, which supports the finding mentioned, would have been relevant for the purpose of ascertaining such intention; but where, as here, the intention is expressed with certainty, the circumstances shown and the finding were immaterial. *Salter v. Ives*, 171 Cal. 790, 792, 155 P. 84.

In *Colby v. Thompson*, 16 Colo. App. 271, 64 P. 1053, cited and relied upon by respondent, a mortgagee, in consideration of the renewal of certain policies insuring the mortgaged property, agreed unconditionally to pay the premiums. In the instant case such facts do not appear. There were procured by the broker, as testified by him, two extensions of the time for the payment of the premiums, the first upon his representation that payment would be made (for which no authority from appellant was shown), and the second following the request that appellant make such payment. The latter request followed the voluntary bankruptcy of the insured, at which time appellant had taken possession of the mortgaged property under the terms of his mortgage, the appellant in reply thereto stating that the property might be taken over by others, in which event, as testified by

the broker, "he would try to turn the policies to whatever interests might take over the plant." No other or further promise was shown, and it is not contended that the extensions were otherwise induced or that appellant failed in any respect to perform.

It being our conclusion that the clause mentioned should be construed as a condition, and that the evidence was insufficient to support a finding that the mortgagee, after the issuance of the policies and the attachment thereto of the mortgage clauses, expressly or impliedly promised to pay the premiums, the judgment is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

77 Cal. App. 641

ANDERSON et ux. v. HARTFORD ACCIDENT & INDEMNITY CO.
(Civ. 4138.)

(District Court of Appeal, Second District, Division 2, California. April 29, 1926. Hearing Denied by Supreme Court June 28, 1926.)

1. Insurance — 425—Where assured, while in a crowd on vessel in outer harbor of San Pedro, felt hand against chest as it grabbed bar pin, but did not see hand or any suspicious move, held taking was not "highway robbery" within policy.

Where assured, while moving through a crowd on battleship in outer harbor of San Pedro, felt a hand against her chest as it grabbed her bar pin, but did not see the hand or any suspicious move, held taking was not covered by rider extending policy insuring against robbery from residence to cover "highway robbery" from assured anywhere in United States by force or violence, in view of provision excluding from protection disappearance of property without force or violence or without knowledge of assured at time.

[Ed. Note.—For other definitions, see Words and Phrases, Highway Robbery.]

2. Robbery — 6.

Force or violence is necessary element of robbery, and distinguishes it from larceny.

3. Insurance — 425.

Where assured, while moving through a crowd, felt a hand against her chest as it grabbed her bar pin, but did not see the hand or any suspicious move, and looked on floor and her dress for pin, held loss was within exception to highway robbery policy, excepting from protection property disappearing without knowledge at the time of the assured.

Craig, J., dissenting.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action to recover under a policy of burglary insurance by H. H. Anderson and wife against the Hartford Accident & Indemnity Company, a corporation. From judgment for defendant, plaintiffs appeal. Affirmed.

Jud R. Rush and William B. Beirne, both of Los Angeles, for appellants.

George L. Greer, of Los Angeles, for respondent.

WORKS, J. This is an action to recover under a policy of insurance. Judgment went for defendant, and plaintiffs appeal.

[1, 2] The policy which respondent issued to appellants insured them, originally, against the direct loss of certain specified property "by burglary, theft, or larceny * * * by its felonious abstractions from within" the place of residence of the assured. Later the protection of the policy was by a rider "extended to cover loss from highway robbery by force or violence" of certain property "from the person of any one insured under this rider while wearing or carrying the same anywhere in the United States or Canada." The rider also contained this language:

"Mere disappearance of property from the person of the assured, unless accompanied by force or violence and unless also within his or her knowledge at the time, is not a risk covered by this rider, and it is not intended hereby to cover pocket picking."

The manner in which the loss occurred out of which this action arose is shown by a stipulation that was entered into at the trial and by the findings of fact which were based upon it. Omitting immaterial or undisputed matters, the stipulation and findings recite:

"That * * * Claire Anderson * * * was the owner of a diamond bar pin, * * * and * * * she was a guest on the battleship Texas, then at anchor in the outer harbor of San Pedro, inside of the breakwater. That at about the hour of 2 o'clock, a. m., Claire Anderson was trying to get to the officers' quarters * * * for the purpose of securing a fur cape, it being checked there while she was attending the seventh anniversary of the ship. This anniversary was attended by perhaps from 2,000 to 5,000 people. There was a crush as people tried to get to the dressing rooms, and she was forcing or working her way through as fast as possible. She distinctly felt a hand against her chest as it grabbed her bar pin. The hand was there just an instant. She did not see the hand or any suspicious move of any one but at once looked down to see her pin. It was gone. She looked on the floor and on her dress, but it was not there. People were moving past her in both directions, and no one made any unusual or suspicious move. * * * The pin was on her dress at the time she felt the hand as described above. The pin and hinge were still upon her dress after the occurrence described. The valuable part, consisting of the filigree and diamond, was snapped or broken off, and the dress to which it was fastened was torn for about three-quarters of an inch."

There is no question that the ornament which was thus lost was included in the property which was protected against loss by the policy. There is also no question but that appellants must recover under the terms of the rider if at all. Our first concern, then, is to ascertain the meaning of the term "highway robbery," as employed in the rider. Some question may exist as to whether the force exerted in removing the bar pin from Mrs. Anderson's person was of such a nature as to translate the act of purloining it into

the crime of robbery. We shall neither discuss nor decide that question. We shall assume as a starting point that the act was robbery. But the rider did not insure against robbery. The protection afforded by it was against highway robbery. What did the parties contemplate when they employed that expression in their contract? The use of the two words together indicates that the assured were to be protected against something different from mere robbery. In a grammatical sense the word "highway" plainly qualifies the word "robbery." In a legal sense, to what extent does the limitation operate? What is highway robbery?

The expression is not known to the Penal Code of this state, nor, so far as we can discover, has it been made the subject anywhere of legislative or judicial definition which fits the facts here presented. Certainly it has never been defined by the courts of California. The phrase, however, is in constant use throughout the English-speaking world. We must commence with the view that it was employed by the present parties in the sense in which it is so generally used. What is that sense? There was a time in the British Isles, the early clearing house of English linguistic development, and even in the most populous portions of them, when the roadside robber haunted every land thoroughfare. The country was badly policed and worse lighted, and it was even unsafe to venture at night upon city streets unarmed. In truth, the "quality" seldom fared forth after nightfall, even in densely populated centers, without an armed guard. The highwayman was a creature of the lanes, byways, and roads. Moreover, his activities were so frequent and his exploits so daring that he was the public enemy. Gibbets were maintained at important crossroads, and upon them robbers were summarily hanged. Their corpses were allowed to swing until their bleached skeletons became dismembered under the action of winds and rain, because of the example thus furnished. It is no exaggeration to say that the land was filled with the clanking of chains and the swaying of bodies which were suspended from them. It is impossible now to understand fully the conditions which then prevailed, but they contributed a striking feature to the annals of Great Britain, they furnished a dominant element in the growth of English criminal law, and they have colored with a carmine hue the literature of every English-speaking people. It is proper first to enter the domain of history, for out of that has emerged the influences which have operated under the conditions above depicted. The terrors of highway robbery menaced the population of England during a long period of time. In a chapter devoted to social conditions between the years 1200 and 1400 Aubrey says:

"The traveling was attended with many inconveniences, and was often dangerous as well as difficult. Traders could not venture through

England with their merchandise, unless attended by a large armed escort. Persons formed themselves into caravans for mutual protection when about to undertake a long journey, or to cross a forest or a heath. The perils were greater to that numerous class who had to travel on foot, and who could not always insure reaching a place where lodgings might be found. Not only were there dangers from bandits and outlaws, but knights, landed gentry, and noblemen connived at their dependants practising highway robbery, and shared in the plunder."

Macaulay, dealing with conditions following the Peace of Ryswick, which was concluded in 1697, sets down the following graphic recital:

"The peace had, all over Europe, and nowhere more than in England, turned crowds of old soldiers into marauders. Several aristocratical equipages had been attacked even in Hyde Park. Every newspaper contained stories of travelers stripped, bound, and flung into ditches. One day the Bristol mail was robbed; another day, the Dover coach; then the Norwich wagon. On Hounslow Heath, a company of horsemen, with masks on their faces, waited for the great people who had been to pay their court to the King at Windsor. Lord Ossulston escaped with the loss of two horses. The Duke of Saint Albans, with the help of his servants, beat off the assailants. His brother, the Duke of Northumberland, less strongly guarded, fell into their hands. They succeeded in stopping 30 or 40 coaches, and rode off with a great booty in guineas, watches, and jewelry. Nowhere, however, does the peril seem to have been so great as on the Newmarket road. There, indeed, robbery was organized on a scale unparalleled in the kingdom since the days of Robin Hood and Little John. A fraternity of plunderers, 30 in number according to the lowest estimate, squatted, near Waltham Cross, under the shades of Epping Forest, and built themselves huts, from which they sallied forth with sword and pistol to bid passengers stand."

In a note to the first sentence of this text, the great historian says:

"George Psalmanazar's account of the state of the south of France at this time is curious. On the high road near Lyons he frequently passed corpses fastened to posts. 'These,' he says, 'were the bodies of highwaymen, or rather of soldiers, sailors, mariners, and even galley slaves, disbanded after the peace of Reswick, who, having neither home nor occupation, used to infest the roads in troops, plunder towns and villages, and, when taken, were hanged at the county town by dozens, or even scores sometimes, after which their bodies were thus exposed along the highway in *terrorem*.'"

The "Fortnightly Review" makes this statement as to conditions existing as late as the period 1780-1786:

"Even a walk or drive to Kensington or Chelsea, both country villages at that time, was not undertaken without fear of highwaymen or footpads."

When we enter the realm of the law, it is not surprising that the effect of these startling aberrations from a regulated state of

society becomes manifest. Under the English law, from an early period, robbery on the king's highway was distinguished from other forms of crime. It was punished capitally and the offender was denied the benefit of clergy. 4 Bl. Comm. 243, 373. Without going to sources, an interesting statement upon the subject of highway robbery, as contemplated by the English law, is found in the arguments of counsel and in the opinion in *State v. Johnson*, 61 N. C. 140. In that case the defendant was charged under a statute which prescribed the death penalty for robbery perpetrated in or near a public highway. The evidence showed that the victim of the crime which was sought to be punished in the case was assaulted and robbed while walking along a railroad track. It was said in the course of the brief filed on behalf of the defendant:

"Highway robbery *insidiatio viarum* was excluded from clergy at common law previously to Statute 25, Edw. III, Pro clero; 4 Bl. 373; 1 Chit. Cr. Law, 675; 2 Hale, 333. The statute Pro clero gave clergy for any treasons or felonies not touching the king himself or his royal majesty. Yet a construction prevailed after this that *insidiatores viarum* might be denied it (Hale & Haw. ubi supra); the reason assigned being that it was a sort of hostile act and bordered upon treason. 4 Bl. 373; 1 Ch. Cr. L. 675. Upon complaint of this to Parliament, the Stat. 4, H. IV, c. 2, granted it to them. The reason above grew out of the fact that the king had a right of passage for himself and for all his subjects. Comyn, Chemin (A, 2) p. 27. Where highways are unsafe, the whole country is in peril. The policy of this security applies only to places where every citizen has a right to pass and repass at pleasure, particularly to such upon which every man is sometimes compelled to be, and to transport articles of value, and expose such at lonely places; at the same time that the robber himself cannot be excluded from being thereupon, having the right to pass and repass as well as others, and being under the protection of the sovereign in the enjoyment of his right."

The following appears in the opinion of the court:

"The benefit of clergy is taken from the offense of robbing any person in or near any public highway. Statutes Hen. VIII. and Ed. VI. re-enacted, Rev. Stat., c. 34, § 1, and also re-enacted, Rev. Code, c. 34, § 2, in connection with section 22. These statutes, from the earliest time, have received a uniform construction, by which it is held that, although, at the date of the passage of the original acts, there were three sorts of public highways—one called '*iter*,' over which the people passed on foot; another called '*actus*,' over which they passed on foot or on horseback; and a third called '*via*,' over which they passed on foot or horseback, or in vehicles with wheels (Coke Lit., 56, a, b)—and, although the statutes use the words '*public highway*,' still they do not embrace any but the last kind, the '*via*,' or, by way of pre-eminence, the highway. 1 Hale, 535, Id. 333; 2 Hawk. 476; 4 Blackstone, 373. For it was considered that the mischief intended to be remedied existed in a special degree in regard to the '*via*,' or highway of most impor-

tance; that is, those over which all of the King's subjects, were at liberty to pass and repass on foot, on horseback, and in carriages; and it was resolved by the judges that a statute so highly penal, and affecting human life, should be confined to the most important kind, and could not, by construction, be made to include the two other kinds, notwithstanding the mischief in some degree extended to them."

Upon this reasoning the court determined that a railway was not a highway within the meaning of the North Carolina statute. This final result is not stated for the purpose of showing that the unknown person who relieved Mrs. Anderson of her brooch, under the facts in the present case, was not a highway robber, but in pursuit of our endeavor to ascertain the accepted meaning of the term "highway robbery." The import of that expression under the English criminal law is determinable in some degree from an inspection of modern lexicons. A part of the matter under the word "highway" in the Standard Dictionary reads:

"In English history, highway designated the main public road, which was the subject of special royal enactments controlling the policing thereof; it was properly known as the king's highway."

It is said in Webster, under the word "highway":

"Originally, highway designated a chief or principal way, which, being traveled by the public in general, was, early in English history, brought under the protection of the king's peace."

When we turn to English literature, and especially to those works of fiction which are based on historic fact, what a broad foundation is found upon which has been built a popular understanding of the expression "highway robbery"! The activities of the roadside robber furnish one of the most persistent themes in British story. Who that has read English fiction—and even the pages of history from which the English novelist has taken his facts—has not heard of Dick Turpin, Jack Sheppard, and Robin Hood? Scott's novels are full of the exploits of the highwayman. "Rob Roy" deals with the theme. Dickens has not neglected it, as witness "A Tale of Two Cities." Bulwer is crowded with it, one instance being "The Last of the Barons." R. D. Blackmore's great novel, "Lorna Doone," is practically based upon it. The same strain stands forth prominently in Jeffery Farnol's delightful latter-day novel, "The Broad Highway." One of Lord Dunsany's sketches, printed in the collection which carries the name, "The Sword of Welleran," deals with the same theme. Nearly all of these romantic tales depict graphically the manner in which the highway robber did his work, and several of them paint the picture of his summary punishment upon the gibbets of the roadside—a picture different only in degree

from that painted by Psalmanazar in his account of conditions in France following the Peace of Ryswick. And the few tales mentioned are but a minor fraction of the vast number which load the shelves of English and American libraries.

In our quest it is not amiss to turn to the modern lexicographer. The Encyclopedic Dictionary disposes of the term "highway robber" thus: "The same as highwayman." Highway robbery is defined in that work as: "Robbery committed on or near the public highway." The definition of "highway robber" as given in the work calls for the accompanying definitional rendition of "highwayman." It is: "One who robs passengers on the public highway; a highway robber." Neither "highway robber" nor "highway robbery" is defined in any of the other dictionaries which lie before us. March's Thesaurus Dictionary thus defines "highwayman": "A robber who plunders on public roads." The Standard Dictionary renders the same word thus: "One who practices, commits, or attempts to commit highway robbery; one who robs in public places, or lurks for the purpose of robbery." Webster defines "highwayman": "One who robs on the public road; a highway robber." The Century Dictionary gives this definition of that word: "A robber on the highway; one who robs passengers in public roads or places."

We may now safely state the mental picture formed by the composite citizen—and it is his view that we endeavor to ascertain—when he reads or hears of a highway robber or a highwayman. What does he see? There can be no doubt of the answer. History, literature, tradition, and conversation based upon them, have given him a definite conception of the two terms, for, in truth, the two are one. He sees a determined individual, whether masked or unmasked, who appears before the wayfarer with pointed weapon or uplifted bludgeon and rifles the pockets of his victim. He sees no secret plunderer, no sneak thief, no pickpocket. He could see no highway robber, no highwayman, in the individual who despoiled Mrs. Anderson of her treasured bar pin. If we grant that the crime through which she suffered was robbery, under the technical rules of the criminal law, we are convinced that it was not highway robbery within the meaning of the insurance policy before us.

We are not concerned, in reaching this conclusion, with the question whether the waters of San Pedro harbor or the decks of the battleship Texas are a highway in the sense that a highway robbery might have been committed upon them. Such a question would have arisen if Mrs. Anderson's despoiler had made her the victim of a "holdup" in some dark and secluded spot upon the decks of the ship—if he had boldly confronted her, put her in terror, and by such a means had deprived her of her property. Even under such circumstances a respectable brief could have been written in derogation of the right of appellants to recover under the policy. Under

the actual circumstances of the case, the necessity for such a brief does not exist.

If we admit, for the sake of argument, in approaching a new angle of the case, that there is doubt as to the general meaning we have ascribed to the expression "highway robbery," there is yet an objection to the right of appellants to recover. There is enough in the rider attached to the policy to show that the parties intended the term as employed in their contract to have some such meaning, as we, in an attempt to ascertain its usual import, have fastened upon it. By the terms of the rider appellants were insured against "highway robbery by force and violence." In the commission of every robbery either force is exerted or violence is committed. These are necessary elements of the crime, and they distinguish it from larceny. They are therefore embraced within the meaning of the word "robbery." Here, however, the words "force" and "violence" are expressed accompaniments to the word "robbery." Would it not be a curb upon the intention of the parties to determine that by the addition of the accompanying words they intended merely a reference to the slight degree of force which, under some of the decided cases, will serve to raise the crime of larceny to that of robbery, and which is implied in the latter word itself? Under some of the cases, undoubtedly, and considering now only the crime of robbery and not what the parties here have called highway robbery, the tearing of Mrs. Anderson's dress and the separating of the "valuable part" of the brooch from the pin which held it, would constitute a sufficient force to make the crime a robbery. We think the parties meant much beyond that by the employment of the expression "with force and violence." And there is more in the rider to indicate that they did. We have seen that it contained this negative provision:

"Mere disappearance of property from the person of the assured, unless accompanied by force or violence and unless also within his or her knowledge at the time, is not a risk covered by this rider."

In the pursuit of our present purpose this language does not require dissection. To us it seems plain as it stands. When added to the phrase "with force and violence," where that expression is inserted after the words "highway robbery," it appears to us to show that the parties intended the latter term in their contract to have the meaning we have ascribed to it as a result of our search for the sense in which it is generally accepted. The parties intended that there should be no recovery under the rider unless one of the assured was the victim of a "holdup" and thereby lost an article described in the rider.

[3] There is, however, one clause of the rider which requires a more minute consideration. Appellants were not insured unless a loss suffered by one of them was "within his or her knowledge at the time." This language plainly imports a knowledge of loss

at the time—that is, at the very moment—of the robbery which occasioned it. The clause has already operated strongly as an aid to our determination that the rider insured appellants only against “holdups.” But let us now investigate more narrowly the question whether Mrs. Anderson knew “at the time” of the robbery that she had been despoiled of her brooch. According to the findings of the trial court, based upon the stipulation between the parties:

“She distinctly felt a hand against her chest as it grabbed her bar pin. The hand was there just an instant. She did not see the hand or any suspicious move of any one, but at once looked down to see her pin. It was gone. She looked on the floor and on her dress, but it was not there.”

The only part of the finding which tends in any degree to warrant a recovery under the policy is the recital—for it is nothing more—“as it [the hand] grabbed her bar pin.” There is here no showing that she was conscious that any hand had “grabbed” the pin and had actually asported it, or even that she was conscious that it had been “grabbed” at all. The recital, too, must be considered with the context of the portion of the finding in which it occurs. So considered, the strongest view that can be taken of the finding is that it shows that Mrs. Anderson *suspected* that an attempt had been made to rob her. What is there in the finding to limit it to that potency, granting that it is so strong? The victim of the crime, after she felt the hand on her chest, looked down to see her brooch. She looked on the floor and on her dress, *but it was not there*. There is no finding that she knew, until after she endeavored to find the brooch, that her dress had been torn or that the pin had been broken from the valuable part of the ornament. There was plainly an expectation or hope on her part that she would find the ornament either on her person or on the ship's deck. She therefore, we repeat, merely suspected that an attempt had been made to rob her. Surely there was here no “disappearance” of the brooch which was “within * * * her knowledge at the time” when it was taken. This circumstance alone precludes a recovery in this action.

We do not find it necessary here to consider specially the portion of the negative clause of the rider to the effect that the policy was not intended “to cover pocket picking.” The authorities upon the question whether the despoiler who filched Mrs. Anderson's brooch was a mere pickpocket are at variance. We do not feel compelled to attempt to reconcile or to distinguish them.

The negative clause of the rider furnishes an aid to the construction of the policy which we have not yet mentioned. The policy as originally issued appears to have protected the assured against all forms of larceny and robbery occurring within their household. If it be argued from this that the rider should

be construed in such a manner as to protect the parties to the same extent when abroad “anywhere in the United States and Canada,” the argument falls to the ground upon a mere perusal of the negative clause mentioned. It plainly shows that the protection of the rider was not afforded as to all classes of robbery. It is more than plain from all that we have said that the rider covered no kind of larceny. Judgment affirmed.

I concur: FINLAYSON, P. J.

CRAIG, J. I dissent. The important facts in this action are that the plaintiff was robbed of a diamond taken from a pin which she was wearing while on board the battleship Texas, then anchored in the Los Angeles harbor. It was stipulated that she “distinctly felt a person's hand grasp the pin.” Recovery is sought upon a contract of insurance; the body of the policy is one insuring against burglary of the assured's dwelling, and a rider attached thereto purports to further protect from “loss from highway robbery by force or violence.” The pin was fastened to the waist worn by the assured, and the robber separated the diamond from the clasp, leaving the latter attached to the waist. It was also provided in the rider that “mere disappearance of property from the person of the assured, unless accompanied by force or violence, and unless also within his or her knowledge at the time, is not a risk covered by this rider.”

Upon the theory maintained by the respondent, because of the fact that the robbery was committed on the Texas, it was not highway robbery, and therefore the loss was not covered by the policy. The taking of the diamond constituted robbery. Pen. Code § 311; Rex v. Maron, R. & R. C. C. 419. Under the stipulation, the assured had knowledge of the robbery. The Los Angeles harbor is within the jurisdiction of Los Angeles county. Manley v. People, 7 N. Y. 295, 304; People v. Wilson, 3 Park. Cr. R. (N. Y.) 199; Haskins v. People, 16 N. Y. 350. It is navigable, and hence is a public highway. Gunter v. Geary, 1 Cal. 462. Innumerable other authorities could be cited to the last point, but it is not necessary. The Encyclopædic Dictionary defines a highway robbery as a robbery committed on or near the public highway. Many other works of the same character announce substantially the following definition of a highway robber: “One who robs in public places.” Under these authorities, and in the absence of any statutory definition of the term, it is clear that the loss sustained by the plaintiff was through a highway robbery, accomplished by force, and with her knowledge.

In so far as the respondent's single argument is concerned, no further discussion is necessary, but, since I am constrained to dissent from the foregoing opinion, the dis-

charge of a full measure of service seems to require that the reasons inducing that conclusion be set forth in greater detail.

Of course, the intent of the parties constitutes the contract. Our object is to discover that intent. However, they are presumed to have contracted with the law in mind, and to have used words in the meaning which they possess as a matter of law. Hence, it is important here to determine the meaning of the term "highway robbery." While the definition of "highway robbery" in this action involves the determination of civil rights only, it is a term usually found in the realm of criminal law, and we must seek there for light upon its true meaning. Macgillivray on Insurance (1912) p. 964.

To my mind, little of value is to be gained by consideration of the occurrences, conditions, and classes of highways described in early English history. In the first place, if it be accepted without challenge that about the year 1200 A. D., and for some centuries thereafter, "highway robbery" was a term which as then used was applicable only to robbery of a type intended to inspire terror in the bravest hearts, and committed on a via, as distinguished from an iter or actus of that period, these facts furnish no aid to a determination of the question here presented, to wit, Did the parties to this insurance contract intend the company to insure against a loss to the assured such as that shown to have been sustained in the instant case? This is so, first, because nothing in the foregoing opinion indicates that waterways did not sometimes form a part of the vias or king's highways. Blackstone has well said, "Law is the soul of reason." A law would surely fail miserably to measure up to this standard, which would denounce a certain act as a felony without benefit of clergy if committed on the king's highway built upon land approaching a river, but wholly omit to condemn the same act on a boat crossing the river. History tells us that the king's highway led from London to the Thames, at Staines; there the king and his subjects, who might be desirous of traveling to Worcester, were transported by boats across the river, or might go by bridge; there the via on land resumed, and by it they might pass on to their destination. We are informed that one purpose of the law at that time making robbery a more serious offense when committed on the king's highway than when perpetrated upon or near the actus or iter, was that all of the king's subjects were at liberty and were often required to pass and re-pass upon the former, and hence greater protection should be extended against the taking of articles of value from them there by robbers. Again, robbery on the king's highway was more severely punished, out of respect and consideration for the rights and prerogatives of royalty and nobility, who principally traveled thereon and who usually

used the via rather than the iter or actus. The carriages for whose use the vias were constructed were the property of nobility and of the few rich among the untitled. The poor had not much of value which might be the subject of plunder. The vias were few in number, but the nobility and the rich perforce crossed the Thames, the Trent, and other rivers. They traveled up and down these highways in boats before vias were constructed or carriages were built, and navigable waterways were recognized as highways, and from the earliest times formed a part of the same system of transportation and travel as did the vias. Who will deny the unreasonableness of a law which would ordain one rule and one punishment for robbery done in a via, and none, or an entirely different rule and punishment, for the same depredation by the same robbers against the same travelers, on a boat crossing from one shore of the Thames to the other? Every consideration of logic and reason would require the same act to be denounced as the same crime in each instance, and there is absolutely nothing in either the law quoted or the references to history and literature contained in my Associates' opinion to justify the conclusion that the law made any distinction in that behalf. On the other hand, there is substantial reason and authority for the contrary conclusion, to which attention will be called later.

Again, the conditions formerly existing ceased centuries ago, and the reasons which may have resulted in the robbery upon the via being denied benefit of clergy, while the same outlaw who worked on the iter and the actus had that consideration allowed him, never had any application in America. Of royalty and nobility we have none. The poorest citizen has the same protection afforded him as the richest, and highways far superior to the ancient vias form a network over our state and nation.

The mere fact that Scott and Blackmore, in their inimitable imagery and fiction, have painted pictures of highwaymen three-fourths hero and one-fourth outlaw, would hardly be taken as proof that such was the character of all highwaymen then. These and other authors visioned ideals not the inferiors, or even the average robbers, of that time; and their tragic descriptions of the deeds of robbery done with dash and daredevil bravery upon the vias is no indication that even at that time the taking of property from the person of another by a cowardly thief who snatched a watch, broke the chain which attached it to the clothing of the owner, and ran, would not have been called a robbery then as much as it would to-day, and a highway robbery also, if it took place on or near a via, or on a navigable waterway. But, if we were to assume that highway robbery could not have been committed on an actus or iter, but might upon a via, and because of this we further assume the fact to be that

highway robbery could not be committed on a water highway (which of course does not follow) there exists a further reason why we are not assisted in construing the insurance policy in question by the facts and fiction of those olden times. It is common knowledge that the meaning of many, if not of most, terms used in the year 1200, or even 1500, A. D., have substantially changed, some being used in a radically different sense, some falling into almost disuse, and others so evolving as to be vastly broader in their scope. Without definite continuity of the ancient distinctions between the various classes of highways, we are left in the position of accepting precedent hundreds of years old, without any indication that the reason for its origin still exists. While a proper respect for precedent is essential to security of property and of rights of every character, I apprehend that instances are rare indeed among the reported cases where a definition established by statute or judicial decree rendered in the shadow of the Dark Ages has been accepted, although the reason upon which it was based is but a memory. Such procedure would furnish justification for the common criticism of courts, usually mistakenly and ignorantly made, that they are hide-bound, and listen to the voices of the dead rather than to those of the living, in a blind adherence to precedent, however old and lacking in logic.

Suppose a suit be brought on a contract in which the term "landlord" is used, and a dispute arises concerning the meaning of that word and the rights of the landlord. Should we go back even as far as Blackstone and base our decision upon his discussion of the subject, we would find ourselves holding that a landlord has jurisdiction over dependent landholders, with power to redress misdemeanors, and nuisances, to settle their disputes, etc. Blackstone's definition of a tenement has no application to that term as used in America to-day. The constant forward march of civilization has resulted in complete abandonment of the early definition of the term "debtor" as a felon. Nothing would be gained in construing modern statutes or contracts by tracing the term "debtor" back to the days of fettered felons, and imprisonment for debt, or in reflecting upon the former use of chains, and execution blocks, and the discovery of pieces of dead debtors, in quest of a modern definition of a market place. Difficult, indeed, would be the task of writing a thesis upon commercial law, or any of its branches, if the slightest recognition were afforded the terms and principles denounced by the Twelve Tables.

So, in this instance, I cannot bring myself to take into serious consideration that part of the foregoing opinion which deals with conditions, statutes and literature of the Middle Ages and early modern era. It is not my contention that these should never be given attention, but that their worth is negli-

gible unless it can be shown that the conditions and causes are the same as those existing to-day.

To my mind it is elementary that every thoroughfare over which all the public have a right to pass and repass and use for transportation and travel is a highway, and that this definition applies to waterways as well as those on land; also that one who robs on or near a highway is a highwayman. This being so, little authority need be cited to support these propositions. However, serious challenge, I think, justifies a more extended reference to authorities.

To secure uniformity in legal rights and law enforcement, it is essential that no different consequences should follow the performance of an act in one place in the same sovereignty than in another. There is no apparent reason why per se an act of any character should be classified differently when committed on water than on land, or when it is done on a boat traveling the state highways of navigable waters than on a bus traveling the state highways constructed on the solid earth. The route of travel on which the ship was at the time the act was committed was a state highway, and it was within the sovereign jurisdiction of the state of California as unconditionally as any point in the system of public boulevards in this state. *U. S. v. Bevens*, 3 Wheat. 336, 4 L. Ed. 404; *Comm. v. Peters*, 53 Mass. (12 Metc.) 387. In *Hargrave's Tracts*, at page 8, it is said:

"For as the common highway on the land be for the common land passage, so these kind of rivers, whether fresh or salt, that bear boats or barges, are highways by water."

The Supreme Court of Massachusetts, in deciding the case of *Attorney General v. Woods*, 108 Mass. 436, 11 Am. Rep. 380, used the following language:

"Navigable streams are highways; and a traveler for pleasure is as fully entitled to protection in using a public way, whether by land or by water, as a traveler for business."

"Where water is navigable in law, whether or not within the ebb and flow of the tide, the public have a common right to use it for navigation as a public highway." 29 Cyc. 304.

In *Gunter v. Geary*, 1 Cal. 462, the Supreme Court of this state said:

"It is well settled that all that part of a bay or river below low water at low tide, is a public highway. * * *"

In many other jurisdictions the same rule exists, and has been applied, in both civil and criminal cases involving obstructions of public highways, and kindred questions. In *American Steamboat Co. v. Chace*, 16 Wall. 522, 21 L. Ed. 369, it was said that the waters of Narragansett bay constituted "one of the public highways within the state" of Rhode Island. In *State v. Narrows Island Club*, 100 N. C. 477, 5 S. E. 411, 6 Am. St. Rep. 618, it

was said with reference to Big Narrows, in Currituck Sound.

"If the water referred to was thus navigable, the public had the right to use the same for the purposes of a highway and navigation. * * * Navigable waters are natural highways—so recognized by government and the people—and hence it seems to be accepted as a part of the common law of this country, arising out of public necessity, convenience, and common consent, that the public have the right to use rivers, lakes, sounds, and parts of them, though not strictly public waters, if they be navigable, in fact, for the purposes of a highway and navigation, employed in travel, trade, and commerce."

Other authorities of the same import are numerous. *Bigelow v. Nickerson*, 70 F. 113, 117, 17 C. C. A. 1, 30 L. R. A. 336; *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713, quoted with approval in *German Alliance Ins. Co. v. Home Water Supply Co.*, 174 F. 764, 768, 99 C. C. A. 258, 42 L. R. A. (N. S.) 1005; *Comm. v. Coombs*, 2 Mass. 489, 492; *Moore v. Day*, 199 App. Div. 76, 191 N. Y. S. 731; *Smart v. Aroostook Lumber Co.*, 103 Me. 37, 68 A. 527, 14 L. R. A. (N. S.) 1083; *Dwinel v. Veazie*, 50 Me. 479, 484; *Mashburn v. St. Joe Impr. Co.*, 19 Idaho, 30, 113 P. 92, 33 L. R. A. (N. S.) 824; *C. R. I. & P. R. Co. v. Williams (C. C.)* 148 F. 442, 447; *B. & M. R. Co. v. Lowell & L. R. Co.*, 124 Mass. 368; *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho, 484, 101 P. 1059, 133 Am. St. Rep. 125; *State v. Portland Gen. Elec. Co.*, 52 Or. 502, 95 P. 722, 98 P. 160; 2 Chitty's Crim. Law. 382.

A case which illustrates the fact that waterways and land thoroughfares are not to be distinguished as highways is *French v. Camp*, 18 Me. 433, 36 Am. Dec. 728, involving the Penobscot river, which had frozen over, and a hole had been cut in the ice by the defendant for the purpose of watering stock. The opinion of the court reads, in part:

"The waters of the Penobscot are, of common right, a public highway, for the use of all the citizens. This right is generally exercised, when they are in a fluid state; but, when congealed, the citizens have still a right to traverse their surface at pleasure."

Any distinction, therefore, must necessarily be of a technical character, based only upon the fact that water is water, and land is land. It should not be the purpose of courts to base their decisions upon such inconsequential distinctions, nor should it be presumed that the parties to a contract believed the laws to be so framed, or intended their contracts to recognize such unessential differences.

In addition to the definition of a highway robber given in the *Encyclopædic Dictionary*, *Funk & Wagnalls' International Dictionary* defines a highwayman as "one who robs in public places." In 29 Cyc. at page 364, it is said that "'highway' is a name for all kinds of public ways, whether by land or by water," and many cases are there cited to the effect that navigable waters are highways.

It is well established that, when the language used in a contract of insurance is ambiguous, or when a doubt arises in respect to its application, or as to limitations of liability thereunder, it must be interpreted most favorably to the insured. *Clark v. New Amsterdam Casualty Co.*, 180 Cal. 76, 179 P. 195; *Bayley v. Employers', etc., Corp.*, 125 Cal. 345, 58 P. 7; *Welch v. British American Assurance Co.*, 148 Cal. 223, 82 P. 964, 113 Am. St. Rep. 223; 7 Ann. Cas. 396; *Coniglio v. Conn. F. Ins. Co.*, 180 Cal. 596, 182 P. 275, 5 A. L. R. 805; *Wells Fargo & Co. v. Pacific Ins. Co.*, 44 Cal. 397; *Mah See v. N. American Acc. Ins. Co.*, 190 Cal. 421, 213 P. 42, 26 A. L. R. 123. I do not think it necessary that this rule be exclusively relied upon in the case at bar to maintain the company's liability, since we deem a navigable harbor a highway to all intents and purposes, nor do I feel impelled to limit insurance against highway robbery to robbery committed on a highway technically established as such for all municipal purposes. It is generally understood, and is said in Webster's New International Dictionary, that a "holdup" is a "highway robbery," and I think the appellants contemplated insuring themselves against loss from robbery by force and violence in the open, as distinguished from, or in addition to, thefts from their domicile.

This suggests another consideration which points to the same conclusion as above indicated, namely, that the parties intended the clause being construed to have a wide scope. This is the fact that the principal part of the insurance contract constitutes one against the unlawful taking of personal property from within the premises described, and it is followed by the provision in question, intended to afford protection against results from highway robbery. Surely the insured as well as the insurer had in mind, not so much the exact spot or route in which the robbery should take place, as the nature of the act to be insured against. It would appear quite certain that they contemplated insurance against the taking of personal property from the person by means of force or violence, committed anywhere in the open, not covered by the preceding provisions of the policy, and it can hardly be thought that the parties at the time considered making a distinction between such acts, whether done in a field, or on water, or within the confines of a boulevard. Suppose bandits commit a robbery of a horseman or pedestrian upon one of the bridle paths of the parks, or among the hills of California. Would any one doubt the propriety of describing the occurrence as a highway robbery, or those who committed it as highwaymen? Yet these bridle paths are substantially the same "ways" as were the acts of history. Having contracted for reimbursement for losses occasioned by similar classes of acts than from the home, without doubt the idea of the parties was to insure against all other such robberies committed by force and vio-

lence, with knowledge of the assured. Viewed from every standpoint, the wording of the contract of insurance points to this conclusion. It is to be noted that the rider did not insure against loss from all highway robbery, but only "loss from highway robbery by force or violence," etc. Clearly, the addition of the words "by force or violence," after "highway robbery" indicates a limitation upon the class of highway robbery, loss from which it is intended to insure. There might be highway robbery where the taking was by putting in fear. This is evidently the purpose which the parties had in mind in adding the words "by force or violence," rather than as indicating that they believed the content of the term "highway robbery" to necessarily involve excessive force or violence.

Again, the further limitation upon the liability of the insurer points inevitably to the correctness of the construction above indicated. The additional words prove, if nothing else does, that the meaning ascribed by the foregoing opinion to the term "highway robbery" could not have been in the minds of the parties to this contract. If they pictured a determined individual, perhaps masked, appearing before a wayfarer, with uplifted bludgeon, or pointed firearm, rifling the pockets of his victim, who surrenders in abject terror, can any one reasonably suppose that they would have regarded it as necessary to have inserted the stipulation that "mere disappearance of property from the person of the assured, unless accompanied by force or violence and unless also within his or her knowledge at the time, is not a risk covered by this rider"? Could any one conceive of the victim of a highway robbery committed in the manner so graphically portrayed in "Lorna Doone," or "A Tale of Two Cities," or "George Psalmanazar's Account of the State of the South of France," not having "knowledge at the time" that he was being robbed? The fact that the rider contains this added restriction upon the insurer's liability seems to exclude the idea that the parties contemplated only insurance against the type of tragedy occurring upon some via in the days of Robin Hood, and Little John, when such robbers were often regarded as heroes, sometimes occupying a position in the respect and affection of the common people almost on a par with the nobility.

I think that, instead of proof that the parties intended to include in the policy insurance only where the one insured had been a victim of a typical Wild West holdup, this language demonstrates conclusively that the contrary is true, and that they intended to protect against any form of robbery, provided it be committed in the open, and by force or violence, and with knowledge of the victim. If the parties had intended to limit the lia-

bility otherwise, it may reasonably be expected that apt language would have been used to express such intent.

It seems clear, also, that the picture of a highway robbery existing in the minds of the parties must have been such that they anticipated a claim might be made that the taking of property from the person even without his knowledge would be included within the term; that it might be said that taking property from the person, though not by force or violence, but only through cunning or artifice, is highway robbery. Otherwise, why should they have added the proviso against such taking being covered by the term? The effect of this language, to my mind, is exactly the same as though the contract had read, "All loss by robbery in the open, if accomplished by force or violence, and if the assured at the time of being robbed has knowledge of the fact, is covered by this policy." Under such a statement the appellant would, hardly deny liability.

Again, I cannot agree with the narrowly restricted view that the provision, "unless also within his or her knowledge at the time," should be so construed as to require that the person robbed must have had a consciousness of the result of the acts of the robber, and an appreciation of the fact that such acts would result in a particular article of value being separated from the person and possession of the assured and falling under the control of the robber. The absurdity of such construction is apparent, if we consider where it would, of necessity, lead. Robbers not infrequently operate on crowded streets and well-traveled roads. Should A., in one of these places, approach B. from behind and strike him unconscious with a blackjack, rifle his pockets of money, and strip him of jewelry, under the construction suggested and accepted by the foregoing opinion, no recovery could be had by the insured, because this taking was not within his "knowledge at the time." Or, suppose A., at the point of a pistol, attempts to rob B., B. resists, and A. uses his pistol for a club, and in a struggle which ensues, B. believes he has defended his possession, but, upon A. desisting and taking flight, investigates, and finds his watch is gone. If the clause in question should be so narrowly construed as to require a consciousness of every move that was made in the combat and its effect in the matter of the extraction of property from the assured, there could be no recovery.

That appellant was forcibly robbed to her then knowledge seems to be conceded, and is clear. Having been robbed on the navigable waters of Los Angeles harbor, used at the time for navigation, it follows that the loss was one suffered through highway robbery within the obvious intention of the contract.

77 Cal. App. 681

CRAIG v. DINWIDDIE. (Civ. 3071.)

(District Court of Appeal, Third District, California. April 30, 1926.)

1. Quieting title ⇨43—Under complaint to quiet title and answer that defendant's mortgage constituted prior lien, all facts tending to prove defendant's priority held admissible.

Under complaint to quiet title and answer alleging that defendant's mortgage constituted prior lien, antedating plaintiff's acquisition of property, all facts and circumstances tending to establish priority of defendant's lien, including facts as to prior mortgage of which that set up was renewal, were admissible.

2. Vendor and purchaser ⇨244.

Evidence held to show that subsequent purchasers had actual notice of prior unrecorded mortgage executed by vendor.

3. Mortgages ⇨178 — Execution of renewal note and renewal mortgage continued mortgagee's right to same priority as under original mortgage.

Where owner executed to mortgagee new note and mortgage in renewal of prior note and mortgage, payment of old note was suspended until maturity of new note, and mortgagee was entitled to same priority as before mortgage was renewed.

4. Equity ⇨56—Equity looks to substance, not form, in determining nature of transaction.

Equity looks to substance, not to form, in determining whether second note and mortgage were given in payment of prior note and mortgage or merely in renewal.

5. Limitation of actions ⇨164.

Mortgage lien is not extinguished by lapse of time while debt is kept alive.

6. Limitation of actions ⇨151(2).

Promise to pay debt, made before limitation statute runs, keeps obligation alive, and suit, if brought, must be upon original promise.

7. Limitation of actions ⇨164—Where renewal note and mortgage were executed, subsequent grantee held to take title subject to mortgagee's lien, though new mortgage was not recorded until after conveyance by mortgagor (Civ. Code, §§ 19, 1214).

Where owner executed new note and mortgage in renewal of prior note and mortgage, subsequent purchaser of property held to take subject to mortgagee's lien, in view of Civ. Code, § 19, though new mortgage was not recorded until after conveyance by mortgagor, and original note was long overdue, where all parties had actual notice of second mortgage, notwithstanding section 1214, providing that conveyance is void as against later conveyance first recorded.

8. Limitation of actions ⇨165—Mortgagor's grantee cannot quiet title until debt is paid, where there were extensions of which he had notice, notwithstanding mortgage lien has been extinguished by time.

Notwithstanding lien of mortgagee has been extinguished by lapse of time, mortgagor's gran-

tee cannot quiet title without paying debt due, where extensions of time had been granted to mortgagor of which grantee had notice.

9. Mortgages ⇨305—Mortgage is not discharged by change in form of debt.

No change in form of evidence of debt will discharge mortgage, since mortgage secures the debt, and is not discharged until debt it was given to secure is satisfied.

10. Mortgages ⇨316—Where renewal mortgage was executed, and subsequent grantee, though he had actual notice, claimed it was void because not recorded at proper time, equity would, if necessary, set aside release of original mortgage.

Where owner executed note and mortgage in renewal of prior note and mortgage, and, after original mortgage had been released, subsequent grantee of property, though he had actual notice of latter mortgage, claimed it was void because not recorded at proper time, equity would, if necessary to protect mortgagee, set aside release and award foreclosure.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action to quiet title by H. S. Craig against Nellie Dinwiddie. From an insufficient judgment, plaintiff appeals. Affirmed.

R. H. Chamberlain, Jr., of Oakland, for appellant.

A. M. Pence, of Covina, for respondent.

PLUMMER, J. Action by plaintiff to quiet title to sixty and a fraction acres of land situate in Madera county, state of California. Defendant pleaded a mortgage lien on the premises involved. Plaintiff had judgment subject to the mortgage, and appeals from that part of the judgment establishing defendant's lien.

The complaint alleges that on the 7th day of February, 1924, plaintiff became and ever since has been the owner of the tract of land above referred to, and further that defendants (there being some fictitious persons named as defendants) claim to have some estate, right, title, or interest in, to or against said property, or some portion thereof, but that such claims of defendants, and each of them, are without any right whatever and are subject and subordinate to the rights and claims of the plaintiff. The answer of the defendant, Nellie Dinwiddie, sets up a certain mortgage on the premises described in the complaint, said mortgage being dated September 22, 1920, for the sum of \$6,565, payable 3 years after date, interest at 7 per cent. per annum, said mortgage being executed by Andrew McKibben and Nancy J. McKibben, alleged to be the owners of the premises referred to in plaintiff's complaint at the date of the execution of said mortgage, and that said mortgage constituted a first lien on said real estate, and that plaintiff's interest in said land is subsequent and subject to the

lien of said mortgage. The answer also denies that the claim and interest of the said Nellie Dinwiddie is subordinate or subject to the plaintiff's claims.

The transcript shows that on or about the 22d day of September, 1916, E. I. Voorheis and Sarah E. Voorheis, his wife, then being the owners of the real estate referred to in plaintiff's complaint, executed a note and mortgage for the sum of \$6,565, payable 3 years after date. This mortgage covered the lands and premises described in plaintiff's complaint. This mortgage was duly recorded, and thereafter, and on or about the 5th day of December, 1917, assigned to Amanda E. Dinwiddie and Nellie Dinwiddie, and by them assigned to one Sherman Gail, and by the said Sherman Gail reassigned to Amanda E. Dinwiddie and Nellie Dinwiddie as joint tenants. After the execution of the mortgage just mentioned, known as the "Voorheis mortgage," the real estate referred to was sold and conveyed to Andrew McKibben and Nancy J. McKibben, his wife, who, on or about the 22d day of September, 1920, executed to Nellie Dinwiddie a mortgage on the lands described in the first mortgage and the premises involved in this case, to secure a note in the sum of \$6,565, payable 3 years after date; the "Voorheis mortgage" herein referred to being past due and unpaid. This mortgage, called the "McKibben mortgage," was not recorded until on or about the 15th day of November, 1922. In the meantime, and on or about the 16th day of March, 1921, Andrew McKibben, the mortgagor, conveyed the land in question to Margaret P. Van Hoosear. Thereafter, and after the recording of the McKibben mortgage, Margaret P. Van Hoosear and William S. Van Hoosear, by deed of gift, conveyed the property in question to their son, Burr S. Van Hoosear, who, on or about February 7, 1924, conveyed the land to the appellant, H. S. Craig. The Voorheis mortgage referred to herein was not satisfied of record until on or about the 5th day of March, 1924, a date subsequent to the time when the plaintiff and appellant took title to the property. The Voorheis mortgage was satisfied of record at the request of William S. Van Hoosear on behalf of appellant. After the satisfaction of the Voorheis mortgage had been entered of record, the plaintiff instituted this action to quiet title. The satisfaction of mortgage recites that "the Voorheis mortgage has been fully paid by renewal thereof"; the renewal being by way of the mortgage executed by the McKibbens and set up in the answer of the defendant, Dinwiddie.

[1, 2] Plaintiff's claim is based principally upon the provisions of section 1214 of the Civil Code, which reads:

"Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser

or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action."

Respondent's answer is based upon the principle set forth in section 19 of the Civil Code, which reads:

"Every person who has had actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

Objection is also made by the appellant that the court admitted proof of the transactions recited showing the execution of the Voorheis mortgage, the fact of its renewal by the McKibbens' mortgage, and that the Voorheis mortgage was never otherwise paid on the ground that such questions were not tendered by the pleadings. The answer itself, however, alleges that the McKibben mortgage constituted a prior lien upon the premises, the lien which antedated the acquisition of the property by the plaintiff. The plaintiff's complaint alleged that the claim of the defendant, Dinwiddie, was subordinate to the rights of the plaintiff. This allegation was denied by the defendant. Under this state of the pleadings we think the court was correct in admitting proof of all of the facts and circumstances tending to establish the priority of defendant's lien. At the time the plaintiff took title, both the Voorheis and McKibben mortgages were of record and of which record the plaintiff must be held to have had constructive notice, and under the record we think had actual notice. The record shows that the plaintiff acted as the attorney for the Van Hoosears in the transactions had by them in relation to the property. William S. Van Hoosear testified as to his knowledge of the circumstances of the Voorheis mortgage for \$6,565 on the premises at the time he paid the same through the McKibbens. His testimony, by question and answer, is as follows:

"Q. At the time you bought the property in question here from the McKibbens, there was a mortgage on it belonging to Miss Dinwiddie and her mother for \$6,500, wasn't there? A. It shows \$6,565.

"Q. The same amount? A. That is what was told us; that is what we found of record, known as the Voorheis mortgage.

"Q. In other words, there was a mortgage indebtedness when you bought it, of \$6,565? A. Two of them, two mortgages.

"Q. But there was a mortgage which Miss Dinwiddie owned of \$6,500? A. \$6,565, known as the Voorheis mortgage.

"Q. And, during all the time that you owned this property and before you deeded it to your son, that mortgage was on the property? A. Yes, sir.

"Q. It was on the property when you deeded it to your son? A. Yes, sir.

"Q. And, during all the time that you owned the property and your son owned the property, you paid the interest on that mortgage? A. I sent the money; yes, sir.

"Q. And wrote letters to Miss Dinwiddie, requesting time to pay the interest? A. Sometimes, when my wife was sick; yes, sir.

"Q. You did that? A. Yes, sir; I admit that.

"Q. And, at the time you deeded this property to your son, you have said that first mortgage was still on the property? A. The Voorheis and the other mortgage was still on the property.

"Q. Never was paid? A. No, sir.

"Q. As far as you know, never has been paid? A. No, sir."

The deed from Margaret P. Van Hoosear and William S. Van Hoosear to Burr S. Van Hoosear bears date of the 18th day of November, 1922; notwithstanding this deed of gift, William S. Van Hoosear testified that he continued to pay interest on what he called the Voorheis mortgage to the defendant, Dinwiddie, until to and including September, 1923. Upon cross-examination, the witness, William S. Van Hoosear testified that he first had knowledge of what is called the McKibben mortgage in October, 1923, and that, when he suggested the release of the Voorheis mortgage of record, he was referring to what he called the outlawed mortgage, and that the Voorheis mortgage, by its terms, became outlawed in September, 1923. Without setting forth the entire evidence from which we think the court was justified in concluding that all parties concerned were well aware of all the proceedings, we content ourselves with quoting from the opinion of the trial court, which clearly indicates the character of the whole transaction:

"The court has well in mind the testimony; I want to say frankly this is a most unusual set of circumstances; without commenting on my ideas of the evidence, I am satisfied that the existence of this mortgage is well within the knowledge of all the parties; therefore it is the judgment and decree that title be vested in H. S. Craig as prayed, subject to the lien and incumbrance of the mortgage of Miss Dinwiddie."

Any inquiry on the part of the plaintiff would have elicited the information that the Dinwiddie mortgage was given simply as a renewal of the Voorheis mortgage. It was not given in payment, and no release or satisfaction of the Voorheis mortgage was ever entered other than that solicited by the plaintiff and the Van Hoosears which was obtained in the language we have quoted, which was followed immediately by this action to quiet title. Any reasonable or prudent man would have made inquiry to ascertain the facts concerning the two mortgages, and, under such circumstances, we think section 19 of the Civil Code has direct application.

[3-6] The debt in this case was at all times kept alive. There is no pretense that the

McKibben note and mortgage was given as an additional note and mortgage or other than as claimed by the respondent. The form or procedure followed perhaps differs somewhat from the usual method of renewing notes, but the substance was exactly the same, and, by the execution of the new note and mortgage, payment of the old note was suspended until the maturity of the new note, and thus leaving the respondent standing precisely where she stood before the mortgage was renewed, as far as priority is concerned. *Tolman v. Smith*, 85 Cal. 288, 24 P. 743. Equity will look at the substance of the transaction and not merely the form characterizing the procedure. *Tolman v. Smith*, supra; *Swift v. Kraemer*, 13 Cal. 526, 73 Am. Dec. 603. While the debt remains, the lien is not extinguished. *Worth v. Worth*, 155 Cal. 599, 102 P. 663. This is not a case of a new promise, but simply a continuation of the old obligation, as pointed out in *Weinberger v. Weidman*, 134 Cal. 599, 66 P. 869, where the distinction is drawn between one made before and one made after the statute has run:

"The one keeps alive the first obligation, and, if suit is brought, it must be upon the original promise, and, so long as the debt is kept alive, the lien of the mortgage continues."

In *Newhall v. Hatch*, 134 Cal. 269, 66 P. 266, 55 L. R. A. 673, the court, in considering the effect of the renewal of a note secured by mortgage, thus states its views:

"At the time the note was renewed, Hatch was the owner of the land, and the plaintiff was the owner of the debt. They were the only parties interested in the transaction, or that would be affected thereby, and the effect of this renewal of the obligation could not be impaired by any subsequent acts of others. The renewal had the same effect with reference to persons thereafter dealing with the land as if Hatch had then executed a mortgage for that amount."

The court then holds that the renewal of a note works a continuation of the mortgage lien. In *Lent v. Morrill*, 25 Cal. 492, the court holds that, if the maker of a note secures the same by a mortgage on lands, and while still the owner of the mortgaged property extends the time of payment of the note, a purchaser from the mortgagor of the premises mortgaged takes the same subject to the lien of the mortgage until the note is barred by the statute of limitations, although at the time of his purchase he did not know that the time of payment of the note had been extended. The language of the court is as follows:

"It is a matter of no moment that Chambers, when he took his conveyance of the land in 1862, had no knowledge that the note and mortgage had been extended. Lent was not delinquent in any known common-law or statute duty or requirement. He was not bound to serve personal notice of the acknowledgment of February, 1859, upon any one, nor to publish the

fact in the gazettes; and, if he had caused the acknowledgment to be recorded in the recorder's office, it would have been followed by no legal consequences. Chambers, on the other hand, knew, at least when he bought and paid his money, that the mortgage had not been discharged of record. He further knew, as matter of law, that under the statute of limitations a renewal of the note was a possible event. He might, and as a prudent man he ought, before concluding his purchase, to have sought out Lent and inquired of him as to whether the note had been renewed in fact. If on such application Lent had told him that there had been no renewal, and if thereupon Chambers, on the faith of the statement, had closed the trade and paid his money for the land, Lent would have been estopped from setting up the mortgage against the man whom his own false suggestions had misled. Not having pursued that course, however, Chambers must be understood to have bought and taken his conveyance subject to all hazards."

[7] Had the plaintiff made any inquiries as to the mortgages covering the land in question which were on record, as he should have done under the terms of section 19 of the Civil Code, he could have ascertained the facts from the respondent, the owner of the mortgage indebtedness, and, had he been misinformed by her as to any such facts, he could have pleaded the same by way of estoppel, but, instead of so doing, he chose the course of attempting to defeat an honest indebtedness and an equitable lien to secure the payment of the same by an alleged flaw in the respondent's claim, and, having so done, the plaintiff must be held to have taken the land subject to all hazards. Again, as said in *Tolman v. Smith*, supra:

"As long as the statute of limitations has not run, a renewal or extension of the mortgages is not required; they are alive, though 'suspended.' And, in the second place, the substituted mortgage was executed with the requisite formalities, and, as shown by the cases cited below, it will be treated by a court of equity as an extension of the old mortgages to the extent of the debt secured by them."

This was a case where additional mortgages were given. The court further said:

"The effect of conditional payment of one mortgage by another is to suspend the remedy on the old mortgage until the maturity of the new one. Until such maturity the old mortgage cannot be foreclosed. But if the debt be not paid at maturity, the old mortgages revive and have priority over an intervening mortgage to a third person."

[8, 9] This principle carries the lien of the respondent back to the date of the execution of the Voorhels mortgage, which was long prior to the inception of any rights acquired by the plaintiff. To the same effect is the case of *Chapman v. Hicks*, 41 Cal. App. 158, 182 P. 336, where it was held that a judgment quieting title could not be entered until the

debt was paid; there having been extensions of time, of which the grantee had notice. In the case at bar the testimony shows the non-payment of the debt and its renewal by second mortgage. Under such circumstances, we also think the language of the Supreme Court, quoted in *Bank of Suisun v. Fiske*, 65 Cal. App. 776, 225 P. 8, applicable:

"A mortgage secures the debt and not the note or bond or other evidence of it. No change in the form of the evidence or the mode or time or times—nothing short of actual payment of the debt, or an express release—will operate to discharge the mortgage. The mortgage remains a lien until the debt it was given to secure is satisfied, and is not affected by a change of the note or giving a different instrument as an evidence of the debt, or by a judgment at law on the note merging the original evidence of indebtedness."

[10] The giving of the second note in this case, as we have stated, did not change the indebtedness. It only postponed the time when action might be had to foreclose the mortgage given to secure its payment, and in this case, so long as the debt remained alive, if necessary to protect the rights of the mortgagee, equity would set aside the release procured in the manner and under the conditions disclosed by the record and award foreclosure. 19 R. C. L. § 236; *Kern v. Hotaling Co.*, 27 Or. 205, 40 P. 168, 50 Am. St. Rep. 710.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; HART, J.

77 Cal. App. 744

ORANGE COUNTY v. BACKS, County Clerk. (Civ. 5305.)

(District Court of Appeal, Second District, Division 2, California. May 3, 1926.)

Mandamus $\S$ 74(2)—Writ lies to compel county clerk, as ex officio clerk of board of supervisors, to attest ordinance calling special bond election (Pol. Code, § 4038, subd. 8).

County clerk's duty under Pol. Code, § 4038, subd. 8, as ex officio clerk of board of supervisors, to authenticate published proceedings of board, is purely ministerial, so that mandamus lies to compel him to attest ordinance calling special election to authorize bond issue, legality of which he cannot dispute.

Petition by the County of Orange, by T. B. Talbert, Chairman of the Board of Supervisors, for writ of mandate to J. M. Backs, County Clerk, and ex officio clerk of the Board. Writ granted.

Alex P. Nelson and Clyde Bishop, both of Santa Ana, for petitioner.

L. A. West, of Santa Ana, for respondent.

CRAIG, J. The petitioner prays for a writ of mandate directing the county clerk, as ex

officio clerk of the board of supervisors of Orange county, to attest an ordinance calling a special election for the purpose of determining whether or not certain bonds shall be issued for harbor improvements. This he has refused to do, upon a number of grounds involving the constitutionality and legality of the issuance of the bonds if they should be voted.

Section 4038, subd. 8, of the Political Code makes it the duty of the clerk to authenticate with his signature and the seal of the board proceedings of the board whenever they shall have been ordered published. This is purely a ministerial duty, the performance of which can be made contingent upon no other consideration than the order of the board of which he is ex officio clerk. He cannot dispute the legality of the actions which they have taken upon constitutional or other legal grounds. *Marin Municipal Water Dist. v. Dolge*, 172 Cal. 724, 158 P. 187; *City of Los Angeles v. Lefande*, 157 Cal. 30, 106 P. 218; *Thoits v. Byrbee*, 34 Cal. App. 226, 167 P. 166.

The writ is granted.

We concur: WORKS, Acting Presiding Justice; CONREY, Justice pro tem.

77 Cal. App. 548

ADELSTEIN v. GREENBERG et al.
(Civ. 5050.)

(District Court of Appeal, First District, Division 1, California. April 24, 1926.)

1. Partnership ⚡282—Partners on partial dissolution of copartnership could reserve copartnership leasehold in building as separable from merchandise, fixtures, and other assets assigned by dissolution agreement.

On partial dissolution of copartnership, partners had legal right to reserve to copartnership leasehold interest in building as being species of property separable from merchandise, fixtures, and other assets belonging to copartnership, and transferred and assigned by dissolution agreement.

2. Attorney and client ⚡92.

Statement of counsel made during course or argument on demurrer held not binding as not made during trial of action on merits as admission or stipulation of fact.

3. Appeal and error ⚡1010(1).

Finding of trial court supported by evidence cannot be disturbed on appeal.

4. Landlord and tenant ⚡76(2).

Where leasehold interest is owned jointly, it is not violation of covenant against assignment for one colessee to acquire interest of the other.

5. Landlord and tenant ⚡47.

Condition involving forfeiture must be strictly interpreted against party for whose benefit it is created.

6. Landlord and tenant ⚡104—Assignment of lease by one colessee to another without lessor's consent on partial dissolution held not to result in forfeiture.

Assignment of lease from one colessee to another on partial dissolution of partnership without lessor's consent held not to result in forfeiture; both lessees continuing to be jointly and severally liable to lessor.

7. Landlord and tenant ⚡76(1).

Covenant in lease against assignment containing additional words, nor any interest therein, held to mean that neither entire leasehold interest or any less interest included therein should be assigned, and was not such as prohibited assignment by one of colessees to other.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Dora Adelstein against Isaac Greenberg and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Harry K. Wolff, of San Francisco, for appellant.

Sylvain Lazarus, Eugene H. O'Donnell, and Gillogley, Crofton & Payne, all of San Francisco, for respondents.

KNIGHT, J. This is plaintiff's appeal from a judgment in defendants' favor in an action in unlawful detainer.

For more than three years prior to the month of April, 1923, respondents Isaac Greenberg and Solomon Lipschitz, as copartners, were engaged in the millinery business, operating three stores in San Francisco and two in Oakland. One of their San Francisco stores was located on Fillmore street in premises owned by appellant. On April 26, 1923, appellant entered into a written lease with respondents for the continued use of said premises for a term of six years and nine months, commencing on May 1, 1923, the total rental being \$26,775, payable in monthly installments ranging from \$275 to \$375 during the period of the lease. The terms of the lease recited that respondents had paid appellant the sum of \$1,125 "as a bonus for obtaining" the lease, and it was agreed that, in consideration of the full performance by respondents of the terms, covenants, and conditions of said lease, appellant would pay to respondents at the expiration of said lease the sum of \$1,125, otherwise they were to receive nothing.

The copartnership continued to conduct the business in the premises leased from appellant until December 31, 1923, at which time a partial dissolution of copartnership was effected; the written agreement between the partners in this respect providing "that

said copartnership shall be dissolved except as to the extent of the reservations herein-after excepted as and of the date January 1, 1924." Under this agreement four of the places of business belonging to the copartnership were divided; two being assigned and transferred to each partner, together with the merchandise and fixtures belonging thereto. The Fillmore street establishment was set apart to Lipschitz. Said agreement further provided that each partner was vested with sole ownership in the property thus assigned and transferred to him; that the rental of the respective stores should thereafter be paid by the parties occupying the same; and that "each of said stores may, subsequent to the date of said dissolution, operate under the trade name which same now bears and said several trade names shall be considered a part of said several businesses." The leases to three of the stores were expressly assigned by the terms of the agreement to the parties to whom those particular stores were transferred, but no mention whatever was made therein of the lease to the Fillmore street premises more than to provide that Greenberg's interest in the deposit for the security of the performance of the terms of that lease was assigned to Lipschitz. It was agreed that the fifth store, located in Oakland, should continue to be the property of, and conducted by, the copartnership until the lease of those premises expired on September 30, 1924, and that thereafter the business should be "closed out, and the said partial partnership as to said business terminated."

On December 19, 1923, about two weeks previous to the execution of the so-called agreement of partial dissolution, appellant mailed to respondents a letter stating that she had been informed by Mr. Lipschitz that respondents were contemplating a change in the firm; that one partner was about to dispose of his interest in the business to the other, and advising respondents "to read the third paragraph on page 10 of your lease." The letter concluded: "This is to notify you that no change can be made without my written consent first had and obtained thereto." On January 1, 1924, pursuant to said agreement, Lipschitz assumed ownership of the Fillmore street store, and paid the January rental in advance. On January 9, 1924, appellant served on respondents a notice of termination of the lease, and demanded the surrender of the premises upon the ground that respondents had violated the following covenant in said lease:

"The lessees further covenant and agree that neither this lease nor any interest therein whether legal or equitable, shall be assigned, alienated, pledged or hypothecated voluntarily or by operation of law, nor shall said demised premises be sub-let in whole or in part without the written consent of the lessor having previously thereto been obtained."

Respondents refused to vacate said premises and on January 14, 1924, appellant commenced this action.

The trial court found, in effect, that no transfer or assignment of said lease had ever been made by respondents, or either of them, and accordingly rendered judgment in their favor. The main contention of appellant is that this finding is not supported by the evidence, claiming in this regard that the terms of said agreement, as well as the circumstances surrounding the taking over and operation of the Fillmore street place of business by Lipschitz, established an assignment of the lease; and, basing her next point on such assumed assignment, appellant urges as a proposition of law that the assignment of the lease from one partner to the other without her consent as lessor operated as a forfeiture of the lease and to the money paid as security for the performance of its conditions and covenants.

[1, 2] So far as the record discloses, there was no express assignment of said lease either by the terms of said agreement or otherwise, and we believe that the transactions involving the transfer of the Fillmore street place of business to Lipschitz did not carry with it such assignment. After having received appellant's letter of December 19, 1923, respondents evidently concluded that in the settlement of their copartnership affairs they would reserve as copartners ownership of the lease to the Fillmore street premises, and their agreement was apparently drafted and signed with that end in view. It will be noted from a reading of the entire instrument that the intention of the parties was, not to bring about an immediate and complete dissolution of the copartnership at that time, but merely to divide the assets which were specifically enumerated in the agreement, and that as to those remaining, some of which were expressly mentioned in the agreement, the copartnership relation was to continue. Among the properties thus reserved to the copartnership were the assets belonging to the Oakland store and the leasehold interest in the Fillmore street premises. As between themselves, respondents doubtless had the legal right to make this kind of an adjustment of their copartnership property, for the reason that the leasehold interest in the Fillmore street premises was a species of property separable from the merchandise, fixtures, and other assets belonging to the store, and consequently could be legally reserved by the copartnership from the transfer and assignment of the assets belonging to the store. *Johnson v. Levy*, 3 Cal. App. 591, 86 P. 810. The statement of counsel for respondents made before the trial court during the course of the argument on demurrer indicating that there had been an assignment of the lease, to which appellant calls attention, is unimportant, being merely the statement of a legal conclusion, and, even if it

could be regarded as a matter of fact, was not binding on respondents because it was not made during the trial of the action on the merits as an admission or stipulation of fact.

[3] If, as the trial court found, and as we believe to be the case, there was no assignment of the leasehold interest to Lipschitz, appellant is wholly without ground for complaint, because the tenancy created by the lease continues unbroken, and the duties and obligations of respondents and the rights of appellant thereunder, as original parties to the lease, remain unchanged and unimpaired. The lease provided, it is true, that the lessees should not sublet the premises, and that the same should be used "for the conduct of millinery and millinery supply business only, and for no other business whatever," but neither of those provisions has been violated. It is not claimed that the premises have been sublet, and the quoted provision of the lease does not require that the business mentioned shall be owned or conducted jointly by the lessees. For the foregoing reasons, we conclude that the finding of the trial court to the effect that an assignment of said lease had not been established is supported by the evidence, and therefore said finding cannot be disturbed on appeal.

[4, 5] It has been held generally in this state and in other jurisdictions that, where the leasehold interest is owned jointly, as by copartners, it is not a violation of the covenant against assignment for one colessee to acquire the interest of the other. *Randol v. Scott*, 110 Cal. 590, 42 P. 976; *Spangler v. Spangler*, 11 Cal. App. 321, 104 P. 995; *Ruppe v. Utter* (Cal. App.) 243 P. 715; *Swartz v. Bixler*, 261 Pa. 282, 104 A. 501; *Bristol v. Westcott*, L. R. 12 Ch. Div. 461. Where strangers are brought into the lease, a different situation is presented. *De Angeles v. Cotta*, 62 Cal. App. 691, 217 P. 821. In *Randol v. Scott*, supra, the rule is stated as follows:

"A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created, and to prevent the restraint from going beyond the express stipulation; and a covenant by the lessees not to assign the lease must be presumed to mean that the lease should not be assigned by the joint act of the lessees."

In the case of *Spangler v. Spangler*, supra, one colessee assigned to the other, and the landlord claimed a forfeiture. The court said:

"The covenant is that the lessees shall not assign, and only one of them has done so. It does not provide that neither of the lessees shall assign, nor that one may not assign to the other; and, construing this covenant strictly against the lessor, as the law requires us to do, it should be presumed to mean that the lease shall not be assigned by both. As the assignment was by one only of the lessees, there was

no breach of the covenant, and therefore there was not forfeiture."

In *Bristol v. Westcott*, supra, the lease to a copartnership contained a covenant against assignment without lessor's consent, and it was held that there was no breach, where one of the lessees, on dissolution of the firm, agreed to assign to the other his interest in the lease, if the consent of the lessor could be obtained, but had already signed further memorandum reciting that he had already given sole possession of the premises to the other. The covenant in that lease was construed as inhibiting only the parting with possession to any person other than one of those two to whom possession was originally given.

[6, 7] It would therefore appear in the instant case that, even though there were an express or implied assignment from one colessee to the other without the lessor's consent, a forfeiture would not result. Under such circumstances, the assignment being made without the consent of the lessor, the relations between the lessor and the lessees would remain unaffected by the transaction between the lessees, both lessees continuing to be jointly and severally liable to the lessor for any breach occurring. *Wood v. Longyear* (Cal. Sup.) 242 P. 932. Appellant does not question the correctness of the rule adhered to in the cases cited, but endeavors to distinguish the instant one from them upon the ground that the covenant here against assignment contained the additional words "nor any interest therein." As already pointed out in the cases of *Randol v. Scott*, supra, and *Spangler v. Spangler*, supra, the covenant against assignment must be presumed to mean that the lease shall not be assigned "by the act of the joining lessees," and it would seem to follow therefrom in the case at bar that the additional words mentioned mean simply that neither the entire leasehold interest nor any less interest included therein shall be assigned "by the joint act of the lessees," the result of which would be, for instance, to bring in with respondents one or more strangers to the lease, as was done in the case of *De Angeles v. Cotta*, supra. If the intention had been to preclude an assignment from one colessee to the other, a clause to that effect could easily have been inserted in the covenant in question.

"A forfeiture can be enforced only when there is 'such a breach shown as it was the clear and manifest intention of the parties to provide for.' *Taylor on Landlord and Tenant*, 8th Ed. § 489, and cases cited. * * * Of course it is unnecessary to cite authorities to the points that covenants in restraint of alienation are barely tolerated, and that contracts looking to penalties and forfeitures must be strictly construed. * * * Our own Code provides that 'a condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created.' Civ. Code, §

1442. As to the power of re-entry for the forfeiture of a lease it was said by Justice Miller: 'It has always been considered that it was necessary to restrain it to the most technical limits of the terms and conditions upon which the right is to be exercised.' 'Elevator Case' [C. C.] 17 F. 201. 'Covenants of this description are construed by courts of law with the utmost jealousy to prevent the restraint from going beyond the express stipulation.' Taylor on Landlord and Tenant, § 403." *Randol v. Scott*, supra.

The covenant in the lease here, as already shown, contained no clause against assignment by one colessee to the other. That being so, it is not within the power of the courts to revise the lease so as to insert such a clause. However, if, as we believe, the evidence supports the finding of the trial court to the effect that there has been no express or implied assignment of said leasehold interest, the question of the effect of such an assignment becomes immaterial.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

77 Cal. App. 716

ELLIOTT v. VAN DELINDER, County Treasurer. (Civ. 5077.)

(District Court of Appeal, Second District, Division 2, California. May 1, 1926.)

1. Officers —30.

Const. art. 3, § 1, prohibiting officer of one department from holding office in another, affects title to office.

2. Mandamus —172.

Title to office, questioned because of violation of Const. art. 3, § 1, cannot be litigated in proceeding for writ of mandate to compel county treasurer to pay salary thereof.

3. Stipulations —18(7)—Agreed facts, in proceeding to compel county treasurer to pay salary, that respondent was duly qualified justice of peace, held to fix title to office.

In proceeding for writ of mandate to compel county treasurer to pay salary, agreed statement of facts, reciting that respondent was duly qualified justice of peace of certain township, held to fix title to office.

4. Quo warranto —11.

Quo warranto is proper remedy by which to test title to all public offices.

5. Mandamus —172.

Alleged incompatibility of offices raises question of title which cannot be questioned in proceeding for writ of mandate to compel payment of salary to incumbent.

6. Officers —94.

Right to receive salary attached to office is incident to title and not to exercise of duties.

7. Stipulations —14(10).

In proceeding for writ of mandate to compel county treasurer to pay salary of justice of peace, stipulation conceding respondent's title to office held conclusive of right to salary.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Petition by Charles J. Elliott for a writ of mandate against H. R. Van Delinder, as County Treasurer of the County of Ventura, directing payment of salary. From a judgment granting the writ, defendant appeals. Affirmed.

Edward Henderson, Dist. Atty., and James C. Hollingsworth, Deputy Dist. Atty., both of Ventura, for appellant.

Durley & Downes, of Oxnard, for respondent.

WORKS, J. Petitioner is a township justice of the peace. During his incumbency of that office he also held an employment with the department of engineering of the state, under which employment his duties were to obtain rights of way for the construction and installation of certain state highways. He has been engaged in the discharge of the duties of the employment, and has received for his labors in that behalf a certain salary from the state treasury. The auditor of the county in which petitioner holds his office as justice of the peace issued to him a warrant for his salary as justice for a month during which he had exercised his employment under the department of engineering, and for which he had been paid his salary by the state. Petitioner presented the warrant to defendant, the county treasurer of the county, and defendant refused to pay it. Petitioner then filed in the superior court his petition for a writ of mandate requiring defendant to make the payment. An alternative writ issued, defendant answered, and the proceeding came on for trial on an agreed statement of facts. Judgment was rendered directing the issuance of a peremptory writ, and defendant appeals.

[1] Section 1 of article 3 of the Constitution of the state reads:

"The powers of the government of the State of California shall be divided into three separate departments—the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this Constitution expressly directed or permitted."

It is contended by appellant that respondent comes within the inhibition of this section in his attempt to discharge the duties of both his judicial position and his employment above mentioned, and that, as he has received his salary for the month under the em-

ployment, he is not entitled to the salary for that period as justice of the peace. We cannot perceive how this question is to be considered in the present proceeding. It is too plain for argument that the Constitution, in its provision that no person "charged with the exercise of powers" under one of the departments of government "shall exercise any functions appertaining to either of the others," affects the title to offices. The inhibition means that no person shall hold offices under different departments of the government at the same time, and it exists for the purpose of aiding in the preservation of the barriers which under the American system have been erected between the three departments. The truth that the section deals with the titles to offices permeates the opinion of the Supreme Court in the leading case of *People v. Provines*, 34 Cal. 520.

[2-4] The facts of the present proceeding appear in a stipulation entered into by the parties, which recites that, during the time covered by the salary warrant issued to respondent by the county auditor, he was "the duly qualified justice of the peace" of a certain township. The stipulation therefore fixes his title to the office. If, however, that question were not settled as a matter of fact, and if appellant were contending in this proceeding that respondent had forfeited the office of justice of the peace by discharging the duties of his employment under the department of engineering of the state, the feat could not be accomplished. "The statutory procedure in the nature of quo warranto is the proper remedy by which directly to test the title to all public offices" (22 Cal. Jur. 206), and it has been declared frequently that the question cannot be tried collaterally (*People v. Sassovich*, 29 Cal. 480; *People v. Provines*, supra; *Matter of Danford*, 157 Cal. 425, 108 P. 322). It has been decided, specifically, that the title to an office cannot be tested in a proceeding for the writ of mandate. *Turner v. Melony*, 13 Cal. 621.

[5-7] It is contended that the office of justice of the peace, held by respondent, is incompatible with the employment exercised by him under the engineering department of the state, and that therefore he cannot hold the office. There are several reasons why this point is not available to appellant. In the first place, an alleged incompatibility of offices raises the question of title (*People v. Garrett* [Cal. App.] 237 P. 829), and that question, as based upon such a claim, can no more be tried in this proceeding than can the question sought to be presented under section 1 of article 3 of the Constitution. Further, under the doctrine of incompatibility of offices, an office first held by an individual becomes vacant by an acceptance by him of a second office the duties of which are incompatible with those of the first (*People v. Garrett*, supra), but the petitioner here fails

to allege whether or not respondent's acceptance of the employment under the engineering department came after his acquisition of the office of justice of the peace. Other reasons why the question of incompatibility of offices cannot be urged by appellant need not be stated.

The right to receive the salary attached to an office is an incident to the title to the office, and not to the exercise of its duties. 21 Cal. Jur. 942. Therefore, the title of respondent to the office of justice of the peace being conceded by the stipulation of the parties, and, even if it were not, the title not being impeachable in the present proceeding, it follows that respondent is entitled to the payment of the installment of his salary as justice of the peace which is in question here.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

77 Cal. App. 733

In re La MOTTE. (Civ. 5352.)

(District Court of Appeal, Second District, Division 2, California. May 3, 1926.)

1. Attorney and client ☞61.

Upon application for reinstatement as attorney, questions presented are moral and mental qualifications of petitioner as touching fitness to resume work of legal profession.

2. Attorney and client ☞61—Applicant for reinstatement as attorney held to have sustained burden of proving requisite moral and mental qualifications (Code Civ. Proc. § 287, subd. 1).

Upon application for reinstatement as attorney, after disbarment after conviction for crime, under Code Civ. Proc. § 287, subd. 1, petitioner held to have sustained burden of showing that both moral and mental qualifications were such that application might be granted.

3. Attorney and client ☞61.

Petitioner for reinstatement as attorney after disbarment for conviction of crime has burden of showing both moral and mental qualifications.

In the matter of the application of James D. La Motte for reinstatement as an attorney and counselor at law. Application granted.

Gilligan & Cobb, of Los Angeles, for petitioner.

WORKS, J. This is an application for the reinstatement of an attorney at law after disbarment. The rules governing such matters and the procedure to be followed in disposing of them in this particular division of the District Court of Appeal are defined and laid down in the opinion *In re Stevens* (Cal. Sup.) 241 P. 88, and in our opinion *In re Cate*, 247 P. 231.

[1] Under these decisions it becomes our

duty, in the present proceeding, to determine two questions: (1) What are the moral qualifications of petitioner, as touching his fitness to resume the work of the legal profession? (2) What are his mental qualifications, as affecting the same matter? We are able to answer these questions without making the reference which we found necessary in each of the three proceedings that were dealt with in the opinion *In re Cate*, supra.

[2] Petitioner was disbarred pursuant to that portion of the statute which provides for the removal of an attorney upon his "conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence." Code Civ. Proc. § 287, subd. 1. The crime that resulted in the disbarment was not one which in any way concerned petitioner's duty as a lawyer, nor was it in any way connected with his law practice. His moral character, therefore, has not been tainted with any turpitude involving loss or damage to any of that large class who find it necessary to employ the services of members of the legal profession. At the time of his disbarment, petitioner had been engaged in the practice of the profession principally in the county of Riverside, in which jurisdiction he had maintained his law office and in which he resided. Some time before the filing of petitioner's application for reinstatement he requested the Riverside County Bar Association to appoint a committee to investigate his "activities and conduct" with a view of obtaining from the association a recommendation for his reinstatement. The committee was appointed, and the investigation was made, with the result that the committee recommended to the association that it further the desire of petitioner to procure a reinstatement at the bar. Accordingly, at a regular meeting of the association held thereafter a resolution was adopted, by a unanimous vote, which recites that the investigation conducted by the committee was thorough and painstaking, that it covered "the past and present activities and conduct" of petitioner, and that it appears to the association that petitioner, by his exemplary conduct, has proven his fitness to be reinstated as a lawyer. The resolution then recommends to this court that the reinstatement be made.

Following petitioner's disbarment, and after his release from the imprisonment in the county jail which was imposed upon him as a punishment for his crime, which was a misdemeanor, he has engaged in several employments. There are before us affidavits from petitioner's superiors in some of the employments which he has exercised since his disbarment, and he gives ample reason for his inability to present affidavits relating to all of them. His reasons for leaving particular employments and taking up others are highly creditable to him. In each of the affidavits referred to it is shown that petitioner frankly disclosed to his prospective

employer, in seeking the position, the fact of his disbarment and all of the occurrences which led to it. These affidavits exhibit also, by specific statements of fact, the thorough diligence, ability, honesty, and fidelity with which petitioner has discharged the duties of his various employments. One of petitioner's superiors, the city manager of the city of Glendale, frequently invited petitioner to his home because of his apparent worth, and gives satisfactory evidence of his conduct in those surroundings. Another of petitioner's superiors has been in petitioner's home and gives evidence of the fine conditions which prevail there. The affidavit of petitioner's present superior shows that the corporation of which he is an officer will employ petitioner as counsel in important matters in the event of his reinstatement.

The offense which caused petitioner's disbarment was committed while he was in a state of intoxication from the excessive use of liquors. While this circumstance was no defense to the charge made against him, we can readily perceive from the nature of the offense that it probably would not have been committed if petitioner had not been in a state of inebriety. It is pertinent to remark here that he pleaded guilty to the charge. The record contains ample evidence that petitioner has never indulged in the use of intoxicants since the offense was committed.

Petitioner has shown the possession of the moral qualifications which are necessary to every individual who would serve the public as a lawyer.

We turn now to the question of petitioner's mental qualifications. He is of the age of 34 years. He was admitted to the bar in 1914, after an examination in open court which covered a part of two days; that time being consumed in the examination of a rather large class of which he was one. The nature of the examination is indicated to some extent by the fact that about 28 per cent. of the class was denied admission. In preparation for his work as a lawyer, petitioner attended the law school of a university for one year and read law with a practicing lawyer for a period the length of which is not shown. He was in the army for 18 months, and, with the exception of that time, he practiced law continuously from his admission to his disbarment. A period of a few days more than 3 years has elapsed between the date of the disbarment and the filing of the present application. During that time petitioner has engaged in three employments that made necessary the exercise of mental activity not greatly different from that required in some of the work of a practicing lawyer. For a little more than 3 months he was an adjuster for a credit association. The duties of this position required, as a part of his work, that he conduct the examination of judgment debtors on proceedings supplementary to execution, and on that account he resigned the employment for the reason, as he alleges,

that he did not desire to violate the order under which he had been disbarred. Petitioner was for about 9 months the escrow clerk of a bank. His present employment is as a claim adjuster for an automobile insurance corporation, and in it he has been engaged for nearly 2 years. We have already observed that this corporation intends to employ petitioner's services as a lawyer in the event of his reinstatement. It is averred in the affidavit of an officer of the insurance company:

"That said James D. La Motte is given absolute authority to settle and adjust claims, and in this capacity he very frequently is entrusted with the disposition of large sums of the company's money; that said James D. La Motte has worked diligently, hard, and faithfully during the time he has been employed by your affiant, and that his record and ability in the capacity in which he serves his employer is excellent; that he has at all times used sound discretion and good judgment in his work, and has always performed his said duties loyally to his said employer, and fairly to claimants."

Petitioner has been examined by us in open court upon some of the matters which are involved in this proceeding. He presents a good appearance and is mentally alert. Through information gathered during the examination we have had an opportunity to inspect pleadings, a brief and other papers prepared by petitioner while he was a member of the bar. We find from such inspection that the work done by him in those matters was satisfactorily performed.

We find, to quote the language of the Supreme Court in the opinion *In re Stevens*, supra, that of petitioner's "grasp of the law there is no question."

[3] In our opinion *In re Cate*, supra, we declared the rule to be that the burden is upon a petitioner for reinstatement to show both the moral and mental qualifications without which such an application cannot be granted. In our opinion the present petitioner has met the test which is by that rule required.

Petition granted.

We concur: FINLAYSON, P. J., CRAIG, J.

77 Cal. App. 790

SALENEEK v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 5595.)

(District Court of Appeal, First District, Division 1, California. May 7, 1926.)

1. Master and servant §419.

Evidence held to sustain award denying additional compensation for rupture because of new and further disability.

2. Master and servant §417(7).

Court of Appeals is without power to interfere with award of Industrial Accident Commission, made on conflicting evidence, with weight in favor of award.

Proceedings under the Workmen's Compensation Act by August M. Saleneek, claimant, opposed by Graff & Son, employer. An order of the Industrial Accident Commission denied additional compensation, and claimant brings certiorari. Affirmed.

George Rosen, of San Francisco, for petitioner.

Warren H. Pillsbury and G. C. Faulkner, both of San Francisco, for respondents.

TYLER, P. J. Certiorari to review the action of the Industrial Accident Commission in denying petitioner additional compensation for an alleged new and further disability resulting from an original injury.

[1] The record discloses that petitioner, while at work on December 1, 1921, sustained a ventral hernia, or rupture. An application was filed with respondent commission on February 24th of the following year, as a result of which the commission awarded him certain compensation. Being dissatisfied with the amount of the award, petitioner filed a writ of review in this court for the purpose of having the award annulled. This petition was denied September 5, 1922. Thereafter he applied to the commission for a permanent disability allowance for his hernia, and on March 21, 1924, the commission allowed him compensation for a permanent partial disability of 10 per cent., amounting to the sum of \$833.20. He claimed that the allowance was inadequate, and again petitioned this court for a writ of review. This petition was denied on October 17, 1924. A petition for rehearing in the Supreme Court was then filed. This petition was also denied by that court. On June 3, 1924, Saleneek again applied to respondent commission for further compensation. This proceeding was predicated upon the claim that the hernia had increased in size, and that certain back trouble had developed as a result thereof. A hearing was had by the commission. Upon such hearing, three of the physicians who had previously examined petitioner filed reports. One of them in his report stated in effect that the hernia was larger, but the other two found no material change in the condition thereof; one reporting that he could hardly find the hernia at all. With this conflict before it, the commission called two other physicians to examine petitioner. Their reports are to the effect that there had been no increase in the size of the hernia since the previous award. The commission, in accordance with this testimony, found that the evidence was insufficient to establish as a fact that the applicant's ventral hernia was any worse than it

was at the time of the decision as to the extent of his disability on March 21, 1924, and he had not, therefore, suffered any new and further disability. It further found upon sufficient testimony that the alleged painful condition of Saleneek's back was not in anywise caused or aggravated by his injury or the treatment thereof. It is apparent that these findings are not only based upon conflicting testimony, but that such testimony preponderates in favor thereof. Saleneek applied for a rehearing, and this petition was denied on November 12, 1925. The present petition followed.

[2] A further review or analysis of the medical testimony would answer no useful purpose. There is a decided conflict therein, and, moreover, the weight of the testimony is in favor of the award. This being so, we are without power to interfere therewith.

The award is affirmed.

We concur: CASHIN, J.; KNIGHT, J.

77 Cal. App. 404

CALIFORNIA HIGHWAY COMMISSION v. BALLARD, County Auditor. (Civ. 3104.)

(District Court of Appeal, Third District, California. April 10, 1926.)

1. Counties $\hookrightarrow$ 178.

Purposes for which highway bonds were voted under County Highway Act 1907 (St. 1907, p. 666) cannot be changed.

2. Mandamus $\hookrightarrow$ 154(2)—Petition for mandamus requiring county auditor to transfer money from county highway improvement fund to state treasury for use by state highway commission in improving county highway held not to show that money was to be used for purposes voted by county electors (County Highway Act 1907 [St. 1907, p. 666]; Pol. Code, § 365h, subd. [d], as added by St. 1925, p. 385, § 6).

Petition for mandamus, requiring county auditor to draw warrant for transfer of money from county highway improvement fund to state treasury for use by state highway commission in improving county highway pursuant to resolutions of board of supervisors and county highway commission, under Pol. Code, § 365h, subd. (d), as added by St. 1925, p. 385, § 6, held not to show that money was to be used for purposes voted by county electors, as required by County Highway Act 1907, where such resolutions, set forth in petition, did not so provide, but left kind of improvement wholly to agreement of state highway commission and governing board of county or road district.

3. Highways $\hookrightarrow$ 99¼.

Special fund, raised for particular purpose by special taxes, bond issue, or the like, cannot be used for different purpose.

4. Constitutional law $\hookrightarrow$ 143—Highways $\hookrightarrow$ 97¾, New, vol. 16A Key-No. Series—Statutory provisions authorizing county boards to pay state for road funds created by tax levy or bond issue held not unconstitutional, if applied to proceedings under County Highway Act 1907, as violating contract with voters approving bond issue in changing officers or personnel of officers expending money (St. 1907, p. 666; Pol. Code, § 365h, subd. [d], as added by St. 1925, p. 385, § 6).

Pol. Code, § 365h, subd. (d), as added by St. 1925, p. 385, § 6, authorizing governing board of county or road district to pay into state treasury for purposes of act any road funds under its control, created by tax levy or bond issue, held not unconstitutional, if applied to proceedings under County Highway Act 1907, as violating contract with voters approving road bond issue in changing officers or personnel of officers by whom money is to be expended.

5. Highways $\hookrightarrow$ 97¾, New, vol. 16A Key-No. Series—Act authorizing transfer of road funds by county and road district governing boards to state treasury does not purport to modify, amend, or repeal provisions of County Highway Act 1907, which is special, and mostly mandatory, while later act is general, and merely permissive (St. 1907, p. 666; Pol. Code, § 365h, subd. [d], as added by St. 1925, p. 385, § 6).

Pol. Code, § 365h, subd. (d), as added by St. 1925, p. 385, § 6, authorizing governing boards of counties and road districts to pay into state treasury for purposes of act road funds under their control, created by tax levy or bond issue, is general and purely permissive in terms, and does not purport to modify, amend, or repeal any provision of County Highway Act 1907, which is mandatory in most provisions, especially those affecting issuance of bonds, performance of work, and expenditure of, and accounting for, money, and deals with special subject of, and contains complete scheme for, highway improvements by counties.

6. Statutes $\hookrightarrow$ 158.

Repeals by implication are not favored.

7. Statutes $\hookrightarrow$ 225½—Complete special act and general provision of later act concerning same subject should be so construed as to maintain integrity of both, but special act prevails in case of irreconcilable conflict.

Special act, complete in itself, and general provision of later act as to same general subject, should be so construed as to maintain integrity of both, but special act prevails, if there is irreconcilable conflict.

8. Highways $\hookrightarrow$ 97¾, New, vol. 16A Key-No. Series—Statute not referring to powers of governing boards of counties, road districts, etc., nor calling attention to provision for different disposition of road funds raised by bond elections, held not to impliedly amend act as to construction of highways by counties (Const. art. 4, § 24; County Highway Act 1907 [St. 1907, p. 666]; Pol. Code, § 365h, subd. [d], as added by St. 1925, p. 385, § 6).

In view of Const. art. 4, § 24, requiring that every act embrace but one subject expressed in title, but that act be held void only

as to part not expressed therein, Pol. Code, § 365h, subd. (d), as added by St. 1925, p. 385, § 6, title of which, "An act to amend section 365c of the Political Code * * * and to add sections 365d", etc., "all referring to the powers and duties of the California highway commission," does not refer to powers and duties of boards of supervisors or governing boards of counties, road districts, etc., nor call attention to provision for different disposition of funds raised by bond elections under, or any contemplated amendment of County Highway Act 1907, does not impliedly amend such act, which specifically deals with construction of highways by counties.

9. **Mandamus** — 100—Financial benefit to county does not justify writ of mandate requiring county auditor to transfer money from county highway improvement fund to state treasury for use by state highway commission, without authority under County Highway Act 1907 (St. 1907, p. 666; Pol. Code, § 365h, subd. [d], as added by St. 1925, p. 385, § 6).

That issuance of writ of mandate requiring county auditor to draw warrant for transfer of sum from county highway improvement fund to state treasury for use by state highway commission in improvement of county highway, under Pol. Code, § 365h, subd. (d), as added by St. 1925, p. 385, § 6, would financially benefit county by enhancing general government aid, does not justify issuance of writ, in absence of authority in auditor to so act under County Highway Act 1907.

Application by the California Highway Commission for writ of mandate to T. H. Ballard, as Auditor of Modoc County. Writ denied.

Paul F. Fratessa, of San Francisco, for petitioner.

Reuel A. Laird, of Alturas, for respondent.

PLUMMER, J. This cause is before us upon a petition filed by the California highway commission seeking a writ of mandate directing and commanding the respondent, T. H. Ballard, as the auditor of the county of Modoc, to draw his warrant upon a special fund of the county of Modoc, designated as the highway improvement fund of said county, for the transfer from said fund of the sum of \$40,000 to be deposited in the proper funds of the state treasury, to be used by the California highway commission in improvement of a certain 3.7 miles of highway in the county of Modoc.

On the 1st day of July, 1919, an election was held in the county of Modoc, state of California, and at said election, held pursuant to appropriate notices given therefor, the issuance of \$400,000 in bonds for the improvement of highways in the county of Modoc was authorized. The election was held under and in pursuance of an act of the Legislature known as the County Highway Commission Act, approved March 19, 1907, and acts amendatory

thereof (Stats. 1907, p. 666). Pursuant to said election the board of supervisors of the county of Modoc duly appointed T. A. Walls, H. B. Stephens, and A. G. Loomis highway commissioners of the county of Modoc for the purpose of constructing the roads for which the bonds were issued. The record also shows that, pursuant to the election, bonds were issued and sold in the said sum of \$400,000, and out of the funds derived from the sale of said bonds there still remains in the highway improvement fund of the county of Modoc at least the sum of \$40,000. The record also shows that in the proceedings leading up to the bond election it was specified that a portion of the money to be raised from the issuance and sale of said bonds should be expended in the improvement of the 3.7 miles of highway referred to in this action.

It further appears from the record that on or about the 10th day of September, 1925, the highway commission of the county of Modoc adopted a resolution addressed to the board of supervisors of the county of Modoc, wherein they recommended that the board of supervisors of the county of Modoc request and authorize the California highway commission to take over the improvement, realignment, and construction of the said 3.7 miles of highway, and also that the said board of supervisors deposit, or cause to be deposited, to the credit of the California highway commission the sum of \$40,000 derived from the sale of said bonds voted by the electors of Modoc county under the act of 1907, as above stated, transferring the same from the highway improvement fund of the county of Modoc to the treasury of the state of California, there to be deposited to the credit of the California highway commission, the same to be used by said highway commission in making the improvements contemplated on the said 3.7 miles of highway in Modoc county, returning the surplus, if any, to the county of Modoc. That on the same day, to wit, on the 10th day of September, 1925, the board of supervisors of the county of Modoc adopted a resolution purporting to transfer such funds in the following language, to wit:

"And be it further resolved, that the county of Modoc do deliver and deposit with said California highway commission the sum of \$40,000 now derived from the sale of bonds voted by the electors of Modoc county under the act approved March 19, 1907, above mentioned, to pay for the construction of said repairs and improvements and incidental expenses; the balance of said sum, if any, remaining after the completion of said repairs and improvements to be returned to Modoc county."

That thereafter, and on the 6th day of January, 1926, the board of supervisors of the county of Modoc adopted a further resolution reciting the adoption of the resolution of September 10, 1925, and including therein the following:

"Now, therefore, be it resolved, in accordance with said resolution above referred to, that the Auditor of Modoc County, be and he is hereby authorized, empowered and directed to draw his warrant on the Treasurer of Modoc County payable to the California Highway Commission in the sum of \$40,000.00, the same to be paid from funds derived from the sale of bonds under the Act above referred to, as provided for in said resolution adopted by this Board on the 10th day of September, 1925."

It further appears from the record that the auditor of Modoc county declined to make the transfer of funds as directed in the resolutions adopted by the board of supervisors on the ground that said transfer was unauthorized. This proceeding is prosecuted to compel the respondent, as auditor of the county of Modoc, to issue his warrant for the transfer of said funds.

The authority for said transfer is based upon the following language which appears in subdivision (d) of section 365h of the act of the Legislature approved May 19, 1925 (Stats. 1925, p. 385), to wit:

"And, further, the governing board of any county, permanent road division, or road or boulevard district or division may pay into the state treasury, as provided herein, for the purposes hereof, any funds under its jurisdiction and control subject to use for bridge, road or boulevard purposes, created by tax levy or issuance of the bonds of any such political subdivision or otherwise."

The act of 1907 providing for the improvement of highways and the issuance of bonds therefor by the several counties is a special act dealing with the construction of highways and the issuance of bonds by the several counties of the state. It provides first for the filing of a petition with the board of supervisors signed by at least 10 per cent. of freeholders who are electors of the county, praying for an election to determine the question of issuing bonds for the improvement of highways, etc.; that thereupon the board of supervisors may appoint a highway commission for the county. This highway commission is to consist of three members. What is meant by main highways is next defined in the statute. The act then specifies that immediately upon their appointment the commission shall proceed with all diligence to investigate the main public highways, determine which ones shall be improved by the issuance of bonds, the kind of improvements to be made thereon, and the estimated cost thereof, also to investigate carefully the question of laying out and constructing new public highways and to have a map showing said proposed new public highways, and the kind of improvements to be made thereon, estimated costs, etc. The act further provides for the employment of a competent engineer or engineers, and other experts to make the necessary surveys and assist the commission in determining the best material to be used and the best manner of

making such improvement and the cost thereof. After these preliminaries have been completed, the commission must report to the board of supervisors, setting forth the highways proposed to be improved, describing generally the kind of improvements to be made thereon and the estimated cost of the work to be done and the amount to be raised by bonds therefor, and praying the said board of supervisors to call an election for the issuance of bonds of the county to defray the estimated costs. The statute then specifies that, if this report is adopted, the board of supervisors shall without delay call an election to determine whether bonds of the county shall be issued, and the amount recommended by the commission for the purposes stated in the report, said election to be called and held and bonds issued and sold in accordance with the provisions of law relating to the issuance, sale, and payment of county bonds. The act then provides that the proceeds of the sale of bonds shall be placed in a special fund to be known as the highway improvement fund of the county, and shall be used solely for the purposes set forth in said report; also that no moneys shall be paid out of said funds, except upon a warrant of the auditor of said county issued upon the order of the highway commission, duly allowed by the board of supervisors. Following these provisions the act contains a full and complete procedure of carrying on the improvement, giving of notices, letting of contracts, requiring of bonds for the faithful performance of contracts, that the improvements to be made shall be durable, and further general provisions not necessary to be further specified herein.

Respondent contends that the words which we have quoted from subdivision (d) of section 365h of the act approved May 19, 1925, are unconstitutional and void, as applied to any of the provisions of the County Highway Act of 1907 for the reason that the submission to the voters of the question of issuing bonds and the approval thereof by the electors carries into the proceedings all of the several provisions of the act of 1907, including the officers who may be intrusted with the expenditure of the moneys so voted as well as other provisions, and constitutes a contract with the voters which cannot be changed, altered, or modified by any subsequent act of the Legislature. Other constitutional questions have been considered which will be set forth later on in this opinion. Respondent also contends that the act of 1907 is special, is an act relating to a particular subject, and that it is not altered, amended, or changed by the general language found in the act of 1925, which we have hereinabove set forth. It is further objected that the Legislature cannot by a later act change the terms or authorize the performance different than that provided for in the original act.

[1] Section 6 of the County Highway Act of 1907, as we have seen, provides that, before

the question of issuing bonds is submitted to the electors, the highway commission of the county must submit a report to the board of supervisors describing generally the kind of improvements to be made and the estimated cost thereof. By the terms of section 7 of the same act the board of supervisors must base their call for a bond election upon the report of the highway commission and for the purposes therein specified. The various provisions of the sections of the act of 1907 preceding the power given to call an election for the issuance of bonds set forth the procedure necessary to be taken, the purposes for which the bonds are to be issued, and constitute the jurisdictional basis upon which the bond issue must rest. These purposes as we shall presently see, cannot be changed.

[2] The petition filed in this matter sets forth that, in accordance with the provisions of subdivision (d) of section 365h of the Political Code, as amended in 1925, the board of supervisors of Modoc county and the highway commission of Modoc county did request the California highway commission to accept the said sum of \$40,000, and to deposit the same in the state treasury, and to use and expend said funds so deposited for the construction of said 3.7 miles of road in Modoc county in accordance with the plans, specifications, and regulations for the construction, realignment, repair, and improvement of said road as set forth in said proceeding for the sale of said bonds, etc. This statement in the petition would be sufficient to show that the money is proposed to be used for the same purposes by the California highway commission, as voted by the electors of Modoc county, were it not for the fact that immediately following this statement the petitioner sets forth the resolutions adopted both by the highway commission and the board of supervisors of the county of Modoc, which fails so to provide. The resolution of the highway commission reads:

"That your honorable board request and authorize the California highway commission to cause such plans, specifications, estimates, surveys, and maps to be prepared as may be necessary for the repair and improvement of said road, and that said board further request and authorize said California highway commission to take full charge of said repairs and improvements, to call for bids, etc., to do all things which the said California highway commission may deem necessary for the early and full completion of said repairs and improvements proposed to said road," etc.

The resolution described the road as follows:

"Beginning where said survey leaves the present travelled road at Station 428+00 near what is known as the Surprise Valley Station, and continuing to the point where said survey enters the said present traveled road at Station 673+50 near what is known as the Bowers Ranch on Joseph Creek, in Modoc county, Cal., a total distance of 3.7 miles."

The resolution adopted by the board of supervisors uses the same general language, and leaves the question of the kind of improvement to be made wholly and entirely to the California highway commission. So far as the resolutions adopted by the county highway commission and the board of supervisors of the county of Modoc are concerned, there is nothing which indicates or requires the California highway commission to make the kind of improvement upon the road in question which constitutes the basis of the bond issue submitted to the voters of Modoc county. It may be true that the California highway commission would make the same kind of improvement, but there is nothing in the procedure taken requiring such to be done. These resolutions were undoubtedly drafted and adopted by the respective boards in conformity with the language of subdivision (d) of section 365h of the Political Code, as amended in 1925. Said subdivision empowers the highway commission to cause plans, specifications, and estimates to be prepared for the repair and improvement of highways, etc., and, after providing for the acceptance of funds, further provides:

"And the California highway commission shall use and expend the funds so deposited for the construction of bridges, roads or boulevards situated within such political subdivision, in accordance with the plans and specifications and other terms as are mutually agreed upon by said commission, on behalf of the state of California, and such governing board."

Whether the same kind of improvement shall be made as that submitted to the electors upon the bond election is an unmentioned matter, and appears to be left wholly to the mutual agreement of the California highway commission and the governing board of the county or road district, as the case may be.

[3] The law is well settled that, where by special taxes, bond issue, or the like, a special fund is raised for a particular purpose, it cannot be used for a different purpose. *Ann. Cas.* 1917B, 868; *New Castle-upon-Tyne v. Atty. Gen.*, [1892] *App. Cas.* [Eng.] 568; *Gray v. Matheny*, 66 Ark. 36, 48 S. W. 678; *Jenkins v. Williams*, 14 Cal. App. 89, 111 P. 116; *People v. Auditor*, 30 Ill. 434; *Cook County v. McCrea*, 93 Ill. 236; *Davis v. Muscatine County, Morris (Iowa)* 161; *Bradley v. Love*, 76 Iowa, 397, 41 N. W. 52; *Doty v. Ellsbree*, 11 Kan. 209; *Adams v. Helms*, 95 Miss. 211, 48 So. 290; *Pine Tree Lumber Co. v. Fargo*, 12 N. D. 360, 96 N. W. 359; *Red River Val. Nat. Bank v. Fargo*, 14 N. D. 88, 103 N. W. 390; *State v. Mikkelson*, 24 N. D. 175, 139 N. W. 525; *Daley v. Board of Public Works*, 9 Ohio Dec. [Reprint] 118, 11 Cinc. L. Bul. 25; *Northup v. Hoyt*, 31 Or. 524, 49 P. 754; *Wolff Chemical Co. v. Philadelphia*, 217 Pa. 215, 66 A. 344; *State v. Cardozo*, 8 S. C. 71, 28 Am. Rep. 275; *Kennedy v. Montgomery County*, 98 Tenn. 165, 38 S. W. 1075. To the same effect is the case of *O'Farrell v. County of So-*

noma, 189 Cal. 343, and cases cited on page 348, 208 P. 117.

[4] The objection that the proviso found in subdivision (d) of section 365h of the Political Code, as amended in 1925, if applied to proceedings taken and had under the County Highway Act of 1907, would work a prohibited violation of contract by the Constitution, in changing the personnel of the officers, or changing the officers by whom the money is to be expended, seems to us untenable. The language of the Supreme Court, in deciding the case of *In re Wetmore*, 99 Cal. 146, 33 P. 769, is based upon this point. The court there said:

"The indebtedness is not to be incurred, nor are the bonds to be issued until after the voters of the municipality have so directed, but as it is the vote of the electors which determines that they shall be issued, it is immaterial to them what officers of the city carry out this vote."

The question there presented was as to what officers should carry out the purposes for which bonds of the city of Oakland were issued; the purpose being to erect certain school buildings. So long as the school buildings were erected according to the provisions of the bond election, the purpose of the election would be accomplished, which was the real contract, and the agency by which the work was to be carried on was an immaterial matter. The same principle was recognized in the case of *Conlin v. Board of Supervisors*, 99 Cal. 17, 33 P. 753, 21 L. R. A. 474, 37 Am. St. Rep. 17. See, also, *Blanding v. Burr*, 13 Cal. 343; *Creighton v. San Francisco*, 42 Cal. 446; *Beals v. Amador County*, 35 Cal. 624.

[5] We will next consider the objections which are fundamental in their character and do not affect merely the legal sufficiency of the proceedings had and taken by the various boards of the county of Modoc in attempting to make the transfer of funds. As we have seen, the act of 1907 deals with the special subject of the improvement of highways by the several counties of the state. A complete scheme for such improvement is contained within the various sections of the act covering the inception to the completion of both proceedings and the work contemplated. It sets forth how the legal machinery shall be set in operation, how the money shall be raised, how it shall be expended, and the manner in which the expenditure of the money shall be accounted for, the requirement of security for the faithful expenditure of the money by the giving of bonds, etc. The words quoted from subdivision (d) of section 365h of the Political Code, as amended, and as well the entire wording of the section, are general in terms, and do not purport to be an amendment of any of the provisions and requirements of the County Highway Act of 1907. Again, the language of the act of 1907 is mandatory in most of its provisions, and

especially in all of its provisions affecting the issuance of bonds, the carrying on of the work, the expenditure of the money and accounting therefor. The proviso in subdivision (d) of section 365h of the Political Code, as amended in 1925, urged as authority for the transfer of said funds, is purely permissive in its terms, and does not purport to modify, amend, or repeal any of the provisions of the County Highway Act of 1907.

[6, 7] It is only by implication that the proviso contained in the section referred to of the act of 1925 can be held to be a repeal or amendment or modification of any portion of the act of 1907, and we do not need to cite authorities supporting the rule, that repeals by implication are not favored. Again, as we have said, the act of 1907 is a special act relating to the improvement of highways by the issuance of bonds, and is complete in itself, while the proviso in the amended subdivision of section 365h of the Political Code is general in its terms. In such cases, the rule is that they should first, if possible, be so construed as to maintain the integrity of both, but, if there is an irreconcilable conflict, the special act prevails. If there were not other valid objections, we think the proviso in the section of the Political Code referred to could be given effect as to money not raised in accordance with the provisions of the act of 1907. In the case of *People v. Pacific Imp. Co.*, 130 Cal. 442, 62 P. 739, in speaking of general and special acts, the court said:

"Where a special and a general statute treat of the same subject, the special act will control as to its special provisions, and will not be deemed repealed by implication by a later general statute, although the terms of the general statute, taken strictly, would include the terms of the special statute, if they are not irreconcilably inconsistent, and if there is no manifest intention of the Legislature to repeal or alter the special statute."

It may be here stated that there is nothing in the act approved May 19, 1925, indicating an intention on the part of the Legislature to repeal or amend any of the provisions of the County Highway Act of 1907. In the case of *Reed Orchard Co. v. Superior Court*, 19 Cal. App. 648, 128 P. 9, 18, in passing upon the subject of repeals by implication, this court quoted from the case of *People v. Pacific Imp. Co.*, supra, and followed the rule set forth by Commissioner Cooper, which we think applicable here:

"It is the established rule of construction that the law does not favor a repeal by implication, but that where there are two or more provisions relating to the same subject-matter they must, if possible, be construed so as to maintain the integrity of both. It is also the rule that where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although latest in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject

matter as far as coming within its particular provisions."

Therein is quoted Judge Cooley (Cooley's Constitutional Limitations [6th Ed.] 182), wherein he said:

"The repugnancy between two statutes should be very clear to warrant a court holding that the one later in time repeals the other, when it does not in terms purport to do so. This rule has peculiar force in the case of laws of special and local application, which are never to be deemed repealed by general legislation except upon the most unequivocal manifestation of intent to that effect."

See, also, Lewis' Sutherland on Statutory Construction (2d Ed.) § 274, and *Miller v. Engle*, 3 Cal. App. 330, 85 P. 159.

It is submitted that no intention was actually manifested by the Legislature, in the said amendment of 1925, to repeal section 1254 or 1257, Political Code, and, in the light of the foregoing familiar rule of construction, it should be held that no repeal by implication was effected.

[8] The same rule is adopted in the case of *Cohn v. Isensee*, 45 Cal. App. 531, 188 P. 279. Section 24 of article 4 of the state Constitution requires that every act shall embrace but one subject, which shall be expressed in its title, etc., setting forth further that, if part of an act is not embraced in the title, such act shall be held void only as to the part thereof not expressed in the title. The title of the Act of May, 1925, reads as follows:

"An act to amend section three hundred sixty-five c of the Political Code of the state of California and to add sections three hundred sixty-five d, three hundred sixty-five e, three hundred sixty-five f, three hundred sixty-five g, three hundred sixty-five h, three hundred sixty-five i, three hundred sixty-five j, three hundred sixty-five k, three hundred sixty-five l, three hundred sixty-five m, three hundred sixty-five n, three hundred sixty-five o and three hundred sixty-five p to the said Code, all referring to the powers and duties of the California highway commission."

[9] There is nothing in the title relating to the Highway Act of 1907 purporting to be an amendment or repeal of any of the provisions thereof, nor is there anything in the title which we have just quoted referring to the powers and duties of boards of supervisors or governing board of any county, permanent road division, or road or boulevard district. There is nothing in the title which we have set forth which calls attention to the fact that the Legislature is providing for a different disposition of the funds raised by bond elections held under and in accordance with the County Highway Act of 1907, or that any amendment of that act is contemplated, or that any officer is to be relieved of the duty and obligation to account for the expenditure of funds raised at such bond election. The title of the

Act of May 19, 1925, expressly sets forth that the amendments contemplated are all referring to the powers and duties of the California highway commission, thus limiting the scope of the act. Under such conditions we do not readily see how it can be held that the proviso found in subdivision (d) of section 365h of the Political Code, as amended in 1925, can be held to amend by implication the County Highway Act of 1907 specifically dealing with the construction of highways by counties. That it would financially benefit the county of Modoc by enhancing general government aid, however commendable, does not justify the issuance of the writ in the face of want of authority which we have considered and the objections which we think valid.

The petition for the writ is denied.

We concur: FINCH, P. J.; HART, J.

77 Cal. App. 738

PEOPLE v. RODWAY. (Cr. 1268.)

(District Court of Appeal, Second District, Division 2, California. May 3, 1926.)

1. Criminal law §563—Elements of "corpus delicti" are certain facts forming its basis and existence of criminal agency as to cause of them.

Elements of "corpus delicti" are certain facts forming its basis and existence of criminal agency as to cause of them, and it is not essential to show that crime charged was committed by defendant.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Corpus Delicti.]

2. Burglary §31—Evidence in prosecution for burglary of an apartment held sufficient to prove corpus delicti.

In prosecution for burglary of an apartment, evidence showing that there was a burglarious entry, and that articles were removed through a criminal agency, held sufficient to prove corpus delicti.

3. Burglary §31—Evidence in prosecution for burglary of a store held sufficient to prove corpus delicti.

In prosecution for burglary of a store, evidence showing that store had been entered, and that owner had given no one permission to do so, or to remove any of property taken therefrom, held sufficient proof of corpus delicti.

4. Criminal law §722½—Remarks of prosecuting attorney acquiescing in proper admonition of court that defendant's prior conviction for highway robbery went only to his credibility as a witness, and then stating his view of effect of evidence under charges on which defendant was on trial, held not misconduct.

Prosecuting attorney, who, in referring to defendant's prior conviction for highway robbery,

bery, was properly instructed by court to confine reference solely as going to credibility of defendant as a witness, *held* not guilty of misconduct by thereafter asking jury to consider prior conviction solely as going to defendant's credibility, and then stating his view of effect of the evidence under charges on which defendant was on trial, especially where no exception was taken, and no objection made, or court requested to admonish jury concerning such remarks.

5. Criminal law ⚡442—Court properly admitted contents of check taken and filled in by defendant charged with burglary, and cashed by payee, and evidence sufficiently connected him therewith to show that it had passed through his hands.

In prosecution for burglary, in which defendant had taken a blank numbered check and filled it out, and had it cashed by payee, allowing contents of check to go to jury, *held* not error, in view of identification of check by owner, and that defendant first told payee that he had mailed a check to her, and was told by payee that she had received check and had cashed it, and that he accepted from her proceeds thereof after deduction by her, sufficiently connecting him with check to show that it had passed through his hands.

6. Criminal law ⚡442—Permitting payee of check taken by defendant and filled out by him to testify to contents of letter which came with check *held* not erroneous, where evidence showed that check had passed through defendant's hands, though it was not shown that payee was acquainted with defendant's handwriting.

In prosecution for burglary, in which defendant had taken a blank numbered check, and filled it out, and cashed it through payee, permitting payee to testify to contents of letter which came to her with check *held* not error, where evidence sufficiently connected defendant with check to show that it had passed through his hands, although it was not shown that payee was acquainted with defendant's handwriting.

Appeal from Superior Court, Los Angeles County; Elliott Craig, Judge.

Allan Rodway was convicted under separate counts of burglary in the first and second degree, and he appeals. Affirmed.

R. C. Hunting, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

WORKS, J. Defendant was charged, in two counts, with the crimes of burglary. Under the first count he was convicted of burglary in the second degree. Under the second count he was convicted of burglary in the first degree. He appeals from the judgment of conviction and from an order of the trial court denying his motion for a new trial.

[1] Appellant made a confession of his guilt of each of the crimes with which he was charged. He contends as to each count that

the corpus delicti was not proven, by evidence aside from that contained in the confession, in that there was a failure to prove that he was connected with the commission of the crime. Such a showing, however, is not a necessary item in the proof of the corpus delicti.

"The two elements of corpus delicti are: (1) Certain facts forming its basis; and (2) the existence of criminal agency as the cause of them. To establish the corpus delicti it is not essential to show that the crime charged was committed by the defendant." *People v. Flores*, 34 Cal App. 393, 167 P. 413.

See, also, *People v. Britt*, 62 Cal. App. 674, 217 P. 767.

[2] We are not certain that, irrespective of the question just mentioned, appellant intends to present the point that the evidence was insufficient, aside from the confession, to prove the corpus delicti. We shall assume, however, that he does. The evidence under the first count, excluding that embraced in the confession, showed, according to appellant's brief, that one McCaleb and his wife resided in a certain apartment; that they both left the apartment at 8 o'clock on a given morning, after having locked the doors of the place; that they could not remember whether or not they locked their bathroom window before their departure; that they returned to the apartment at 6 o'clock on the evening of the same day; that on their return there were missing from the apartment certain canceled checks and insurance papers, a cape and a coat, a black handbag, certain articles of old jewelry, two or three pairs of shoes, and two tie pins; that on their return their bathroom window "had been pulled down even with the bottom section, and was still open"; and that on their return "there were finger prints and foot prints on the bathroom window in dust on the top of the window." In addition to this showing in appellant's brief, respondent directs our attention to evidence to the effect that the missing articles were in the apartment when the McCalebs departed in the morning; that the old jewelry consisted of some rings and a lavalliere; that one of the articles which were missed was a fur; that Mrs. McCaleb saw the fur in the apartment on the morning when she and her husband left the apartment; that she saw the coat and the cape there on the preceding evening; and that neither of the McCalebs had given permission to any one to enter the apartment or remove any of the missing articles therefrom. This evidence was sufficient to prove the corpus delicti, as it tended to show that there was a burglarious entry of the apartment, and that the articles were removed through a criminal agency. There is nothing in *People v. Vertrees*, 169 Cal. 404, 146 P. 890, which precludes such a view.

[3] In proof of the corpus delicti under the second count of the charge, there was evidence which tended to show that the complaining witness, one Gloege, was a storekeeper; that he closed and locked his place of business at 6:30 o'clock on a certain evening; and that he reopened it at 7:30 the following morning; that, when he entered the store in the morning and went to his desk, he found his cash drawer partly open, and his cash boxes gone from it; that he had locked the drawer on leaving the night before, but that on his return he found it pried open; that the glass in the back door to his premises was broken; and that the door was unlocked and unbolted, having been fastened from the inside by means of a key and a bolt; that the glass was broken in such a manner that it "gave him just room enough to reach on the inside and unlock and unbolt the door"; that Gloege, on his return to the store in the morning, missed several articles of small personal property, some checks, one of which was for the sum of \$110, and cash in the amount of about \$114.65; and that he had given no one permission to enter his place of business or to remove therefrom any of the property mentioned. This evidence furnished complete proof of the corpus delicti.

[4] During the trial appellant testified that he had been convicted of a felony, and that the felony was highway robbery. In the course of the argument the following occurred:

"A Deputy District Attorney: Now, ladies and gentlemen of the jury, you are dealing here with a self-confessed felon, a man who has taken the stand and admitted he has been convicted of highway robbery. He has been caught here in two burglaries committed in this county.

"Counsel for Defendant: I think that is improper argument, if it please the court. That is only relevant as to his credibility as a witness, and so forth.

"The Court: Counsel is correct in his statement. Confine the remarks about prior conviction of a felony to merely the force and effect of impeaching the defendant's own testimony. * * * It only goes to the credibility of the witness, and the jurors are so instructed.

"The Deputy: Very well, then, ladies and gentlemen. Let's merely consider the question of the fact that he is a highway robber as going to the credibility of his testimony. Nevertheless, he has been caught at the present time in the commission of two burglaries."

It is now contended that the deputy district attorney, in what he said in his argument after the remarks of the court, was guilty of misconduct. In that portion of his argument, however, the officer merely acquiesced in the very proper admonition of the court, and then, in the last sentence of the excerpt from the record, stated his view of the effect of the evidence under the charges upon which appellant was on trial. There was here no misconduct. It is not amiss to observe, also, that no exception was taken

to that part of the argument to which objection is now made, nor was any request presented to the court to admonish the jury concerning it.

One of the checks which was missed by the complaining witness Gloege, when he arrived at his place of business on the morning after it was burglarized, bore the rubber-stamped number 120. The number had been stamped on the check by Gloege himself, but at the time it was abstracted from his place of business it was otherwise blank. While he was on the witness stand, Gloege was shown a check bearing a rubber-stamped number 120, but which, in addition, had been otherwise filled out. It was then dated December 18, 1924, which was a date two weeks later than that on which Gloege's store was burglarized, it was payable to Mrs. M. Moyer, was drawn for \$75, and bore a signature, "A. Gloege." The complaining witness testified that this signature was not in his handwriting, but the check as filled out was identified by him as the same check, numbered 120, which he had missed from his premises, although he testified on cross-examination that the rubber stamp with which he had stamped the number 120 was of an ordinary kind, not specially made for him, and bought by him on the open market. He also testified, however, that the number on the filled-out check was of the same size and appearance as the one which he had placed on the blank check which was stolen from him. The check, as filled out, was marked for identification in connection with Gloege's testimony. It should be remarked that, in addition to the matters above stated, the check bore the indorsements, "Mrs. M. Moyer" and "Mrs. W. A. Moyer."

Mrs. Mary Moyer was examined as a witness for the prosecution. She testified that the indorsements on the check numbered 120 were in her handwriting; that the check came to her through the mail on December 21, 1924; that she had a conversation with appellant the day before the check was received by her, in which he asked her if she had then received "the check," and she told him she had not; that the envelope which contained the check when it came to her also contained a letter, but that she had destroyed the letter; that on the next day after she got the check she had a second conversation with appellant, during which he again asked if she had received the "check," and she told him that she had, and that she had cashed it; that in the letter which came to her with the check, "He just stated he had sent me the check and told me to get it cashed and keep from the amount of the check when I got it cashed what he owed me, and he would meet me over at the Pacific Electric Station, and I should give him the rest of the money, which I did"; that her second conversation with appellant occurred at the Pacific Electric Station; and that the check identified

by Gloege was the same check that she received through the mail. This testimony went in over the objections of appellant. The check was received in evidence; also over appellant's objection.

[5] Appellant contends that the trial court erred in allowing the contents of the check to go to the jury. We think not. The identification of the paper by Gloege, the fact that appellant first told Mrs. Moyer that he had mailed a check to her, the fact that he asked her later if she had received it, and was told that she had and that she had cashed it, the fact that he accepted from her the proceeds of the particular check she had received after she had deducted "what he owed" her—all these circumstances, we think, sufficiently connected him with the paper, and showed that it had passed through his hands.

[6] It is also contended that the court erred in permitting Mrs. Moyer to testify to the contents of the letter which came to her with the check. We think the chain of circumstances just mentioned is sufficient to uphold the action of the court in this regard, although it was not shown that Mrs. Moyer was acquainted with appellant's handwriting.

Judgment and order affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

77 Cal. App. 783

PEOPLE v. RODWAY. (Cr. 1269.)

(District Court of Appeal, Second District, Division 2, California. May 6, 1926.)

1. Forgery $\S$ 44(1/2).

In prosecution for forgery, evidence that person whose name was signed on checks did not make or authorize signatures *held* sufficient to prove corpus delicti.

2. Criminal law $\S$ 517(4)—Where corpus delicti was proven by independent evidence, extrajudicial statements of defendant might be considered in determining any questions to which statements had an application.

Where corpus delicti, in prosecution for forgery of checks, had been proven by independent evidence, extrajudicial statements of defendant might be considered by jury in determining any questions arising in the case, and to which statements had an application.

3. Criminal law $\S$ 370—Admitting check to show guilty knowledge by defendant in forging other checks held not erroneous, where evidence, aside from defendant's admissions, showed that check was a forgery.

In prosecution for forgery of checks, admitting other check for purpose of showing guilty knowledge by defendant *held* not erroneous, where there was evidence aside from defendant's admissions that check was a forgery.

4. Forgery $\S$ 44(1/2).

Evidence *held* sufficient to show that defendant uttered, passed, and published check with which he was charged with having forged.

Appeal from Superior Court, Los Angeles County; Elliott Craig, Judge.

Allan Rodway was convicted of forgery under two counts, and he appeals. Affirmed.

R. C. Hunting, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

WORKS, J. Defendant was charged in two counts with the crimes of forgery. The first count related to a check signed "J. A. McCaleb," payable to S. De Giric and indorsed "S. De Giric." The second count concerned a check signed "J. A. McCaleb," payable to H. Foley and indorsed "H. Foley." Defendant was found guilty on both counts. He appeals from the judgment of conviction and from an order of the trial court denying his motion for a new trial.

[1] It is contended that, aside from certain extrajudicial statements made by appellant, the evidence was insufficient to prove the corpus delicti under either count. Excluding the extrajudicial admissions of appellant, there was evidence under each count which tended to prove that an individual named J. A. McCaleb had known appellant for more than a year prior to the dates upon which the crimes charged against him were alleged to have been committed; that at one time appellant had resided "next door" to McCaleb; that the latter did not make the signature appended to either of the checks involved in the charges; and that he had authorized no one to make either of them. This evidence was sufficient to prove the corpus delicti under each count. *People v. Flores*, 34 Cal. App. 393, 167 P. 413; *People v. Lundin*, 120 Cal. 308, 52 P. 807; *People v. McGlade*, 139 Cal. 66, 72 P. 600.

[2, 3] For the purpose of showing guilty knowledge, the trial court admitted in evidence a check signed "A. Gloege," and made payable to Mrs. M. Moyer. It is insisted that in this respect the trial court erred, for the reason that, aside from the extrajudicial admissions of appellant, there was no sufficient evidence that the check was a forgery. But the admissions of appellant are not properly to be laid aside in determining whether the check was admissible. The corpus delicti having been proven under each of the charges made in the respective counts, by independent evidence, the extrajudicial statements of appellant were proper to be considered by the jury in determining any questions arising in the case, and to which the statements had an application (8 Cal. Jur. tit. "Criminal Law," §§ 248, 249, and cases cited); and

there was evidence that appellant admitted that he had "written a check on Mr. Gloege's account, forging Mr. Gloege's name." In addition to this admission, however, there was evidence that an individual named A. Gloege had not affixed the signature to the check now in question; that he had not authorized any one to affix it; that he had an account in the bank on which the check was drawn; that the payee of the check, Mrs. Moyer, received it from appellant; and that she cashed it and gave appellant a part of the proceeds. The Gloege check was properly received in evidence.

[4] It is alleged in the second count of the charge against appellant that he uttered, passed, and published the check therein mentioned. It is now contended that the evidence was insufficient to prove this allegation. There was testimony that appellant presented the check to a teller at a bank for payment; that he then said his name was H. Foley; that, upon being asked to identify himself, he fled; and that he was pursued several blocks, and was then caught and arrested. This evidence proved the allegation in question (12 Cal. Jur. 655, 656, and cases cited), although we do not decide whether it was necessary to be proven, in view of the fact that it was alleged and proven that appellant was guilty of forgery in affixing the name "J. A. McCaleb" as a signature to the instrument in question.

Judgment and order affirmed.

We concur: FINLAYSON, P. J.;
CRAIG, J.

77 Cal. App. 690

R. KRASNOW & SONS, Inc., v. EMERZIAN et al. (Civ. 3077.)

(District Court of Appeal, Third District, California. April 30, 1926.)

1. Sales $\S$ 177.

Purchaser cannot be compelled to accept greater amount than maximum specified in contract.

2. Sales $\S$ 33.

Purchaser accepting greater amount than maximum specified in contract is liable for excess in accordance with prices and terms of contract, in absence of specific agreement to contrary.

3. Sales $\S$ 33.

Offer or delivery by seller of larger quantity than specifically purchased constitutes new offer, acceptance of which operates as assent according to terms of original contract.

4. Sales $\S$ 164.

If purchaser accepts more than maximum specified in contract so as to be liable on quantum meruit basis, contract price is evidence of

reasonable value, controlling in absence of other evidence.

5. Appeal and error $\S$ 1011(1).

Finding of trial court based on conflicting evidence will not be disturbed on appeal.

6. Sales $\S$ 181(13).

Finding that grapes accepted by purchaser in excess of maximum amount under contract of purchase were not received under agreement that they be sold on commission basis held sustained under evidence.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by R. Krasnow & Sons, Inc., against C. Emerzian and another for materials furnished, labor performed, and for commissions. Judgment for defendants on the original cause of action and on their cross-complaint, and plaintiff appeals. Affirmed.

H. A. Savage, of Fresno, and Morrison, Dunne & Brobeck and Morrison, Hohfeld, Foerster, Shuman & Clark, all of San Francisco (H. A. Judy, of San Francisco, of counsel), for appellant.

L. L. Cory and W. H. Stammer, both of Fresno, for respondents.

HART, J. Plaintiff brought this action to recover from defendants the total sum of \$20,110.96, alleged to be due and owing to plaintiff for shock and other material furnished defendants and for labor performed in connection therewith by plaintiff and for commissions on the sale of a certain specified quantity of grapes and certain labor performed and materials furnished necessary to the handling of said fruit for the purposes of shipment and sale.

The issues were made by the complaint, the answer thereto, the cross-complaint of defendants, asking for affirmative relief and the answer of plaintiff to the cross-complaint. Findings were in favor of defendants, and, accordingly, judgment was rendered and entered that "plaintiff take nothing by its complaint, and that defendants do have and recover judgment against said plaintiff * * * for the sum of \$10,635.22," which sum includes interest on the sum of \$10,204.50 (the principal sum found by the court to be due defendants from plaintiff) at the rate of 7 per cent. per annum from December 1, 1922, to the date of the entry of the judgment. The plaintiff appeals from the judgment, on a bill of exceptions.

The plaintiff is and had been for many years prior to the time of the commencement of this action engaged in the business of buying and selling fruit of all kinds and also handling fruit for growers on consignment—that is, receiving fruit from fruit growers and selling the same for the latter on a commission basis. The defendants were, and had been, for a considerable time prior to the date

of the filing of the complaint herein, engaged in the business of growing grapes of many varieties in what is designated as the "Modesto district," near the town of Sexton, Stanislaus county.

The following extract from the opening brief of counsel for the plaintiff embraces in part an accurate general statement of the facts of this controversy:

"During the grape season of 1922 there was in plaintiff's employ one Charles Boysen, who was the local manager of the plaintiff in the Modesto district—the district within which defendants' farm was located. Prior to May 10, 1922, Mr. Boysen had interviewed C. Emerzian with reference to the purchase of the grapes then growing upon the Sexton farm. Mr. Boysen was acting under instructions from R. Krasnow, president of the plaintiff corporation, with reference to price, and his negotiations with C. Emerzian did not come to a successful conclusion for the reason that a mutually satisfactory price could not be agreed upon. At Mr. Boysen's suggestion, Mr. C. Emerzian went with him to the Fresno main office of the plaintiff on May 10, 1922, for the purpose of interviewing Mr. R. Krasnow with reference to the proposed purchase of grapes. Accordingly, an interview was had in plaintiff's Fresno office on May 10, 1922, there being present Mr. R. Krasnow, C. Emerzian, Charles Boysen, and James Krasnow, a son of R. Krasnow. At such conference prices were agreed upon, and a written contract of purchase and sale was entered into between plaintiff and defendants. Said contract was partly in writing, and it was in part a printed form that had been prepared for plaintiff's general uses without reference to any particular transaction."

Such of the provisions of said contract as are necessary to have before us in considering and passing upon the legal propositions by which it is sought to support the appeal herein read as follows:

"May 10, 1922.

"In consideration of the price herein specified C. & G. Emerzian, the seller, has sold, and R. Krasnow & Sons, Inc., the buyer, have bought all of the fruit crops hereinafter specified that the buyer shall find suitable for eastern markets, produced during the year 1922 on the following described premises, 1 mile south of Sexton:

Quantity, Tons.	Variety.	Price Per Ton.
225	Alicantes	125.00
250	Zinfandel	70.00
250	Tokays and Black Prince	70.00

"The seller agrees to pick and deliver all of the said fruit at his own expense in good condition, entirely free from mildew, honeydew, rain, or sand damage, or any damage whatsoever, and at the times and place or places directed by the buyer, and not later than No. 15, 1922. * * *

"This contract is understood by the parties hereto to constitute an immediate sale, transferring title to buyer, but until delivery has been completed seller agrees to, and does, assume all risk of loss, depreciation or damage, of whatsoever nature, to any undelivered part of said crop.

"Seller declares he is the sole and absolute owner of the crops herein sold, and the sale of the real property shall not affect the right of the buyer herein.

"The buyer agrees to pay for said fruit upon the completion of delivery thereof and presentation of weight tags therefor, and subject to the following written conditions, which is hereby made a part of this contract:

"Advance of \$8,000 on said crop. If cars loaded other points buyer agrees to pay for hauling.

"Delivery to be made on board cars at Sexton. Cash on delivery \$8,000. Advance apply on last delivery. To start picking Tokay as soon as pass inspection. Buyer agrees to furnish boxes.

"To start picking wine grapes between 5 and 15 of Sept., 1922. Time is the essence of this contract.

"Executed in triplicate. [Signed] C. Emerzian, A. G. Emerzian, Seller. Address: 3211 Tulare St., Fresno. R. Krasnow & Sons, Inc., Buyer, by Boysen. No. 766. Original."

The defendants, in the months of September, October, and November, 1922, delivered to the local office of the plaintiff at Sexton, Stanislaus county, and the latter received and accepted, a total of 1,020 tons of grapes of the varieties specified in the contract, or approximately 300 tons of such grapes in excess of the tonnages specified in the above contract. The controversy between the parties to this action relates to or involves the excess quantity of grapes of the varieties specified in the written contract delivered to and received and accepted by plaintiff.

The complaint is in two counts. In the first it is alleged that defendants are indebted to the plaintiff in the sum of \$5,317.49, for shock and other material furnished by the plaintiff to the defendants, in the months of September and October, 1922, at the special instance and request of the latter, and for work and labor performed by the plaintiff in the same months for the defendants, said sum, it is further alleged, representing the reasonable value of the materials so furnished and the labor so performed.

The second cause of action (set forth in paragraph 2 of the second count of the complaint) is founded on an alleged oral agreement, in pursuance of the terms of which the defendants delivered to the plaintiff approximately 619,545 pounds of Tokay and Alicante grapes on consignment, to be and which were by plaintiff packed, loaded and shipped to Eastern markets and sold for and on account of defendants, upon the agreement and understanding that plaintiff should, from the proceeds of the sales so made, deduct and retain for itself, in addition to costs and expenses necessarily incident to the shipping of said grapes to Eastern markets and selling the same therein, 7 per cent. of the gross amount received for said grapes as a commission for the services of plaintiff so rendered. The total net sum received by plaintiff on account of the sale of said grapes (so the complaint alleged) was \$2,474.71, which sum, it is further alleged, the plaintiff applied to the

partial payment of an indebtedness of defendants to plaintiff in the sum of \$17,268.18, which sum, upon the completion of the arrangements between plaintiff and defendants for the sale of said grapes on consignment or a commission basis, and prior to the shipment and sale of said grapes, was loaned to defendants by plaintiff and repayable on demand. There was left remaining due plaintiff on account of said loan, the complaint further alleges, the sum of \$14,793.47, making the total indebtedness of defendants to plaintiff on account of the claims set up in both causes of action the sum of \$20,110.46, for which, as above stated, judgment is prayed.

The defendants filed an answer and a cross-complaint. By the first named pleading, and answering the first count thereof, it is admitted that plaintiff, at the times mentioned in the complaint, furnished defendants with the materials mentioned in the complaint and performed the labor therein alleged to have been by it performed for defendants, but denies that the reasonable value of said materials and labor was the sum of \$5,317.49, as alleged in the complaint, but alleges that the reasonable value of said materials and labor was the sum of \$4,534.77, and no sum in excess thereof. The answer denies the averment of the complaint that plaintiff demanded of defendants payment of the sum of \$5,317.49, the amount claimed by plaintiff as the sum due it from defendants for shook and other materials, labor, etc., or any other sum, denies that defendants are indebted to plaintiff in any sum whatsoever, but alleges that, at the time of the commencement of this action, there was, "and now is, due, owing, and unpaid to these defendants from the plaintiff" the total net sum of \$10,017.90.

The second count or cause of action set up by the complaint is met by the answer as follows:

"These defendants deny that the plaintiff, at the request of the defendants, or either of them, during the fall of 1922, or at any other time, or at all, accepted from the defendants, or either of them, any Tokay or Alicante grapes on consignment, to be packed, loaded, or shipped to any Eastern market, or otherwise, or at all, or sold for or on account of these defendants, or either of them, or that any arrangement was ever entered into between the plaintiff and the defendants, or either of them, to deduct from the proceeds of any grapes whatsoever, handled on consignment, the cost of any shook, materials or labor for packing, or otherwise, or at all, or the cost of loading, freight, refrigeration, or any cost whatsoever, of delivering any grapes to any Eastern or other market, or to any buyer, or buyers, anywhere, or that the plaintiff was to deduct any per cent. of any gross or other amount received for any grapes for handling the same, as commission, or otherwise, or at all, for plaintiff's services, or to deduct any sums whatsoever owing by the defendants or either of them to the plaintiff.

"And these defendants further deny that the plaintiff, after any arrangement or arrangements for handling any grapes had been made,

as alleged in said second cause of action, or otherwise, or at all, at the special or other instance or request of the defendants, or either of them, loaned to the defendants, or either of them, repayable at any time, any sum whatsoever, or that the net or other amount received from any grapes, in any manner handled under commission by the plaintiff for the defendants, or either of them, after deducting any costs or commissions, was or is the sum of \$2,474.71, or any sum at all, or that any such sum, or any sum at all, has been applied by the plaintiff on account of any indebtedness whatsoever due, owing or unpaid from these defendants, or either of them, for any goods or grapes handled on commission, or that there is any sum whatsoever due, owing or unpaid to the plaintiff from the defendants, or either of them in any manner whatsoever."

The cross-complaint alleges that defendants delivered to plaintiff a certain quantity of grapes at the agreed price of \$92,536.15, that of said amount the plaintiff paid defendants the sum of \$82,518.25, and that "there is now due, owing and unpaid from the plaintiff to these defendants the sum of \$10,017.90, with interest," etc. Judgment is asked for the last-named sum.

Answering the cross-complaint, the plaintiff denies that defendants sold and delivered grapes to it at the agreed price of \$92,536.15, but alleges that it agreed to buy of defendants 725 tons of grapes, for which it agreed to pay defendants the sum of \$63,125, "which said grapes plaintiff did receive, accept and pay for in full, in accordance with said contract"; that, other than the grapes so purchased and received, plaintiff did not at any time purchase from defendants any grapes; denies that it is indebted to defendants in the sum of \$10,017.90, but alleges that defendants are indebted to it as set forth in its complaint.

The court found, among other things, "that the allegations of paragraph 2 of the second cause of action set forth and described in plaintiff's amended complaint are not true, and that the allegations and denials in defendant's answer to said second cause of action are true." It was further found that the defendants sold to plaintiff at the time mentioned in the pleadings certain grapes at the agreed price of \$92,536.15, of which sum the plaintiff paid defendants the sum of \$78,000 cash and the sum of \$5,407.69, "a credit due the plaintiff from the defendants" on account of the claim set forth in the first count of the amended complaint for shook and other materials, work and labor, furnished to and performed for defendants by plaintiff. It was also found that another item of \$1,076.04 was due defendants from plaintiff on account of the sale of certain "Carrigan" grapes by plaintiff for defendants on consignment, and which item is included in the total sum alleged in the answer to be due from plaintiff to defendants.

The appeal, as may readily be discerned from the issues as made by the several pleadings, presents two major points for decision

The first arises upon the position of defendants at the trial that the written contract of sale and purchase covered and was intended by the parties to cover or include all the grapes of the varieties specified in said instrument produced by the defendants on the premises described therein during the year 1922. The second point arises from the contention of the defendants that, conceding, as plaintiff contends is true, that the specification in the contract of the tonnage of each of the varieties of grapes therein mentioned definitely fixed and was understood and intended by the parties to fix and limit the quantity of each kind of such grapes that the plaintiff obligated itself to purchase, the latter, having accepted several hundred tons of the grapes of the designated varieties grown on the premises described in the contract in excess of the tonnages specified therein, without any other agreement or contract as to the terms or conditions upon which it was to receive and accept such excess tonnages than the written contract of May 10, 1922, it is, nevertheless, bound, under a familiar principle of law, to pay defendants for such excess at the prices specified in said contract.

The first point was raised in the court below upon objections by plaintiff to parol testimony offered by defendants and allowed by the court, upon the theory that the language of the contract was ambiguous in that respect, to the effect that it was expressly agreed and understood by and between the parties, and that they intended that the written contract should so provide, that the whole of the crops of grapes of the varieties designated in the contract grown by defendants upon the land described therein during the year 1922 should be covered by said contract of sale; or, in other words, that the plaintiff, by said contract, purchased all the grapes of the varieties specified which might be produced by defendants on said premises during said year at the prices stated in the contract. The objections by plaintiff to the testimony so offered were, manifestly, grounded upon the proposition that, as to the quantities of the grapes of the kinds specified which the plaintiff agreed to purchase, the language of the contract was clear, unambiguous, and definite, in that therein the amount of each variety of grapes so purchased and intended to be purchased was expressly limited to the tonnages specifically set forth in said contract; that therefore the effect of the allowance of parol testimony to show that plaintiff agreed to purchase any amount of each of the specified varieties of grapes in excess of the tonnages so specifically stated would be to vary or change the terms of the written contract in a vital particular, and thus set at defiance the inhibitions of section 1856 of the Code of Civil Procedure and section 1625 of the Civil Code.

We feel no reluctance in declaring that there is much force, apparently, in the con-

tention of defendants that the written contract, in so far as it attempts to express the intention of the parties as to the quantity or amount of grapes of the varieties therein specified to be covered thereby—whether it was intended that the quantity sold should be limited to the tonnages definitely stated in the instrument or to embrace all the grapes of the varieties named produced by defendants on the premises described during the year 1922—is ambiguous, and that it was necessary to remove or clear up the ambiguity by means of parol testimony. Code Civ. Proc. § 1856, subd. 2. Further consideration of this point, however, may be waived, inasmuch as we have arrived at the conclusion that, upon the evidence and the findings, the point secondly made and urged by defendants is sound and well taken, and that, upon the theory of the case thus afforded, the judgment must be sustained.

[1-3] Obviously, a purchaser of a commodity under a contract definitely fixing the exact maximum amount or quantity of such commodity which the purchaser thereby agrees to buy cannot be compelled to accept from the seller any amount or quantity of such commodity in excess of that specified and fixed by the contract. Of course, in simple terms this only means that a party to a contract is not legally obligated to do or perform more than his contract requires of him. The proposition is trite. But it is equally true that, where a purchaser under such a contract does accept a larger amount or quantity of the commodity than that definitely fixed by and specified in the contract as the maximum amount or quantity thereby agreed to be purchased, in the absence of a specific agreement to the contrary or one providing for other prices or arrangements as to the prices to be received by the seller, he is legally bound and may be held liable to the seller for all excess amount or quantity of such commodity so accepted at the prices fixed and stipulated in the original contract. The rule is in effect and substance thus formulated by the authorities and the decisions: That the offer or delivery by the seller to the purchaser of a larger quantity of the commodity than that expressly and specifically contracted for must be regarded as a new offer by the seller, and, while the buyer may, of course, reject such offer, if he accepts the excess quantity, then such acceptance is to be regarded as sufficient evidence of his assent to the offer at the price or prices stipulated in the original contract. "Taking the goods when he knew, or ought to have known, that they exceeded in amount what were ordered or contracted for, is sufficient evidence of assent. The obligation is, therefore, contractual, not quasi contractual. If, by the terms of the original contract or order, the price of the goods was based on their number, weight, or measure, the same rate must be paid for the larger quantity." 2 Williston on

Sales, p. 1159. See, also, *Bedell v. Kowalsky*, 99 Cal. 236, 237, 33 P. 904; *Inman v. L. E. White L. Co.*, 14 Cal. App. 551, 554, 555, 112 P. 560, 561; *Fleming v. Law*, 28 Cal. App. 110, 117, 151 P. 385; *Linger v. Wilson*, 73 W. Va. 669, 80 S. E. 1108; *Levino v. Moore Co.*, 97 App. Div. 109, 89 N. Y. S. 573; *Randall v. National Ice Co.*, 64 Hun, 636, 19 N. Y. S. 633.¹ The last-named case was concerned with a contract for the delivery of 800 or 900 tons of ice. The party delivered 1,314 tons, and the action was for the amount in excess of that named in the contract at the price fixed therein, there being no agreement that the excess amount should be delivered at a price different from that specified in the contract. The court said:

"Having received this ice in excess of the amount called for by the contract, the law would hold the defendant liable to pay for the same, and, in the absence of any agreement to the contrary, at the price stipulated in the contract."

This case was appealed to the Court of Appeals and the decision affirmed, 138 N. Y. 644, 34 N. E. 513.

In *Linger v. Wilson*, *supra*, the defendant ordered a certain quantity of grain by weight. The plaintiffs delivered a larger amount than that ordered or contracted for. After receiving the grain, defendant refused to honor a draft for the grain unless plaintiffs made a new draft allowing a claim which defendant insisted plaintiffs owed him on a previous contract between them. Plaintiffs rejected the claim on the ground that it was not based on any debt or obligation due from him to defendant. About a week after the arrival of the car containing the grain at the delivery point, and a longer time after the receipt by defendant of the invoice showing the quantity shipped, the defendant made the objection that the quantity of grain shipped was in excess of the quantity contracted for. After some controversy between the parties regarding the matter, plaintiffs proposed that defendant should take from the car the quantity actually ordered and that they would dispose of the remainder or excess amount of the grain shipped. Defendant refused to do this. Plaintiffs thereafter sold the entire quantity of grain to the best advantage, and brought an action against defendant to recover the difference between the amount received for the grain and the amount that it was worth at the contract price with defendant. Judgment passed for plaintiffs. On appeal, the Supreme Court, after declaring that the objection by defendant to receiving the grain because of failure of plaintiffs to comply with a former contract between them having no relation to the contract in suit "is no ground upon which defendant can excuse himself from complying with this latter distinct contract of purchase," said:

"Though a purchaser of goods does not order the quantity delivered to him, a sale of the whole will be implied where on receiving the goods the purchaser does not, within a reasonable time, repel the implication by returning the goods or notifying the seller that he will not accept them because of the excess of quantity. Failure to return, or to give notice of nonacceptance, amounts to an acceptance."

The same principle is applied in cases where there is an employment of the personal services of a party for a definite or stated term at an agreed and fixed rate of compensation, and the servant continues to render the same character of service which the contract calls for after the expiration of the term specified therein, and there is no new agreement. *Hermann v. Littlefield*, 109 Cal. 430, was such a case, and therein at page 432, 42 P. 443, it is said that:

"It is elementary that when a person performing labor at an agreed price and for a stated time continues in the same employment after the expiration of the term, without a new agreement, it is presumed by the law, in the absence of anything to the contrary, that the terms of the original contract are continued."

[4] "But," as is said in *Inman v. L. E. White L. Co.*, *supra*, referring to the rule above considered, "if this were not so, plaintiffs could at least recover the reasonable value of the ties in question. No inquiry was made as to the reasonable value, but the contract itself is evidence of this and controlling in the absence of all other evidence"—citing *Adams v. Burbank*, 103 Cal. 646, 37 P. 640; *Hermann v. Littlefield*, 109 Cal. 430, 42 P. 443, *supra*; *Donagan v. Houston*, 5 Cal. App. 626, 90 P. 1073.

The findings herein bring this case clearly within the principles announced and invoked in the cases above reviewed upon either theory therein suggested, according to the nature of the action or remedy resorted to to recover for the excess quantities of grapes delivered to and accepted by the buyer—that is, whether the action was upon the contract itself or upon a quantum meruit for the recovery of the reasonable market value of the excess at the time the sale was made, of which the prices agreed upon and fixed in the contract would stand as sufficient evidence as to reasonable market value in the absence of all other evidence on that question.

[5, 6] As pointed out above, upon the question whether the parties did or did not enter into an agreement whereby the defendants were to and did deliver the excess quantities of Alicante and Tokay grapes to plaintiff on consignment to be shipped and sold by the latter on a commission basis, a direct and clean-cut issue was made and tendered by the pleadings, and, as likewise further pointed out, the court expressly and specifically found, in effect, that the statement in paragraph 2 of the second cause of action set out in the complaint that such an agreement

¹ Reported in full in the New York Supplement; not reported in full in Hun's Reports.

had been made as to said excess quantities was devoid of evidentiary support, and further expressly found that, to the contrary, the denials of the answer of the allegations of the second paragraph of the second cause of action were true. The findings as to the alleged consignment agreement are amply supported by the evidence, or, to state the proposition in a different and equally as accurate a form, the findings necessarily imply that the plaintiff failed to sustain the burden cast upon it, or which it of necessity assumed, of proving by the requisite degree of evidence that as to the varieties of grapes named in the contract any other agreement or understanding than that evidenced by said contract was at any time entered into or had between the parties.

The contract between the parties, which was committed to writing and executed on the 10th day of May, 1922, was, as seen, negotiated on behalf of plaintiff by Boysen, the latter's agent in the Modesto district. R. Krasnow, manager of plaintiff's business, testified that, after the making of the written contract of May 10, 1922, he had three different conversations with the defendant C. Emerzian, in which they discussed various matters relative to the sale of the grapes of defendants; that in one of these conversations, held in the month of August, 1922, said defendant said to said Krasnow that "he would like to sell the balance of the stuff. I told him," continued said Krasnow, "conditions in the East looked bad. It looked as if there would be serious car shortage. I told him I could not use any grapes because I had all I needed. I said if I had cars I would take his grapes on consignment and charge him so much for loading, so much for commission back East." In the month of September, 1922, said Krasnow further testified, he stated to said Emerzian that he (Krasnow) would take the crop of Muscat grapes produced by defendants on consignment, on the basis of certain specified commissions and necessary expenses connected with the handling, shipping and selling of the said crops, and that said Emerzian agreed to that proposition. While this conversation was going on, the witness said, his bookkeeper was present. There was in all these conversations, the witness stated, more or less said about shook and other materials which plaintiff was to furnish defendants and the prices thereof and for labor in handling the grapes received from the former by the latter on consignment.

James Krasnow, son of the Krasnow whose testimony is referred to above, was, he stated, the "outside utility man" for plaintiff, and that his "activities extended in a general way to the receiving of grapes to be handled" by plaintiff. He testified that, at the time the written contract of May 10, 1922, was signed, he, Mr. Boysen, agent of plaintiff, Mr. Krasnow, Sr., and defendant C. Emerzian were

present; that there was nothing said on that occasion as to the handling of defendants' grapes on consignment; that he was frequently in Modesto during the months of September and October, 1922, and in that period of time talked with C. Emerzian "with reference to the handling of defendants' grapes on a consignment basis"; that "Mr. Emerzian said that he would give plaintiff a portion of their grapes on consignment; that he would give over to us to handle on consignment such of the grapes as were not covered by the contract"; that he was at Modesto at the time that grapes were being received from defendants, "and Muscats and Carrigans were received from them as well as Alicantes, Zinfandels, Tokays, and Black Prince." He further stated that "Mr. Emerzian spoke also concerning the handling of Carrigans"; that "he would give us a chance to handle them"; that "we did handle on consignment approximately 10 cars of Carrigans and 14 cars of Muscats."

Harold Hain, son-in-law of Krasnow, Sr., and the bookkeeper of plaintiff at the Fresno office during the months of August, September, and November, 1922, exhibited a number of sheets containing what purported to be a record of the grape transactions between plaintiff and defendants during the year 1922. This record indicated sales at divers times by plaintiff on commission of certain quantities of grapes of the several varieties named in the contract, and also certain quantities of the Carrigan grapes delivered by defendants to the former. The reports of the sales, he stated, were received from the points in the East where the sales were made from 40 to 60 days after such sales, and he would then make a record of the reports, showing prices received, expenses, and net returns, if any, on sheets of paper. On cross-examination, however, he stated that these records were made a very short time prior to the commencement of this action. He further admitted on cross-examination that in another book he preserved a record of the number of tons delivered at points in the Modesto district, as reported by Boysen, the plaintiff's agent in said district, together with the contract prices per ton. In that book there was no notation indicating that any of the contract grapes so delivered, either the quantities coextensive with the limit fixed by the contract or the quantities in excess of those so specifically fixed, were received or accepted by plaintiff on consignment or on any other terms as to prices than those stipulated in the written agreement. The witness admitted that that book—the one just referred to—constituted or embraced the original records of all the grapes of the contract varieties delivered by defendants to plaintiff during the year 1922.

Other than the testimony above synoptically given, there was no proof offered by plaintiff tending to show that any agreement or understanding was had between the par-

ties that the excess quantities of grapes of the contract varieties delivered by defendants to plaintiff were to be handled by the latter on consignment or a commission basis. It is worthy of special note, in considering said testimony, that, while the Krasnows each expressly testified that an agreement was had between plaintiff and the defendants for the handling by plaintiff on a commission basis of certain grapes produced by defendants in the year 1922 other than those of the varieties named in the contract, neither likewise stated that any such agreement or arrangement was had as to the excess quantities. In other words, neither of the Krasnows directly or specifically stated that the agreement which they testified was made by the plaintiff and the defendants for the handling of grapes grown by the latter on their premises in 1922 on a commission basis were of the contract varieties. James Krasnow's testimony that C. Emerzian, either in September or October, 1922, said to him (said Krasnow) "that he (Emerzian) would give over to us to handle on consignment such of the grapes as were not covered by the contract" involved the nearest approach to the declaration that an agreement was had for the handling by plaintiff on commission of the excess quantities of the contract quality of grapes delivered by defendants to plaintiff during 1922 that was made by any of the witnesses for plaintiff, and yet that testimony is so ambiguous that it is difficult to determine therefrom whether the witness intended to say that Emerzian told him that plaintiff could handle on consignment the grapes of all kinds produced by defendants in 1922, including those of the contract varieties over and above the quantities limited by the contract, or those grapes only which were not of the varieties mentioned in the contract. Thus it is manifest that the trial court, as the trier of the questions of fact, was at liberty, in the exercise of its discretion in the appraisal of the value and weight of the evidence, to interpret said statement in the witness' testimony, and it is to be assumed did so interpret it, to mean that Emerzian's proposition as so stated to said Krasnow was that the defendants would deliver to plaintiff, to be by it disposed of on commission, all grapes produced on their premises in the year 1922 other than those grapes likewise produced of the varieties mentioned in the contract. Indeed, assuming, as it is proper to assume, that the language of Emerzian, in making said proposition to Krasnow, was exactly as it was given by the latter in his testimony, the trial court was justified in concluding, as doubtless it did conclude, that said Emerzian then referred to grapes of varieties other than those named in the contract. The admitted fact that the defendants did make an agreement with plaintiff to deliver other varieties of 1922 grapes to it on consignment supports that conclusion.

The foregoing review of the testimony presented by plaintiff upon the question whether any agreement was entered into or any understanding had between the parties that the excess quantities of the grapes of the varieties named in the contract were to be delivered to and received and disposed of by plaintiff on a commission basis clearly shows, as it was and is intended to show, that, if no other testimony addressed to the establishment of such an agreement had been presented than that thus shown to have been presented by plaintiff, the finding by the trial court that no such agreement or understanding was made or had between the parties, or that the burden resting upon plaintiff to show that the excess quantities were disposed of on a commission basis under a special agreement to that effect was not sustained by it, would stand immune from just disturbance by this court. Assuming, though, that the plaintiff's testimony upon that proposition is such that the trial court could properly have deduced therefrom a finding that such a special agreement was made by the parties, we then arrive at the same result under the familiar rule of substantial evidentiary conflicts upon the issues to be determined.

C. Emerzian testified, as did Boysen, plaintiff's agent, that negotiations for the purchase of the grapes of the defendants produced by them in the year 1922 were conducted by him on behalf of defendants, and by Boysen, on behalf of plaintiff; that these negotiations led to the execution of the written contract of May 10, 1922; that, up to the time said contract was executed, he never at any time talked with either of the Krasnows on the subject of the sale to plaintiff of their 1922 crops of grapes; that neither on the occasion of the execution of the written contract nor on any other or subsequent occasion was anything ever said by him to either of the Krasnows or by either of the latter to him about the acceptance and the handling by the plaintiff of the excess quantities of grapes of the contract varieties over the quantities specifically mentioned in the contract on consignment or a commission basis; that no such agreement was at any time ever entered into or understanding had between or by the plaintiff and defendants or either of the latter; that it was the understanding between him and Boysen (and this testimony is referred to as in support only of the position of defendants that no such agreement was made) that plaintiff was to purchase and did by the contract purchase the entire crops of grapes of those named in the contract grown by defendants on their land in the year 1922; and that the statement of the tonnages in the contract was intended only as estimates of the minimum amount of the grapes so sold and purchased.

Boysen testified that he had never heard or understood that the excess quantities were to be handled by plaintiff on consignment;

that he knew of no such agreement or understanding having been at any time made or had between the parties; that the excess quantities were, upon being delivered by defendants, handled just as the other grapes of the same varieties were handled—weighed and then loaded in the cars, and weight tags or receipts prepared and issued, one delivered to the defendants, one retained at the office of appellant in Modesto, and one sent to appellant's main office.

R. W. Fithian, bookkeeper at plaintiff's Modesto office, testified that he prepared on sheets of paper copies of the original records compiled in the Modesto office of deliveries by the defendants of the contract varieties of grapes. "The plaintiff's practice with reference to these records," he testified, "was to make an original which was transmitted to the Fresno office, a duplicate of which was transmitted to the grower, and a triplicate retained in the Modesto office until the close of the season and then sent to Fresno. * * * I did all this under instructions from Mr. Boysen." He further testified that Boysen instructed him that the prices to be noted in the records thus made up were the prices specified in the contract for the varieties therein named. The sheets referred to by the witness as being copies of the original records of the Modesto office of the deliveries made by defendants were introduced in evidence. In this connection, we may, without departing from an orderly consideration of the testimony as presented by defendants, refer to the testimony of C. Emerzian that, subsequent to the delivery of the entire crop of the grapes of the kinds named in the contract, and after he had received the statements referred to by the witness Fithian, he (said Emerzian), in comparing the weights with the weight receipts and the computations of prices with the contract, discovered an error in computation to the extent of \$1,500 against the defendants; that he thereupon visited the Fresno office and called the attention of the bookkeeper in said office (Hain) to the error; that the latter immediately informed him (said Emerzian) that the error had already been corrected in the copy of the statement on file in the Fresno office; that he (Emerzian) then directed the attention of the bookkeeper at the Modesto office to the error, and the former there made the correction. This testimony was not contradicted. It also may here properly be noted that said Emerzian further testified that, after the controversy arose between the parties regarding the excess quantities delivered by defendants to plaintiff, the latter through its officers offered to settle their differences if the latter would agree to a discount on the total sum which the excess quantities came to on the basis of the contract prices, to which proposition the defendants refused to agree.

Further consideration of the evidence here-

in is not required. From the above review thereof it is patent that the court was clearly warranted in finding that no agreement or understanding was had between the parties that the tonnages delivered to and accepted by plaintiff in excess of the named quantities should be received by plaintiff and by it disposed of on commission; that, having in the absence of such an agreement accepted all the grapes delivered without protest or an offer to return the excess quantities, the necessary implication was that the plaintiff accepted them on the terms and at the prices specified in the written contract.

The defendants make no point here that the evidence is insufficient to support the finding in favor of plaintiff on the claim constituting the basis of the first cause of action set forth in the complaint.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

77 Cal. App. 786

MERTENS v. KEENE et ux. (Civ. 5219.)

(District Court of Appeal, Second District, Division 2, California. May 6, 1926.)

1. Landlord and tenant §296(2).

Vendee in possession after default in payments is not a tenant, within Code Civ. Proc. § 1161, subd. 1, authorizing action of unlawful detainer against tenant only.

2. Landlord and tenant §296(2).

Allegation of mere conclusion in complaint in unlawful detainer that defendant vendees in possession abandoned contract by "failure, refusal, and neglect" to perform covenants, does not make them tenants, who may be sued, under Code Civ. Proc. § 1161, subd. 1.

3. Appeal and error §95.

Order, denying motion to quash service of summons, is not appealable, under Code Civ. Proc. §§ 956, 963.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Theodora H. Mertens against Charles Keene and wife. From a judgment for plaintiff and an order denying a motion to quash service of summons, defendants appeal. Judgment reversed, and appeal from the order dismissed.

Cunningham & Blackburn, of Los Angeles, for appellants.

George S. Dennison, of Los Angeles, for respondent.

WORKS, J. This is an action of unlawful detainer. The complaint alleges two causes of action, and judgment went for plaintiff under the allegations of the second of these. It is alleged in that count that on a certain day "plaintiff, as seller, and defendants, as

purchasers, entered into an agreement for the sale of "certain described real property; that on the same date "defendants entered into possession of said premises, and ever since have been, and now are, in possession of said premises"; that "plaintiff has executed and performed all of the conditions precedent recited in said agreement by her to be performed"; that "on the 1st day of October, 1924, a payment in the sum of \$50, by defendants to plaintiff, became due under said agreement, but that defendants failed, refused, and neglected, and now fail, refuse, and neglect, to make said payment to plaintiff, although repeated demands for the payment thereof have been made by plaintiff of defendants; and that subsequent to said 1st day of October, 1924, additional payments, in the total sum of \$425, by defendants to plaintiff, became due under said agreement, but that defendants have failed, refused, and neglected, and now fail, refuse, and neglect to make said additional payments to plaintiff, although repeated demands for the payment thereof have been made by plaintiff of defendants"; that "defendants, by virtue of their failure, refusal and neglect to perform the covenants of said agreement," as alleged in the language immediately preceding the present clause, "did, on the 1st day of October, 1924, abandon said agreement"; that "a reasonable rental value of said premises is the sum of \$50 per month"; and that "plaintiff has frequently, since said 1st day of October, 1924, demanded of defendants to quit and surrender to plaintiff said premises, but that defendants have failed, refused, and neglected to so quit and surrender to plaintiff said premises." The prayer of the complaint is for "the restitution of said premises"; for judgment for a certain sum "as damages for the unlawful detainer of said premises"; that "said damages be trebled"; and for costs. Upon this count of the complaint the clerk of the trial court issued a summons requiring defendants to answer within 3 days after the service thereof. The summons was served and defendants moved the court to quash the service, on the ground that the complaint fails to state a cause of action in unlawful detainer and that, therefore, defendants were entitled to 10 days within which to answer under the provisions of the statute regulating the matter of service of summons in ordinary civil actions. The motion was by the court denied. Defendants not having appeared in response to the sum-

mons, within the time limited thereby, their default was entered, and, pursuant thereto, judgment was rendered against them, ordering a restitution of the premises described in the complaint, ordering the issuance of a writ of restitution, and giving judgment for damages for the detention of the premises. Defendants appeal from the judgment and from the order of the trial court denying their motion to quash the service of summons.

[1, 2] Several questions are made by appellants, but they may all be answered by a solution of this query: Does the second count of the complaint state a cause of action in unlawful detainer? Except for a point made by respondent and hereafter to be mentioned, this question has been answered by the Supreme Court:

"A vendee in possession is not a tenant in any sense of the word, and only a tenant may be sued under the first subdivision of section 1161 [of the Code of Civil Procedure, relating to the action of unlawful detainer]. The proceeding is purely statutory and is restricted in its operation to those persons specified in the statute. * * * Failure of performance of his part of the contract of sale by the vendee in possession does not make him a tenant. * * * Even a vendee who has defaulted in his promised payments is entitled to an opportunity of showing his equities and presenting his defenses." *Francis v. West Virginia Oil Co.*, 174 Cal. 168, 162 P. 394.

Respondent would evade the rule stated in the cited case by pointing to the allegation of the second count of her complaint to the effect that appellants abandoned their contract by their "failure, refusal, and neglect" to perform the covenants of the contract of sale mentioned in the pleading. Respondent says she inserted the allegation of abandonment in an endeavor to avoid the rule stated. We cannot regard the attempt as successful. The Supreme Court having said that the existence of a certain state of facts does not make a vendee in possession a tenant, we cannot sanction the view that an allegation of the mere conclusion that an abandonment arose from the same state of facts, in a given case, can make such a vendee a tenant.

[3] The order of the trial court denying the motion to quash service of summons is not an appealable order. Code Civ. Proc. §§ 956, 963.

The judgment is reversed. The appeal from the order denying motion to quash service of summons is dismissed.

We concur: FINLAYSON, P. J.; CRAIG, J.

198 Cal. 717

PEOPLE v. SCHAFER. (Cr. 2838.)(Supreme Court of California. June 16, 1926.
Rehearing Denied July 15, 1926.)**1. Homicide** ⇨236(1).

In murder prosecution, under Pen. Code, § 274, for causing miscarriage which resulted in death, evidence *held* sufficient to establish death as caused by unlawful means.

2. Homicide ⇨268.

Evidence *held* for jury as to whether accused procured abortion which caused death, in violation of Pen. Code, § 274.

3. Criminal law ⇨1159(2).

Appellate court will not attempt to determine weight of evidence, but will only determine whether on face of record there is sufficient evidence to warrant jury in inferring guilt.

4. Criminal law ⇨1160.

To set aside, because of insufficiency of evidence, verdict of conviction approved on motion for new trial, it must appear that on no hypothesis is there sufficient substantial evidence to support conviction.

5. Criminal law ⇨761(7)—Instructions assuming miscarriage was caused in particular way properly refused, when jury could find it was caused by different means.

In prosecution for murder in producing miscarriage by criminal means, instructions based on assumption that miscarriage was caused by administration of a douche were properly refused, where evidence warranted jury in believing it was caused by different means.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Tillie Schafer was convicted of murder in the second degree, and she appeals. Affirmed.

Nathan C. Coghlan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

WASTE, C. J. Appellant was charged with the crime of murder. It was the claim of the prosecution at the trial that the decedent, a woman about 31 years of age, died as the result of a miscarriage produced by criminal means forbidden by section 274 of the Penal Code, and that the unlawful means were chargeable against appellant. From the judgment of conviction of murder in the second degree, and from the order denying a motion for a new trial, this appeal is taken.

[1] Some time in the early part of 1924 the decedent, being in serious trouble, consulted the appellant, who refused to assist her. On the night of April 23, following, the decedent again went to the home of appellant, remaining all night. Police officers

called to the house the next morning found the decedent lying on a couch dead. The autopsy surgeon testified that he examined the body at the city morgue. He found that death had been caused by hemorrhage of the uterine cavity as the result of an abortion which had been performed within a few hours before the death of the woman, and in his opinion she had been dead but two or three hours at the time he made the examination. He testified that, while he could not state by what means the abortion was actually caused, the entire foetus had been removed; there was no clotting of blood; the tissues were freshly bleeding; and only a bit of the membrane of pregnancy was left. Prior to death there had been a considerable amount of blood lost, which left the body pallid. This evidence was sufficient to establish the corpus delicti, viz. that the woman was dead, and that her death had been caused by unlawful means. *People v. Wright*, 167 Cal. 1, 3, 138 P. 349. It is contended that the evidence was not sufficient to sustain the verdict for the reason, it is claimed, that it does not establish that the unlawful means which occasioned the decedent's death were chargeable against appellant.

[2-4] The police officers who were called to the house on the morning of decedent's death described the condition of the body when found, and told of the blood on the decedent's clothing and on the couch on which she lay. They testified that the kitchen of the flat had "been lately scrubbed up and it was still wet," and in the stove were what appeared to be ashes of rolled cloth, which had been recently burned. On being taken to the police station to be interrogated concerning the death of the decedent, appellant signed two written statements. In them she stated that she did not perform an operation upon the decedent and that she did not know who did. In the first statement the appellant related that the decedent came to her house some time before her death, seeking her help, and "said that she understood that I would perform an abortion on her, but I told her I was not doing that any more since I got in trouble." In the other statement the appellant told how the decedent came to her home the night before her death, and she (appellant) gave the decedent a douche "composed of a solution made out of Indian weed boiled up in a tea and a little camphor added. This tea was given for the purpose of bringing her around." Appellant and decedent slept that night in the same bed. The decedent remained in bed until about 9 o'clock the next morning, when she went to the bathroom, where she fell. Appellant assisted her to a couch, and, after endeavoring to call a physician, notified the emergency hospital. When the ambulance arrived the woman was dead. One of the policemen testified that on the afternoon of

April 24th the appellant was taken to her home, where "she produced a douche bag with a nozzle on it which she said had been used in performing the abortion." There was also found, according to this witness, some Indian weed used by the appellant in cooking the preparation to be used as a douche. There was more of the same kind of testimony, but the foregoing, in substance, is what the prosecution relies on to support the judgment of conviction. The appellant took the stand and denied certain statements made by the police officers, and gave an account of the occurrence differing somewhat from the signed statements.

It is the contention of the appellant that the evidence fails to show that she had any hand in the commission of the abortion, which, it is claimed, caused the death of the decedent, but, in view of all of the circumstances brought out by the testimony in the case, we are of the opinion that there was sufficient evidence to support the finding of the jury. There was evidence that the decedent had consulted the appellant with regard to her condition. When the condition became more serious, she again visited appellant. Apparently no one other than appellant saw the decedent from that time until the woman died. Prior to the visit, decedent appeared to be in her usual health. Death was caused by hemorrhage following an unlawful practice. During the night, according to appellant, the decedent did not require any attention. Appellant and decedent were alone in the house after 7 o'clock in the morning. Appellant placed the time of the death around 9 o'clock. The autopsy physician testified that in his opinion the criminal operation had been performed within a period of two or three hours prior to the death. Appellant admitted that after decedent's death she burned bloody rags in the stove. From these, and the other facts established in the case, it seems only reasonable to conclude that a jury would be warranted in believing that the appellant not only performed the criminal operation, but destroyed the evidence of the crime. Other facts deducible from the record may tend to establish the innocence of appellant, but this court will not attempt to determine the weight of evidence. It is only called upon to decide whether, on the face of the record, it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. It is the function of the jury in the first instance to determine what facts are established, and, before a verdict which has been accepted by the trial court, and subsequently approved on motion for a new trial, can be set aside on appeal upon the ground of insufficiency of the evidence, it must be made to appear that upon no hypothesis is there sufficient substantial evidence to support the conclusion reached in

the court below. *People v. Erno*, 195 Cal. 272, 282, 232 P. 710; *People v. Tom Woo*, 181 Cal. 315, 326, 184 P. 389; *People v. Fitzgerald*, 138 Cal. 39, 41, 70 P. 1014.

[5] Appellant's further contention is that the court erred in refusing to give three instructions proposed by her, which were based upon the assumption that the miscarriage was caused by the administration of the douche containing the solution of Indian weed. In view of the fact that the evidence warranted the jury in believing that the miscarriage may have been caused by means other than the administration of the douche, the instructions in the form in which they were proposed were properly refused. The substance of at least one of them appears to have been covered by other portions of the charge.

The judgment is affirmed.

We concur: LAWLOR, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.

198 Cal. 721

In re DEVLIN'S ESTATE.

DEVLIN v. O'REILLY. (S. F. 11784.)

(Supreme Court of California. June 17, 1926.)

1. Wills $\S$ 133—Will written by testator held not signed within statute requiring olographic will to be dated, written, and signed by testator (Civ. Code, $\S$ 1277).

Will written by testator beginning, "I, Joseph Devlin, have lived at [specified city]; I am owner of this will as it was myself who write it up," and ending, "I will state later what to do with balance," without further signature, and inclosed in envelope on which was written by testator, "This contains Joseph Devlin's will," held not signed within meaning of Civ. Code, $\S$ 1277, requiring olographic will to be dated, written, and signed by the testator.

2. Wills $\S$ 133—Statute requiring olographic will to be written and signed by testator requires each of those things, and will dated and written, but not signed, by testator, is not valid olographic will (Civ. Code, $\S$ 1277).

Civ. Code, $\S$ 1277, requiring that olographic will must be entirely written, dated, and signed by hand of testator, requires each of those things, and will dated and written, but not signed by, testator, is not valid olographic will.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Application for the probate of the will of Joseph Devlin, deceased. From order admitting will to probate and granting letters testamentary to Katie O'Reilly, Peter Devlin, contestant, appeals. Reversed.

C. L. McEnerney and A. L. O'Grady, both of San Francisco, for appellant.

John L. Murphy, of Los Angeles (James A. Himmel, of San Francisco, of counsel), for respondent.

NOURSE, Justice pro tem. [1] This is an appeal from an order admitting to probate a certain document purporting to be the last will of Joseph Devlin, deceased, and granting letters testamentary to Katie O'Reilly. The document which was admitted to probate was entirely written by the deceased and reads, in part, as follows:

"San Francisco, August 15th, 1921—I Joseph Devlin have lived at 229 Ellsworth St. San Francisco, Cal at the above date I am the owner of this will as it was myself who write it up I will appoint my cousin Mrs. James O'Reilly as my respective Trustee. * * * Dear Katie first of all it is my wish that you take charge of my funeral and see that I will be buried respectfully in every way. * * * there is another request I wish to ask of you * * * it is my wish and request that you will pay * * * the sum of \$500.00 * * * for Masses * * * You will find in this Will two separate letters * * * You will read those two letters carefully and then you will know how I wish those Masses said. * * * I bequeath to my sister Isabella Devlin in Ireland \$500.00 also to my Brother Mark Devlin (and other special bequests making a total of \$1500.00) * * * I hope I will be able to leave you a little present for your trouble. * * *

"Dear Katie I have about \$2600.00 Dollars in two different banks * * * besides other papers * * * and last Dear Katie the money in Banks and on hand will about pay all expenses then the little place where I lived is worth about 12 or 1400.00 Dollars when you sell it I bequeath \$500.00 Dollars out of it as a little token of friendship to you I will state to you later what I would wish you to do with the balance I have some other little interests besides I am tired writing Goodnight" (End of document but without period or other mark.)

This document was found after the death of the deceased inclosed in an envelope upon the face of which was written entirely in the hand of the deceased the following:

"This Envelope Contains the Late Joseph Devlin's Will Please Deliver This Will to Mrs. James O'Reilly 558-25 Ave Richmond Dist. San Francisco."

The appellant, who is a brother and heir of the deceased, filed written grounds of opposition to the probate of the purported will and prosecutes this appeal from the order admitting it to probate. The basis of the attack upon the order is that the will was not signed by the deceased and that it does not therefore meet the demands of section 1277. Civil Code, that "An (h)olographic will is one that is entirely written, dated, and signed by the hand of the testator himself." In support of the appeal the appellant relies upon Estate of Manchester, 174 Cal. 417, 163 P. 358, L. R. A. 1917D, 629, Ann. Cas. 1918B, 227; Estate of

Hurley, 178 Cal. 713, 174 P. 669; Estate of Streeton, 183 Cal. 284, 191 P. 16; and Estate of Bernard (Cal. Sup.) 239 P. 404. In reply the respondent insists that under the rule of the Estate of McMahon, 174 Cal. 423, 163 P. 669, L. R. A. 1917D, 778, the court must hold in this case that the use of the expression, "I am the owner of this will as it was myself that write it up," was an adoption by the deceased of the precedent name as his executing signature. In the Estate of Manchester, supra, the document offered for probate began as follows:

"January 14th, 1914. I, Matilda Manchester leave & bequeath all my estate & effects, after payment of legal, funeral & certain foreign shipment expenses (as directed) to the following legatees. * * *

Then followed a statement of devises and bequests to divers persons. It ended as follows: "Whereunto I hereby set my hand this fourteenth day of January, 1914." The document was folded and inclosed in an envelope which was indorsed by the testator as follows: "My will, Ida Matilda Manchester." In reversing the order admitting the purported will to probate, this court held that—

"It was not 'signed' according to the meaning of that word in ordinary usage. To sign, as applied to a document, is defined as follows: 'To affix a signature thereto; to ratify by hand or seal; to subscribe in one's own handwriting.' (Webster's Dictionary.) Unquestionably, as used in the above-quoted section, it means the signature of the testator in his own handwriting written somewhere in or upon the document, with the intention by so writing it to authenticate the document. The name written at another place than the end of the document, and not for the purpose of authenticating it and indicating its completion, but merely to identify the person who is making the will, cannot be deemed to be a name 'signed' to the document, unless that word is given a meaning entirely different from that which it is generally understood to have."

Again in the same case (page 421 [163 P. 360]), the court said:

"The true rule, as we conceive it to be, is that, wherever placed, the fact that it was intended as an executing signature must satisfactorily appear on the face of the document itself. If it is at the end of the document, the universal custom of mankind forces the conclusion that it was appended as an execution, if nothing to the contrary appears."

In the Estate of Hurley, supra, this court, in reversing an order refusing to revoke a previous order admitting a purported olographic will to probate, quoted with approval the language last quoted from the Manchester Case. In the Hurley Case, the document opened with the following words:

"San Francisco, June 6th, 1902—I Margaret E. Hurley being of sound mind and body do make this my last will and testament."

A number of bequests followed, and the document ended, "to Mrs. Skelly of Alameda five hundred dollars to Lillian and Bertha Morris five hundred each." In holding that the document was not a valid holographic will, the court said (page 715 [174 P. 670]):

"In the present case the signature appears in the opening statement of the paper, but there is nothing in the document or in the closing paragraph to indicate that the testatrix intended to adopt that signature as the executing signature of the will. Indeed, the contrary may be inferred from the fact that the will terminates without even a punctuation mark, thereby indicating that the testatrix ceased writing before she had completed declaring her intention and that she did not regard the document as a completed will. But the contrary inference need not appear. In the absence of anything on the face of the will to raise the inference that the name in the exordium was intended as a signature in execution, the holographic document cannot be deemed a valid will."

In *Estate of Streeton*, supra, the document offered for probate had in the upper left-hand corner the name, "Harry Streeton." Then followed:

"Los Angeles, May 3, 1918. My last request if I should pass away in this sickness that everything that belongs to me and is under my name will be given to Mrs. Nellie Williams.
* * *

The will was admitted to probate, and in affirming an order denying a revocation of the will this court reaffirmed the rule in the *Manchester and Hurley Cases* and held:

"In the document now under consideration, there is no space at the end of the writing in which a signature could have been placed. The name of the testator appears in a blank space, disconnected from the rest of the written matter both as to location and meaning. Had the name appeared in the exordium, the logical inference from the context would probably have been that it was intended merely to identify the person making the will, and additional facts might have been necessary to raise the inference that it was also intended as a signature in execution of the will. (*Estate of Hurley*, 178 Cal. 713, 174 P. 669; *Estate of McMahon*, 174 Cal. 423, 163 P. 669, L. R. A. 1917D, 778.) But, as above stated, the name of decedent appears entirely separate from the rest of the writing and by itself. It must be assumed that it was placed on the document for some purpose, and the only apparent and reasonable purpose under the circumstances would seem to be the signing of the instrument with the intention of authenticating the same. This conclusion becomes the more compelling when we consider that the name is written in a blank space at the beginning of the instrument, for such a space is the most natural one in which to place a signature when the usual place at the end of the document is unavailable. The fact that the end of the page was torn off, whatever its importance in a determination of the question of revocation, if of any weight in a consideration of the sufficiency of the signature, tends to support, rather than defeat, the inference that the name was written at the top of

the page with the intention of authenticating the instrument."

In the *Estate of Bernard*, supra, the document offered for probate read in part as follows:

"The following 4 sheets of paper included, Long Beach, California, Oct. 12, 1918. 'I, Josephine Bernard of the City and County of Denver, Colo. do hereby declare this to be my last will and testament.'"

The document terminated near the middle of the last page, "To her husband Herbert Donahue ruby and diamond stick pin." In affirming an order revoking probate of the alleged will the court analyzed and approved all the cases heretofore referred to, together with the *Estate of McMahon*, 174 Cal. 423, 163 P. 669, L. R. A. 1917D, 778. The following language appearing in that decision is particularly appropriate (239 P. 405):

"The signature of the decedent appears only in the exordium, and there is nothing in any other part of the alleged will to indicate affirmatively or by necessary implication that the signature was intended to be or was adopted as the final executing signature in authentication of or in execution of the document as a completed testamentary act. The obvious and natural inference to be drawn from the position of the name of the decedent in the alleged will is that it was intended merely as descriptive personae, and, in the absence of anything affirmatively appearing on the face of the will itself tending to show that such signature was intended to authenticate it, this conclusion is inevitable."

We have referred to the language of the decisions relating to the appearance of the name of the decedent in the exordium alone, but *Estate of Hurley* and *Estate of Bernard* are both applicable here for the additional reason that the documents offered for probate in each of those cases appeared to have been uncompleted, as is the case with the document here under consideration. Commenting on this circumstance, the court in the *Estate of Bernard* (p. 405) said:

"The abrupt termination of the document near the middle of the last page is a strong indication of decedent's intent to do something more in order to make it a complete will. The last clause being, in all general respects, similar to the preceding dispositive clauses manifests that the writer did not intend to terminate the document finally and definitely at that particular point, but, rather, indicates that something additional was to be done, and necessarily compels the conclusion that decedent had no intention of adopting the name written in the opening clause of the will as the executing signature to her final testamentary act."

[2] In support of the order the respondent relies upon *Estate of McMahon*, 174 Cal. 423, 163 P. 669, L. R. A. 1917D, 778, where the purported will read, in part: "This is the last will and testament of Elizabeth R. McMa-

hon." Then followed certain specific bequests and devises, concluding with:

"I do hereby publish and declare the foregoing, entirely written, dated and signed by my own hand, to be my last will and testament, this second day of January, 1912." (Emphasis ours.)

No signature followed this declaration, and no signature appeared in any other place upon the document than in the opening clause. The document was admitted to probate as an olographic will, and this order was, on appeal, affirmed on the ground that the declaration of the testatrix that she had signed the document by her own hand was an adoption by her of her signature as written in the body of the will as her signature in execution of it. The McMahon Case has been cited and followed in the later cases which we have just referred to, but the court has been particular to point out that the case rested upon the peculiar language of the will, from which it was inferred that the name in the exordium was adopted as the executing signature of the testatrix. The language of the McMahon will was materially different from that under consideration in the case before us. There the writer expressly declared that the *foregoing* will was signed by her. This was in effect a declaration that she had signed the will when she inscribed her name in the opening clause, and that she then adopted that signature as the executing signature to the will. Here the deceased merely stated in the opening clause that he *wrote* the will and that he was the owner of it. Now, the writing of the will and the signing of it are two different things. Section 1277, Civil Code, requires that an olographic will must be entirely written, dated, and signed by the hand of the testator. There are three things, therefore, which must be done by the testator to constitute an olographic will within the section. If he has merely written it in his own hand and has failed to date or sign it, it is not a valid olographic will, and from the declaration that he has written it in his own hand there is nothing from which the inference can be drawn that he has signed it or that he has intended to adopt as his executing signature the name which he has inserted in the exordium.

Order reversed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.

77 Cal. App. 745

PEOPLE v. MILLIGAN. (Cr. 1326.)

(District Court of Appeal, Second District, Division 1, California. May 5, 1926.)

1. Criminal law §401.

In trial for making and uttering fictitious note, secured by mortgage on property not owned by person whose name was subscribed to

note, admission of owner's testimony as to legal description of property was not reversible error.

2. Criminal law §400(7).

Legal or other description of definitely located realty may be given in evidence by any one in possession of facts.

3. Indictment and information §161(3).

Under Pen. Code, § 1008, information may be amended so as to state cause of action after evidence is closed, if defendant's substantial rights are not prejudiced, and amended information shows offense under evidence at preliminary examination.

4. Criminal law §1144(1).

Where it is not questioned that information, as amended after evidence was closed, charged offense shown by evidence taken at preliminary examination, it must be presumed that all necessary elements of offense were shown by evidence adduced thereon.

5. Criminal law §1144(1).

Commitment, on which information was based, must be presumed sufficient on appeal from conviction.

6. Indictment and information §161(3)—Permitting amendment of information for making and uttering fictitious note after evidence was closed by adding allegation of intent to defraud held not error (Pen. Code, §§ 476, 1008).

Since information, as amended after evidence was closed, so as to state cause of action, under Pen. Code, § 476, for making and uttering fictitious note, by adding charge of intention to defraud, charged no different offense than was attempted in original information, but charged offense shown by evidence on preliminary examination, and amendment was without prejudice to substantial rights of defendant, who declined opportunity afforded to disprove facts tending to establish such intent, court did not err in permitting amendment, in view of section 1008.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

S. W. Milligan was convicted of uttering, publishing, possessing, and attempting to pass as genuine a fictitious note, and he appeals. Affirmed.

Mathonihah Thomas, of Long Beach, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney and John W. Maltman, Deputy Attys. Gen., for the People.

HOUSER, J. Defendant appeals from a judgment of conviction of the crime inhibited by section 476 of the Penal Code, which makes punishable the fraudulent act of making, passing, uttering, or publishing a fictitious bill, note, or check.

More particularly the information herein charged in substance that at a designated

time and place defendant did willfully, unlawfully, and feloniously utter, publish, and have in his possession a certain false and fictitious promissory note which he attempted to pass as true and genuine.

[1, 2] The first point urged by appellant as a reason for reversal of the judgment is that, over defendant's objection and to the prejudice of defendant's substantial rights in the premises, the trial court erred in permitting a witness to testify to the legal description of certain real property which was security for said alleged fictitious note.

It appears that, without objection, the witness testified that she was the owner of the real property in question, which, as described by the witness, was identical with the street and number thereon stated by defendant in the negotiations by him for the sale of the note, as representing the property upon which the mortgage was given to secure the note in question.

Appellant suggests that the testimony of the witness as to the legal description of the property which she claimed to own was secondary and, consequently, inadmissible. It would seem, however, that the ownership of the real property which purported to be the security for the alleged fictitious promissory note was but incidental to the issue in the case. Defendant was accused, not with any crime affecting the execution of a mortgage, but with the offense of feloniously making and uttering a promissory note. The evidence being that the property upon which the mortgage was given to secure the alleged fictitious note was not owned by the person whose name was subscribed to the note, the description of the particular piece of property which was mortgaged as security for the note, while perhaps not wholly immaterial, was nevertheless of comparative unimportance. Besides, it having been established that the witness was the owner of a definitely located piece of real property, we see no reason why a legal or other description thereof should not be given in evidence by any person in possession of the facts.

[3] It is also contended by appellant that prejudicial error was committed by the trial court in permitting, over defendant's objection, an amendment to the information after the evidence was closed.

It is admitted that as originally drawn the information against defendant contained each of the necessary allegations constituting the offense, with the exception that, in the language of the statute (Pen. Code, § 476), no "intention to defraud" was charged. Such omission having been directed to the attention of the district attorney, he moved the court for leave to amend the information by adding thereto the necessary allegation. Over defendant's objection, the motion was granted by the court and the information was amended accordingly—at the same time leave

being granted to defendant to reopen the case for the purpose of submitting additional evidence. Defendant claimed to have been taken by surprise and "stood on the record." Appellant now insists that, because the information upon which defendant went to trial failed to completely charge the commission of a public offense, no power existed in the trial court to grant the motion to amend the information so that it would state a cause of action; and in support thereof cites several authorities to the effect that, where an information or indictment is fatally defective, in that it fails to state facts sufficient to constitute the crime charged, a judgment of conviction thereof will not be permitted to stand, even though the insufficiency of the formal accusation against the defendant be not raised until after trial. But the question which this court is called upon to consider is whether in the course of the trial, after the evidence has been introduced, a defective information may be amended so that it will state a cause of action in accordance with evidence taken at the preliminary examination. The only authority bearing directly on the point submitted by appellant is that of *People v. Webber*, 44 Cal. App. 120, 186 P. 406, in which it was conceded that if an indictment as originally filed did not state a public offense, it could not be amended so to do at the trial of the action. That statement of the law, however, loses some of its force because of the fact that the court held that the indictment under consideration did charge an indictable offense. On the other hand, section 1008 of the Penal Code provides in part that:

"An indictment or information may be amended by the district attorney without leave of court, at any time before the defendant pleads. Such amendment may be made at any time thereafter, in the discretion of the court where it can be done without prejudice to the substantial rights of the defendant. An indictment cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination."

[4] The language of the statute, while stated negatively, would seem to warrant an amendment such as is here involved, provided that the substantial rights of the defendant were not prejudiced thereby and that the charge preferred by the information as amended constitutes an offense shown by the evidence taken at the preliminary examination. *People v. Foster* (Cal. Sup.) 243 P. 667. As to the latter prerequisite no question is raised. It must therefore be presumed that all the necessary elements constituting the commission of the offense by the defendant including the "intention to defraud," were contained within the evidence adduced on defendant's preliminary examination. The only question, therefore, to be determined, is

whether the incorporation into the defective information at the close of the evidence on the trial in the superior court of the omitted allegation, to wit, that the alleged acts of defendant "were done with the intention to defraud," was "without prejudice to the substantial rights of the defendant." Pen. Code, § 1008.

[5, 6] No claim is made by appellant that the evidence is insufficient to support the verdict, nor was any evidence introduced by either side after the amendment to the information was made; from which it follows that the intention of defendant to defraud (which was the substance of the amendment to the information) had been established at the time the amendment was made. Furthermore, the record shows that defendant was offered full opportunity to introduce any additional evidence bearing upon the transaction which was the foundation for the charge against him, but that he declined to avail himself of the courtesy which was thus extended.

In the case of *People v. Rippe*, 32 Cal. App. 514, 163 P. 506, the information charged that the defendant by means of false representations induced certain parties to sign a promissory note and that they were thereby "defrauded, damaged, and prejudiced." The information contained no allegation that the promissory note had been delivered to the payee thereof. When the case came on for trial the district attorney was permitted to amend the information by an allegation to the effect that the note, when signed, was delivered to the defendant and by him delivered to the payee therein named. In discussing the question, the appellate court said, in part:

"While the information as originally filed did not state facts sufficient to constitute an offense known to the law [citing authority], nevertheless it did attempt to charge the crime of 'obtaining property by false pretenses,' and the amended information did no more than show by a proper allegation that the note which was the subject-matter of the false pretenses had become 'property' within the meaning of section 532 of the Penal Code, which defines the offense of obtaining property by false pretenses [citing authority]. Obviously, therefore, the amended information did not charge an offense different from that attempted to be charged in the original information, which was admittedly founded upon the evidence taken at the preliminary examination, and consequently the filing of the amended information neither prejudiced the defendant nor contravened the provisions of section 1008 of the Penal Code."

The facts in the case of *People v. Miller*, 34 Cal. App. 641, 168 P. 574, are not stated—the entire discussion of the point involved being as follows:

"It is only necessary to say in this case that the original information purported to charge a public offense, and that the amended informa-

tion as filed, after the request of the district attorney and upon the permission of the court being given, did not charge an offense different from that attempted to be stated in the original information. Consequently the filing of the amended complaint neither prejudiced the defendant nor contravened the provisions of section 1008 of the Penal Code. See *People v. Rippe*, 32 Cal. App. 514 [163 P. 506]."

The appeal in the case of *People v. Foster*, recently decided by the Supreme Court of this state (243 P. 667), involved, among other things, the question of the right during the course of the trial of amending an information in which the crime of robbery was charged by changing the name of the person whom it was alleged that the defendant had robbed. In the course of the opinion the following language is found:

"We think the amendment as made to section 1008, Penal Code, in 1911, is quite persuasive, if not entirely convincing, as to the intention of the Legislature to permit, in the discretion of the trial court, the amendment of informations where it can be done without substantial prejudice to the rights of the defendant, so as to correctly state the offense shown by the evidence taken at the preliminary examination."

See, also, *People v. Shope* (Cal. App.) 245 P. 998.

So far as the record discloses in the instant case, the complaint, which was the basis for the preliminary examination of defendant, may have contained each and every allegation necessary to a complete statement of a cause of action. At any rate, as hereinbefore herein indicated, it must be assumed that the evidence adduced on such preliminary examination was sufficient to justify the commitment of defendant. The information based upon such commitment (which commitment is likewise necessarily presumed sufficient) attempted to charge the identical offense for the commission of which defendant went to trial. That with one exception all the acts constituting such offense were adequately set forth in the information is impliedly conceded, as is the fact that the evidence on the trial supported the verdict of conviction. After the information had been amended, defendant declined the opportunity afforded him by the trial court to disprove any of the facts theretofore introduced by the prosecution tending to establish the allegation that the alleged acts of defendant were done by him with the intention to defraud. For the reason that the amended information did not charge an offense different from that attempted to be charged in the original information (*People v. Rippe*, 32 Cal. App. 514, 516, 163 P. 506), but accused the defendant of the offense shown by the evidence taken at the preliminary examination, and because of the fact that such amendment was "without prejudice to the substantial rights of the defendant" (Pen. Code, § 1008), we are

constrained to hold that no error was committed by the trial court.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

77 Cal. App. 720

MORRIS v. STANDARD OIL CO. et al.
(Civ. 5320.)

(District Court of Appeal, First District, Division 1, California. May 3, 1926. Hearing Denied by Supreme Court July 1, 1926.)

1. Master and servant $\Rightarrow$ 389—Compensation insurer for both employer and tort-feasor sued by employee held not entitled to lien against judgment for medical expenditures not in issue (Workmen's Compensation Act 1917, § 26, as amended by St. 1919, p. 920, § 8).

Where employer's insurer was also insurer of party injuring employee, and in employee's action against such party issues as to hospital and medical expenses were not submitted and employee did not recover therefor, insurer held not entitled to lien against judgment, under Workmen's Compensation Act 1917, § 26, as amended by St. 1919, p. 920, § 8, for such expenditures paid by it.

2. Master and servant $\Rightarrow$ 389—Compensation insurer failing to furnish items of medical expenses held to have waived right to lien therefor (Code Civ. Proc. § 1962, subd. 3; Workmen's Compensation Act 1917, § 26, as amended by St. 1919, p. 920, § 8).

Where employee's counsel in action against third party requested employer's insurer to furnish statement of medical and hospital expenses, and finally told insurer that unless it furnished such items it would be considered to have waived claim under Workmen's Compensation Act 1917, § 26, as amended by St. 1919, p. 920, § 8, held that insurer by such failure waived right to lien, in view of Code Civ. Proc. § 1962, subd. 3.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Action by Milton Morris, by J. M. Morris, his guardian ad litem, against the Standard Oil Company for damages for personal injuries, wherein the Ocean Accident & Guarantee Corporation, Limited, of London, England, petitioned to establish a lien under the Workmen's Compensation Act, § 26, against a judgment. From an order allowing a lien for only a portion of the amount claimed, petitioner appeals. Affirmed.

See, also, 188 Cal. 468, 205 P. 1073; 192 Cal. 343, 219 P. 998, 30 A. L. R. 1103; 252 P. 605.

Redman & Alexander, of San Francisco, Hubert Starr, of Los Angeles, and V. N. Thompson, of El Centro, for appellant.

A. L. Hubbell, of Calexico, for respondent.

KNIGHT, J. The petitioner herein, the Ocean Accident & Guarantee Corporation, has

appealed from an adverse order made in a proceeding instituted by it under section 26 of the Workmen's Compensation Act of 1917, as amended in 1919 (St. 1919, p. 920, § 8), to establish a lien against a judgment for damages theretofore recovered by plaintiff, Milton Morris, against the defendant Standard Oil Company as a result of personal injuries sustained by plaintiff through the negligent acts of one of the defendant's employees. The lien sought was founded upon certain payments previously made by petitioner as insurance carrier for medical treatment of plaintiff.

The following facts are not disputed: In September, 1920, plaintiff, who was then 13 years of age, while performing duties as an employee of a newspaper publishing company in Calexico, Cal., was struck and injured by one of defendant's trucks. The petitioner was the compensation carrier for the publishing company, and also the insurance carrier for defendant, and as compensation carrier for the publishing company furnished plaintiff with the necessary medical, surgical, and hospital treatment and paid him compensation. In January of the following year plaintiff's attorney notified petitioner by letter of plaintiff's intention to commence a damage suit against defendant, and asking petitioner whether it desired to have included in the demand for damages the expenditures incurred by petitioner in caring for plaintiff amounting, as said attorney stated he had been informed, to \$1,200 or \$1,500. Petitioner replied that as insurer for defendant it intended to "take up the defense" of the proposed action against defendant, and as compensation carrier for the publishing company would be entitled to reimbursement under section 26 of the act above mentioned for all expenses incurred in connection with plaintiff's injuries. Petitioner further stated that in its opinion the driver of defendant's truck had not been negligent. About ten days after the receipt of that letter plaintiff's attorney again wrote to petitioner stating that he was familiar with the section of the act mentioned by petitioner, and that as soon as the defendant appeared in the action he would amend his complaint so as to include as additional elements of damages the expenditures incurred by the petitioner in caring for plaintiff, and he requested that petitioner advise him at once of the amount of those expenditures. He further stated that, inasmuch as petitioner would be liable for any judgment obtained against defendant, the situation regarding said expenditures would be simplified if plaintiff were released from any liability to his employer for such expenditures, and that thereby the issues which would be tried by the jury would be confined to the questions of negligence and the amount of damages "for physical suffer-

ing and mental anguish"; but that if petitioner was not inclined to execute such release, to "please furnish the figures asked for," so that the same might be included in the proposed amended complaint. Petitioner ignored this letter, and on April 5, 1921, said attorney again wrote as follows:

"On January 2, 1921, I made demand on you for expenses incurred or to be incurred in this matter that the same might be included in the pleadings, but you ignored the demand. The case is set for trial on April 14th, and if you intend to make any claim on the judgment obtained under section 26 of the Workmen's Compensation Act this is to demand that you furnish me figures and items at once for amended pleading, and that you have evidence at the trial to prove the items; *otherwise it will be considered that you have waived any claim.* * * *" (Italics ours.)

Petitioner made no reply to this letter, and therefore said attorney, evidently believing that petitioner had decided to waive all claim against any judgment plaintiff might obtain, did not plead in his demand for damages any of the expenses incurred by petitioner for plaintiff's medical or hospital treatment, nor did he offer any evidence to prove the same at the trial. As further indication of petitioner's waiver of its claim under the section of the act above mentioned, petitioner in defending said action proposed and caused to be given to the jury an instruction as follows:

"You are instructed that in determining the amount of damages to be awarded to plaintiff, if any, you must not consider or make any allowance for any medical treatment, care, or hospital expenses that may have been incurred or paid in caring for and treating the injuries claimed to have been sustained by the plaintiff. Such expense for care, medical treatment, and hospital expenses are no part of the plaintiff's case, and are matters to be adjusted in other and separate proceedings from this. You must allow plaintiff nothing on that account, and must limit your award entirely to compensation for physical injuries, detriment, and loss of capacity sustained by plaintiff without any allowance to him for any supposed or rendered medical treatment, hospital expenses, or care. You are instructed that the father is not a party to this action, but is guardian ad litem only, and you must not allow anything for medical or hospital treatment or care to the boy, Milton Morris, because the father's name appears in the title of this case."

A verdict was rendered for plaintiff for the sum of \$25,000. Defendant appealed, and the judgment was affirmed as to the issue of negligence, but reversed and the cause remanded for new trial upon the question of damages, the court on appeal holding the damages to be excessive. *Morris v. Standard Oil Co.*, 188 Cal. 468, 205 P. 1073. The second trial resulted also in a verdict in plaintiff's favor for the sum of \$25,000, but on motion for new trial the amount of the judgment was reduced by the trial court to \$12,000. Upon appeal taken by defendant, the judgment was

affirmed. *Morris v. Standard Oil Co.*, 192 Cal. 343, 219 P. 998, 30 A. L. R. 1103. During the pendency of the second appeal the Industrial Accident Commission adjusted the compensation claim of plaintiff by awarding him the sum of \$800.64, part of which had already been paid. Thereafter, and prior to the affirmation of the second judgment, petitioner instituted this proceeding to establish a lien against plaintiff's judgment to secure the payment of the sum of \$2,309.79, part of which, to wit, the sum of \$1,509.15 represented the total amount it had expended for plaintiff's medical, surgical and hospital expenses, and the remaining portion, \$800.64, represented the amount paid to plaintiff as compensation. The order of the trial court was that the petition to establish the lien for the item of \$1,509.15 be denied, but that the petitioner be allowed a lien to cover the amount paid for compensation upon the assignment to plaintiff by petitioner of the latter's cause of action against defendant for the amount of said compensation. Subsequently such assignment was executed, and it afterwards became the subject of a separate action and appeal between plaintiff and defendant. This appeal relates only to that portion of the trial court's order denying the lien for the amount paid for plaintiff's medical and hospital treatment.

Section 26 of the Workmen's Compensation Act, upon which appellant bases its claim for a lien, provides in part that where the employee alone prosecutes a suit for damages against the tort-feasor, evidence of the amount of the disability indemnity paid by the employer shall not be admissible in evidence, but that proof of all other expenditures on account of the injuries may be established and be deemed part of the damages suffered. It further provides that "the court shall, on application, allow as a first lien against any judgment recovered by the employee the amount of the employer's expenditures for compensation," which includes expenditures for doctors, nurses, medicines, hospital care, and other items connected with the treatment of the injured employee. Subdivision (f) of section 30 of said act (St. 1917, p. 860), provides that where the employer is insured against liability for compensation and the insurance carrier shall have paid said expenses, the insurance carrier shall be subrogated to the rights and duties of the employer and may enforce such rights in its own name.

[1] The provisions of the act mentioned were doubtless designed to enable the employer or the insurance carrier, as the case may be, who has paid the expenses connected with the treatment of an injured employee, to recover the same through the suit instituted and maintained by the employee against the party causing the injury, and to provide a method whereby the employer or the insurance carrier may be protected in the collection of those expenditures out of any judg-

ment obtained by the employee. But the evidence here shows beyond question that, owing to the position taken by petitioner prior to and during the trial of the action, plainly indicating an intention to waive any right to afterwards collect said expenditures from any judgment which might be obtained by plaintiff, the matter of those expenditures was excluded entirely from the issues of the case and from the consideration of the jury. In fact petitioner concedes that the same were not sued for by plaintiff, nor were they included in the verdict or the judgment obtained by him. Under these circumstances it would be grossly unjust to require respondent to pay said expenses now out of a judgment, the entire amount of which was rendered as compensation for damages accruing exclusively to him; and any lien that would be allowed in view of the facts stated would be based manifestly upon a false claim against plaintiff. It may be fairly inferred from the situation confronting petitioner before trial that the reasons underlying petitioner's desire to exclude the matter of said expenditures from the case were that if a judgment were recovered by plaintiff, petitioner, to the extent of those expenses, would be in effect both judgment creditor and judgment debtor, and consequently would be required to satisfy, with its own money, a judgment in its favor obtained against itself, and after all be not reimbursed for the amount of said expenses. The peculiar situation brought about by the fact that petitioner was the insurer of both plaintiff's employer and the defendant serves as no reason why plaintiff as an insured employee should be charged with and required to pay the expenses of his injury, which petitioner, under its contract with plaintiff's employer, was obligated to assume.

[2] Moreover, we believe that under the circumstances shown by the evidence already narrated, petitioner by its acts and conduct must be held to have waived its right to any lien it may have otherwise been entitled to under the statute. Subdivision 3 of section 1962 of the Code of Civil Procedure provides:

"Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

The conceded facts here are that after two unsuccessful attempts by plaintiff to obtain from the petitioner the items and amounts of said expenditures for the declared purpose of recovering the same from the party causing the injury, petitioner was finally notified that unless it furnished said items it would be considered that it "waived any claim" which it might make against the judgment under said section 26 of said act. The omission

of petitioner under those circumstances to reply to that letter may be reasonably said to have led plaintiff to believe that it would waive such claim, and thereupon plaintiff, acting upon such belief, made no demand in his pleading or in the presentation of his evidence for those expenditures; and, furthermore, in confirmation of such apparent waiver, petitioner caused instructions to be given to the jury which completely excluded the matter of those expenditures from any further consideration in the case. For these reasons stated, we are of the opinion that under the Code section last quoted appellant is now estopped from claiming such lien.

The order appealed from is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

77 Cal. App. 752

PEOPLE v. GRACE. (Cr. 1312.)

(District Court of Appeal, Second District, Division 2, California. May 5, 1926.)

1. Criminal law § 101(5).

Judge in department of superior court to which case was transferred *held* bound by order directing trial as to defendant's sanity made by judge in department where prosecution was begun.

2. Criminal law § 114(9).

In absence of reporter's transcript of proceedings, it will be assumed that judge proceeded according to Pen. Code, § 1368, in ordering trial as to defendant's sanity.

3. Criminal law § 623—Defendant's right to trial as to his sanity held not waived by deputy district attorney's failure to remind court of order directing it.

Defendant's right to trial as to his sanity *held* not waived by deputy district attorney's failure to remind court of order directing it, since he was without authority to waive any right of defendant.

4. Criminal law § 623.

Deputy district attorney had duty to remind court of order for trial as to defendant's sanity, if he knew of its existence.

5. Criminal law § 623.

Defendant's right to trial as to sanity *held* not waived by silence of deputy public defender as to order directing it.

6. Criminal law § 623.

Judge in superior court *held* bound to know, as matter of law, that order had been made for trial as to defendant's sanity.

7. Criminal law § 623.

Most satisfactory evidence is required to show waiver of defendant's right to trial as to his sanity, which had been ordered under Pen. Code, § 1368, in view of sections 26, 1191, 1201, 1221, 1222, 1367, 1587.

8. Criminal law ⚡623—Postponement of trial and defendant's waiver of statutory period within which trial must be had held not to indicate waiver of right to trial as to sanity (Pen. Code, § 1382).

Court's minutes showing that "trial is continued to June 10, 1925. Defendants waive the 60-day statutory period," held not to indicate defendant's waiver of right to trial as to his sanity, since right waived was that secured by Pen. Code, § 1382, relative to time within which trial must be had.

9. Criminal law ⚡623.

Language of Pen. Code, § 1368, providing that, when trial as to sanity is ordered, "trial or the pronouncing of the judgment must be suspended," held mandatory, and self-executing.

10. Prohibition ⚡5(4).

Trial for robbery can be halted by writ of prohibition if had before trial as to sanity which had been ordered under Pen. Code, § 1368, in view of Code Civ. Proc. §§ 1085, 1102.

11. Criminal law ⚡623—Defendant's right to trial as to sanity held not waived, when deputy public defender failed to insist on it, but did insist that insanity at time of crime would preclude trial (Pen. Code, § 1368).

Defendant's right to trial as to sanity, ordered under Pen. Code, § 1368, held not waived when deputy public defender failed to insist on it, but did insist that defendant could not be tried because he was insane at time of crime.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

E. V. Grace, also known as Thomas Lacey, was convicted of robbery, and he appeals. Reversed and remanded.

John F. Groene, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

WORKS, J. E. V. Grace, also known as Thomas Lacey, and Robert Newell were jointly charged with the crime of robbery. Newell finally pleaded guilty, and Grace pleaded not guilty. The trial of Grace then proceeded, and he was adjudged guilty. He appeals from the judgment and from an order of the trial court denying his motion for a new trial.

During the course of the proceedings leading to his conviction appellant was before several judges of the superior court. Both he and Newell were arraigned before Judge Keetch on April 20, 1925. Newell then entered a plea of not guilty, and his trial was set for May 22, 1925. The minutes of the court on that occasion show the following as to appellant:

"Defendant Earl B. Grace stands mute, and plea of 'not guilty' is ordered entered by the court and trial set for May 22, 1925. Defend-

ant Earl B. Grace is granted trial as to his sanity, which trial is set for April 29, 1925."

The title of the cause preceding these minutes, and also the minutes recording Newell's plea and the setting of the day of his trial, is "The People of the State of California v. Robert Newell and Thomas Lacey." The next appearance of appellant was before Judges Keetch and Reeve, sitting together, on April 29, 1925. The minutes of the proceedings of that day are below the caption, "The People of the State of California v. Earl B. Grace," and show: "Trial is continued to May 22, 1925." At the next appearance, which occurred on the date last mentioned, the judge presiding was Judge Elliott Craig. The minutes entered on that occasion are under a caption showing the names of both Newell and Grace as defendants, and recite:

"At request of defendants, trial is continued to June 10, 1925. Defendants waive the 60-day statutory period."

Judge Keetch presided on the day of the next appearance, June 10, 1925, and the minutes of that day are under a caption showing the names of both Newell and Grace as defendants. They contain the following:

"Defendant Robert Newell is not present, being confined in the hospital. Trial is continued to July 15, 1925."

The next minutes appear under date June 23, 1925, Judge Reeve presiding, and they are preceded by a caption containing the names of both defendants. The minutes recite:

"This case is ordered transferred from Department 19 to Department 7 and put on calendar on original setting date, to wit, July 15, 1925."

Judge Crail presided at the next appearance on the date last mentioned. The caption shows the names of both defendants. The minutes recite that Newell withdrew his plea of not guilty and entered a plea of guilty, and they show further:

"On order of court, the following jury is impaneled to try the cause as to defendant, Earl B. Grace,"

—and the names of the jurors are stated. These minutes and the minutes of the next day show the progress and conclusion of the trial of appellant, not upon the issue as to his sanity, but upon the issue as to whether he committed the crime with which he was charged.

We now turn to the reporter's transcript of the proceedings at the trial. After the disposition of certain preliminary matters, and before any witness was called, the following occurred:

"A Deputy Public Defender, representing appellant: If your honor please, there is another matter which we might take up at the present time in regard to the defendant, Grace. At

the time of his arrest on this charge he was under the disability of having been declared an insane person, and was at that time in Norwalk State Hospital. I am under the impression myself that after his arrest he was discharged; that is to say, a discharge was issued by the authorities of Norwalk State Hospital. * * * I looked through the files to see if that discharge was in the files, and I do not find it. When I saw it, it was in the possession of [a] deputy district attorney. The defendant, Grace, now states that he has never been discharged, and the authorities at Norwalk—I found from his mother that he was still carried on the rolls of that institution.

"The Court: That would have no bearing on this case, it would seem.

"The Deputy Defender: I think it would in this respect, that if he had been declared to be insane, and never has been restored to, or discharged from that disability, he could not be tried, and I am under the impression that he was discharged. I have proceeded all along upon the theory that he has been discharged, because the deputy district attorney showed me a letter of discharge from the superintendent at Norwalk.

"The Court: He is personally present. I assume the presumption would be, then, without a commitment, the man was sane. Whatever inference could be drawn from that—

"A Deputy District Attorney (interrupting): I might state, your honor, that I recently examined the law on that question. Your honor is absolutely correct on that. * * * (A jury was thereupon impaneled to try the case, after having been examined as to their qualifications, and were duly sworn. The clerk thereupon read the information, and stated the defendant's plea of not guilty.)"

The trial then proceeded to a conclusion; no evidence being taken, and nothing further being said upon the question as to the sanity or insanity of appellant.

Between the time when the trial was concluded and the time when appellant's motion for new trial was presented to the trial court, Mr. Groene, the present counsel for appellant, was substituted in the place of the public defender. The record made at the argument of the motion for a new trial shows the following:

"Mr. Groene: I would like at this time to have permission to file a written motion for a new trial. This, of course, will be only general grounds.

"The Court: Well, file that.

"Mr. Groene: That is an amendment. I think that in this amendment I mentioned the fact that the defendant is now an inmate of the state institution at Norwalk for the insane, having escaped from there, and that at the time of the perpetration of this crime, if he was present, he was incompetent to carry out a crime of that nature, and that he really should be sent back to that institution in order that he might be further treated until he is well of the ailment that is troubling him, which I understand that he is a dope fiend, but he escaped from there and a few days after this crime was committed which he denies that he had anything

to do with. * * * Now, * * * it seems to me that, * * * he being an inmate now of an institution at Norwalk, he should be sent back there instead of being sent to a prison in this state, and on that ground I think that the trial should not have been held, as far as he is concerned.

"The Court: Have you got an affidavit to that effect?

"Mr. Groene: No, just merely a motion, but I can prepare an affidavit showing those facts. My intention was to go to Norwalk this afternoon and get the affidavit or certificate of the officers there showing that fact.

"The Court: The District Attorney said in open court that he was discharged from Norwalk.

"Mr. Groene: He had not been discharged before the perpetration of this crime. If a discharge has been granted, it was subsequent to that.

"The Court: Have you any evidence at all? You merely have the statement of the defendant to that effect. What does he know about it? By his own admission he has escaped from that institution.

"Mr. Groene: Yes, he escaped from that institution.

"The Court: The defendant says he was discharged; that was the escape.

"Mr. Groene: I expect to make a trip to Norwalk for that very purpose, to get the facts. Of course, what I am stating now is what the defendant states to me, and it looks to me that, if under the facts and the circumstances at the time this crime was committed he had not been discharged, it is a good defense for him in this case.

"The Court: Well, taking up that question now, my idea of the law is that that would not be a defense; that would merely be evidence from which an inference might be drawn that he was insane now, but it would not be conclusive, and the defendant was on the stand and testified, and showed to all of us that he was not insane, didn't claim he was insane. The court does not believe he is insane. There is no occasion to have a similar hearing on the question of his insanity, because there was nothing indicating that he was insane.

"Mr. Groene: But the fact I claim is, he was insane at the time of the perpetration of this crime. Now, if he was insane at that time, whether he is sane now or not, it looks to me that that is the element that should be considered—what was it at that time? It looks to me—

"The Court: His own attorney did not have any faith in it.

"Mr. Groene: Still he escaped from the prison. As I understand it, the district attorney did not show only the mere statement that he had been discharged; he didn't make it evidence.

"The Court: There wasn't any burden on the part of the people to prove he was insane; it was presumed that he was sane.

"Mr. Groene: That is true, too, but I think under all the circumstances he should be given an opportunity, and that that should be brought to the attention of the jury, that he was insane at that particular time when this crime was committed.

"The Court: That is not a plea, that he was

not properly defendant; that wouldn't be a ground for a new trial.

"Mr. Groene: That is not the ground really, but it looks to me, the man having been there, it looks to me that there is something wrong with him mentally.

"The Court: We have talked about it quite a while.

"Mr. Groene: I had four or five talks with him. To tell you the truth, to my own mind, he is not sane to-day, and I think that he should be given an opportunity, and that a new trial should be granted, in order that he may have that fact appear, and that summary proceedings be had to test his mentality, and whether or not he is insane at this particular time or not. I was up in San Francisco and San Quentin for two or three days this week, and I got back late yesterday afternoon and I haven't had a chance to look into the matter or to go to Norwalk. That is all I can say in the matter, your honor.

"The Court: You may stand, Mr. Grace. The motion is denied. * * *

Appellant was then sentenced to imprisonment in the state prison.

Upon this state of the record three points are made by appellant: (1) That Judge Crail was bound by the order of Judge Keetch to the effect that appellant should have a preliminary trial upon the question whether he was insane; (2) that until the preliminary trial upon the issue of sanity was had appellant could not be tried upon the question whether he had committed the act out of which the charge against him arose; (3) that the right to a separate and preliminary trial as to appellant's sanity, under the order made by Judge Keetch, could not be waived by appellant's counsel. Disposition of these points will be made in their sequence as stated.

[1] Upon the first point it seems manifest that appellant's position is correct. In a recent case (*People v. Moronati* [Cal. App.] 232 P. 991) we decided practically the same question. In that action the defendant entered, in a certain department of the superior court, a plea of not guilty and a certain special plea. He was tried in that department, and the jury disagreed. The cause was later transferred to another department of the trial court, where a second trial was had. We determined that the special plea stood at the second trial, notwithstanding the transfer. It is plain to us that the same rule applies here. A superior court is but one tribunal, even if it be composed of numerous departments. A division into departments is made only for convenience in the disposition of the business of the court. An order made in one department during the progress of a cause can neither be ignored nor overlooked in another department in which the cause falls by transfer. The order made by Judge Keetch was as binding and effective in the department presided over by Judge Crail as if the latter judge had made it himself.

[2] Whether Judge Keetch's order remains effective at all is the next question to be con-

sidered, and that question is embraced in the second point made by appellant. Was the trial court in error in proceeding with the trial that was had, in the absence of a trial under the order of Judge Keetch? It is provided by section 1368 of the Penal Code:

"If at any time during the pendency of an action up to and including the time when defendant is brought up for judgment on conviction a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be submitted to a jury; and the trial or the pronouncing of the judgment must be suspended until the question is determined by their verdict, and the trial jury may be discharged or retained, according to the discretion of the court, during the pendency of the issue of insanity."

The language of this section amply upholds the validity of Judge Keetch's order at the time when it was made. The record presents no showing as to the evidence upon which the order was based. Upon the score of appellant's condition of mind there is nothing in the record of the day upon which the order was made except the order itself. Particularly, there is no reporter's transcript of the proceedings of that day. Under such circumstances it is evident that we must assume that the judge did his duty in making the order. That assumption imports that he proceeded in accordance with the mandate of section 1368, and that, therefore, and upon sufficient evidence, a doubt was created in his mind as to the sanity of appellant. So the order stood as to Judge Keetch; so it also stands as to the judge who conducted the trial that was had, unless something has occurred since the order was made which operates to set it aside or abrogate it, or which amounts to a waiver of it.

[3-7] We have already seen that the order was not discharged by a compliance with its terms. No trial was had pursuant to its requirement. And the record furnishes no basis for a claim that it was abrogated or discharged in any other manner, except, possibly, by waiver. Was there a waiver of the right secured by the order? This question we proceed now to discuss. Not only did the judge who tried the cause overlook the fact that the order for a preliminary trial had been made by Judge Keetch, but both the deputy district attorney and the deputy public defender who were at the trial were in the same difficulty. It is evident that they both had overlooked Judge Keetch's order. If they had not, they would have reminded Judge Crail of the existence of the order, for it would have been their duty to do so. The right secured under the order was not waived by the failure of the deputy district attorney in this regard, although it was his duty to have made the reminder, if he knew of the existence of the order, for he was without authority to waive any right of appellant. Nor do we think there was a waiver because

of the silence of the deputy public defender. Upon the score of waiver, and resolving the situation solely from the standpoint of the question of waiver, no more damage could result to the rights of appellant from the failure of the defender to remind Judge Crail of the existence of Judge Keetch's order, than from his failure to remind the former officer of a similar order which had been made by himself. And it seems obvious that a waiver could not have resulted under the circumstances last mentioned. If the order had been made by Judge Crail, he would doubtless have remembered it as a matter of fact, but, whether it was made by Judge Keetch or by himself, he was bound to know that it had been made, as a matter of law. A due regard for the preservation of the safeguards surrounding those charged with the commission of crime will permit no other conclusion. It is pertinent here to make a few observations which relate, not only to the particular point now under discussion, but to others which remain for consideration. The law abhors the punishment of insane persons for the commission of acts out of which charges of crime arise, whether the insanity exist at the time such acts are committed or only at the time the punishment is about to be inflicted, or even if the insanity be discovered while the punishment is in progress. Pen. Code §§ 26, 1191, 1201, 1221, 1222, 1367, 1368, 1587. With this just principle so firmly fixed, as, indeed, it must be among an enlightened people, it would require the most satisfactory evidence to convince us that one ordered to trial upon the question whether he were insane, as a preliminary to his trial on a criminal charge, had waived his rights under the order. We are abundantly satisfied that in the present instance there was no waiver because of the failure of the deputy public defender to remind the judge who conducted the trial that such an order had been made in the cause by another judge.

[8] In determining whether the benefits accruing to appellant under Judge Keetch's order were waived, it is necessary to examine another circumstance shown by the record. The minutes of May 22, 1925, with Judge Craig presiding, show this:

"At request of defendants, trial is continued to June 10, 1925. Defendants waive the 60-day statutory period."

The waiver contemplated, specifically, by the second sentence of this entry was, of course, a waiver of the right secured by section 1382 of the Penal Code, which provides, in part:

"The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed. * * * If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information."

[9, 10] The question now to be considered is whether, in making this express waiver, and in requesting that "the trial" be continued to June 10, 1925, appellant waived the right secured to him by the order of Judge Keetch granting him a preliminary trial as to his sanity. A determination of this question will be materially aided by an inspection of the minutes of the court from those of date April 20, 1925, containing the order of Judge Keetch, to those entered while Judge Craig was presiding, on May 22, 1925. It will be observed that the minutes of April 20th show that a plea of not guilty was entered for appellant, and that his trial was thereupon set for May 22d, but that immediately following this setting a preliminary trial as to his sanity was ordered, and that trial was set for April 29th. The effect of the order making this latter setting was to make inoperative the setting for May 22d until a trial was had on the preliminary question on April 29th or on a later date to which that trial might be continued. So much is evident from the terms of section 1368 of the Penal Code to the effect that whenever a trial as to sanity is ordered "the trial or the pronouncing of the judgment must be suspended." This section does not provide that an order must be made suspending "the trial," but that, upon the making of the order for a trial as to sanity, "the trial" must be suspended. This language of the section is mandatory, and it is self-executing. Moreover, it prescribes a positive duty not to proceed with "the trial" until the preliminary trial has been had, a duty, therefore, which is specially enjoined by law in the contemplation of section 1085 of the Code of Civil Procedure, relating to the writ of mandate. Undoubtedly, therefore, "the trial" which was had before Judge Crail could have been halted by the writ of prohibition; no trial having been had under the order of Judge Keetch, unless that order had in the meantime been abrogated in some lawful manner, for the writ of prohibition is the counterpart of the writ of mandate. Section 1102, Code Civ. Proc. We advert to this state of the law for the purpose of showing how strongly the rights of appellant were entrenched under the order of Judge Keetch. We have already referred to the sacred character of the right which that order conferred upon him.

We return to the minutes of the court. Appellant was before Judges Keetch and Reeve on April 29th, the date set for the trial of the issue as to his sanity. The minutes of that day show: "Trial is continued to May 22, 1925." This entry related to the trial of the preliminary question as to sanity, for no other trial had been set for April 29th. This truth is so obvious as to require but the mere statement of it. When, therefore, May 22d was reached, the day upon which Judge Craig presided, this was the situation: The date had arrived through continuance, upon

which the issue of sanity was to be tried. The date had also arrived, under the original setting, upon which "the trial" was to be had. But at the moment when Judge Craig took the bench, the right of appellant to a trial as to his sanity was alive and vigorous, while the right of the prosecution to demand that "the trial" should proceed was in a state of suspended animation. The minutes entered during Judge Craig's occupancy of the bench must be viewed in the light of these circumstances, and, so viewed, they appear clearly not to show a waiver of the right of appellant under Judge Keetch's order. The first sentence of the minutes shows that "trial is continued" at the request of defendants. So far as appellant is concerned, the request must be deemed to have related only to the trial which was originally set for April 29th, the trial as to sanity, for the plain reason that, up to the moment when Judge Craig made the order that went into the minutes, the trial set for April 29th was the only trial which the court had power to conduct. We need not be concerned over the question whether both "trials" were continued by the order until June 10th. If "the trial" originally set for May 22d was so continued, it was only postponed to a further continuance on June 10th, unless in the meantime the trial originally set for April 29th were had, or the order of Judge Keetch were discharged or abrogated in some other lawful manner. By the second sentence of Judge Craig's minutes "defendants" waived the requirement of section 1382 of the Penal Code. We see nothing inconsistent with the right of appellant under Judge Keetch's order in the making of this express waiver. There was no reason, even if the right to a trial as to sanity were pending, why the waiver as to the time of the main trial should not have been made, and it was doubtless proper for Judge Craig to insist upon the waiver that was expressly made as a condition annexed to the order for continuance, whatever was the effect of that order. It is clear to us that the minutes entered under Judge Craig show no waiver of appellant's right under the order for a trial as to sanity. We need not dwell upon the later minutes of the court, except to say that by them, through regular continuance, the date of the trial originally set for April 29th, the trial as to sanity, was carried forward to the day when appellant appeared before Judge Crail and was tried and convicted pursuant to the original setting of "the trial," to employ again the term used in section 1368 of the Penal Code for May 22d.

[11] When Judge Crail took the bench on July 15, 1925, the right of the prosecution to demand "the trial" was still in a state of suspension. Did anything occur before him to revive that right? Did anything occur before him that amounted to a waiver of appellant's right to a trial as to his sanity? For the purpose of answering these questions,

we have above set forth the colloquy between the judge and the deputy public defender which took place at the commencement of the trial that Judge Crail conducted. Little more than a perusal of the remarks of the two is necessary to an answer to the questions just stated. The deputy public defender did not insist upon a trial as to sanity under the order of Judge Keetch, but he did insist that "the trial" could not proceed, for the reason that appellant had been confined in an institution for the insane, and that he had not been discharged from that custody up to the time of the commission of his alleged crime, although he stated that he was under the impression that such a discharge had been granted after appellant was arrested. It is true that the colloquy between the trial judge and the defender was colored by the incorrect belief, indulged in by both, that a discharge of appellant after his arrest could affect the question whether he was insane at the time when it is alleged that he committed the crime with which he was charged. Nevertheless, we think it sufficiently appears that the defender insisted that appellant could not be tried because he was insane, and that the judge held that the trial must proceed because appellant's sanity was to be presumed. On the whole, we are satisfied that the defender said nothing that worked a waiver of appellant's right under the order of Judge Keetch.

We have quoted the record made at the argument of the motion for a new trial, not as bearing on the question of waiver, but as showing that appellant insisted through his counsel in the trial court, to the last moment, that he was insane. That record is set forth for the purpose, also, of correcting certain erroneous statements made by the trial judge at the time, and which tend somewhat to obscure the circumstances surrounding the trial. The judge said: "The District Attorney said in open court that the [appellant] was discharged from Norwalk." This statement was made by the deputy public defender, and in the form already noticed. The judge also said that "the defendant was on the stand and testified, and showed to all of us that he was not insane, didn't claim he was insane. The court does not believe he is insane." Appellant did not take the witness stand. Before Newell withdrew his plea of not guilty, he insisted upon a continuance of the case on behalf of both appellant and himself. In the midst of Newell's remarks on this subject appellant interjected the statement: "I haven't had a chance." So far as the record discloses, this was his only utterance during the trial. The judge further said: "His own attorney did not have any faith in [the claim that appellant was insane]." The attitude of the deputy public defender on this subject is shown by what occurred at the commencement of the trial. It is to be observed here that the "written

motion for a new trial," referred to in the remarks of Mr. Groene on the argument of motion for a new trial, is not to be found in the record.

Appellant's third point, as above stated, is that his counsel were without authority to waive his rights under the order of Judge Keetch. Because of the conclusions above reached, we find it unnecessary to decide that question. Appellant presents other points which arise, as he contends, under the record of the trial that ended in his conviction, but we need not pause to consider them.

The order of Judge Keetch has never been discharged or abrogated. The trial before Judge Crail was, therefore, a nullity. The cause must be remanded for a trial upon the question of appellant's sanity or insanity, as contemplated by the order of Judge Keetch. After that trial appellant will further be dealt with as required by law.

Judgment and order reversed, and cause remanded for further proceedings in accordance with this opinion.

We concur: FINLAYSON, P. J.; CRAIG, J.

78 Cal. App. 23

In re HILL. (Civ. 5177.)

(District Court of Appeal, Second District, Division 2, California. May 11, 1926.)

1. Infants $\S$ 16—Failure to make findings of fact in proceeding to declare minor ward of court held to require reversal (Juvenile Court Act [St. 1915, p. 1225] $\S$ 2).

In proceeding to make minor ward of juvenile court, failure to make findings of facts upon which court exercises jurisdiction, under Juvenile Court Act, $\S$ 2, as foundation for judgment declaring minor a ward, held to require reversal.

2. Infants $\S$ 16.

In proceeding to declare minor ward of juvenile court, parents are sufficiently "interested parties," under Juvenile Court Act, $\S$ 4, 15f, to entitle them to be present, to produce evidence, and be represented by counsel.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interest.]

3. Parent and child $\S$ 2(3).

State may remove child from parents' custody if its own best interests require.

4. Infants $\S$ 16—Technicalities of procedure, but not rules protecting substantial rights, will be disregarded in summary proceeding to declare minor ward of juvenile court.

Although, in proceeding to declare minor ward of juvenile court, technicalities of procedure should be disregarded, rules protecting substantial rights, such as regular processes of law provided to produce evidence, and to aid courts in testing and weighing it, will not be scrapped.

5. Infants $\S$ 16—Process of law is available to bring witnesses before hearing in juvenile court, and final order may not be based upon details privately whispered to judge in chambers.

In proceeding to declare infant ward of juvenile court, process of law is available to bring witnesses into court, and final order should not be based upon secret information whispered privately to judge in chambers without opportunity for test through cross-examination by interested parties.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

In the matter of Nadine Hill, a minor. From a judgment declaring the minor a ward of the juvenile court, its parents appeal. Reversed and remanded for rehearing.

George M. Cook, of Taft, for appellants.

H. E. Schmidt, Dist. Atty., and Dorsey & Campbell, all of Bakersfield, for respondent.

CRAIG, J. It appears that a petition was filed in the superior court of Kern county sitting in special session as a juvenile court, which asked that Nadine Hill be declared a dependent child under subdivision 4 of section 1 of the Juvenile Court Act (St. 1915, p. 1225). Cruelty of the mother was alleged in the petition as the ground for the child being declared dependent. A hearing was held on June 22, 1925, and thereafter on the same day the following order was entered:

"* * * Hearing and examination closed and good cause appearing therefor, it is by the court ordered that said Nadine Hill be and she is hereby declared to be a ward of the juvenile court, and is remanded to the custody of C. P. Badger, probation officer of Kern county, until further order of the court."

A notice of appeal was filed by the father and mother of the child, purporting to be "from the order or judgment heretofore made and entered in said superior court on the 22d day of June, 1925, wherein the said Nadine Hill was adjudged to be a ward of the juvenile court, and from the whole thereof."

Counsel for respondent expresses doubt as to what action or order of the trial court the appeal is taken from, but we think it evident that the intention was to appeal from the order above quoted.

[1] One ground urged by the appellants involves error of such a character as to require a reversal. The record which is certified as contained "a full, true and correct transcript of all documents and minute orders with exception of subpoena writs," embraces no finding of fact. Section 2 of the Juvenile Court Act provides:

"When any person under the age of twenty-one years, alleged to come within the provisions of any of the subdivisions 1 to 13 inclusive of section 1 of this act, shall be found by said court or judge to come within the terms of any of said

subdivisions as alleged, the court shall adjudge said person to be a ward of the juvenile court and shall in its judgment make a finding of the facts upon which the court exercises its jurisdiction over such person as a ward of the juvenile court; and the court shall thereupon make such order or orders, in accordance with said findings, as may be necessary for the care of said ward of the juvenile court. * * *

The law is clear and mandatory in its requirement that the findings of fact be made as a foundation for any judgment declaring a minor to be a ward of the juvenile court. Such was the holding in *In re Brodie*, 33 Cal. App. 751, 166 P. 605. The point there dealt with another section of the same law, but the same requirement is found therein as in section 2. For this error we think the judgment must be reversed.

[2] During the proceeding herein the court directed the sheriff to remove from the courtroom Mr. George M. Cook, who stated that he was present representing Ellsworth Hill, the father of the child, Nadine Hill. This occurred immediately after Hill had been sworn as a witness at the instance of the court, and had refused to answer questions, stating that he did so on the advice of counsel, because it might subject him to criminal prosecution. The court stated that this was a proceeding in which no attorney may appear as a matter of right, and said:

"I will thank you, Mr. Cook, never again to appear in any juvenile case before me, Mr. Cook."

Under the Juvenile Court Act, § 4, it is provided that upon the filing of the petition citation shall issue requiring the persons having the custody or control of the minor to produce the latter, and, further, that the parents shall be cited and required to attend the hearing. Section 4 makes the failure to comply with such citation a contempt of court. The act authorizes the court to make the minor a ward and to deprive the parents of its custody; also to require the parents to make such payments as may be necessary for its support, and to punish for contempt of court any disobedience or interference with enforcement of orders on the part of the parents. It authorizes the parents to require the hearing to be private, and the right of the parents to be present at the hearing is not only recognized, but special provision is made by which such attendance may be compelled. Being present at the hearing and in nearly all cases having unusual opportunity for knowledge of the issues involved, it may reasonably be assumed that they would be asked to be sworn as witnesses. We have no doubt that in a proceeding of this nature the parents are sufficiently interested parties to entitle them to be present to protect their interests as well as those of the child. To this end it is clear that they may produce evidence and cross-examine witnesses; may appeal from the final orders adversely affecting their

claims; and may be advised and represented by counsel.

[3, 4] While the right of the state to remove the child from its parents' custody is unquestioned, as also is the proposition that in a proceeding for that purpose the most vital question is the child's own good and the best interests of the state as they are involved in the child's welfare, it must be remembered that the family and its relations have ever been recognized as the foundation of society. What a man may lawfully do in the protection of his own personal security and life he may, and indeed it is his duty to, do in the defense of his children. The common law has always upheld the sanctity of the home, the sacredness of parental rights, and the corresponding seriousness of parental obligations. When a parent is derelict in the performance of his duties toward his child, or abuses his trust as its guardian, he should undoubtedly forfeit such trust and be removed from the guardianship. But the charge that there has been an abuse of trust by the parent cannot be regarded lightly. No action affecting rights of property, personal liberty, or security involves issues more worthy of judicial consideration and entitled to judicial determination than a proceeding affecting the custody of a little child, involving as it may the molding of its character for good or for ill. No claims of the parent should stand in the way of his removal from its control, if such drastic action is for the welfare of the child. On the other hand, a normal parent's devotion, care, and guidance are invaluable, and can seldom be replaced. The relations of parent and child should not be severed or disturbed, unless the facts justify it, and the interests of all parties concerned require that these facts be shown by evidence whose verity has been carefully and legally tested. And so, while the exact truth should be searched out, and all mere technicalities of procedure as distinguished from rules which protect substantial rights should be disregarded, the regular processes of the law provided to produce evidence, and the ordinary rules established to aid courts in testing and weighing it, are not scrapped because the proceeding is a summary one.

[5] In the instant case the process of the law was available to bring witnesses into court, and it should have been used for that purpose. If persons secretly informed the judge that the parents' home was not a fit place for this child, and if their information was reliable and of any value, these persons must have known facts which would warrant that conclusion. It was their duty to come forward and in a manly or womanly fashion give their testimony, so that this helpless infant might be withdrawn from danger and cruelty. But details whispered privately to a judge in chambers cannot be the basis of a final order. The more serious the accusation the greater the need that it be carefully tested,

and to that end that no one interested be denied the right of cross-examination.

If it be true, as some of the evidence included in the transcript indicates, and as the people who talked to the judge privately may have said, that Mrs. Hill shamefully abused Nadine, it is exceedingly unfortunate that a rehearing should be required. But consequences fraught with far greater evil would inevitably result from the sanction of judicial abuses of the character here presented; and, if witnesses were reticent about appearing and testifying, they could easily have been brought to the hearing upon citation, which process the law expressly authorizes the court to issue.

It may be added that we are not required to pass upon the question as to whether or not the law might authorize a final order making a minor a ward of the juvenile court, based upon hearsay evidence or statements made to the judge out of court, nor to say that the law might not deprive parents of the right to counsel. The authority of the Legislature to enact such laws is not involved, for the Juvenile Court Law of this state contains no such provision. It unmistakably recognizes that the parents have rights and are interested parties. It provides for the hearing and the reception of evidence, and contemplates an order based upon such evidence. It expressly preserves the right of appeal, and broadens the authority of the appellate court in reviewing the evidence on appeal, so that the weight of the evidence may be considered and the order sustained or reversed according to the preponderance of the evidence. The spirit of the entire law is exemplified by the language of section 15f, which reads as follows:

"On the return of the citation or other process, or as soon thereafter as may be, the court shall proceed to hear and dispose of the case, after full and careful consideration of all the evidence presented and with due regard to the legitimate rights and claims of the parent or parents of said person, and with due regard to any and all ties of blood or affection, but with the dominant purpose of serving the best interests of said persons."

We find no other points which require consideration. The judgment is reversed, and the matter remanded to the juvenile court for rehearing.

We concur: FINLAYSON, P. J.; WORKS, J.

78 Cal. App. 46

PEOPLE v. CANYUN. (Cr. 1278.)

(District Court of Appeal, Second District, Division 2, California. May 14, 1926.)

1. Burglary §41(1).

Evidence held to sustain conviction of burglary.

2. Criminal law §741(1), 742(1), 747.

Weight of testimony, credibility of witnesses, and conflicts between them as to questions of fact, are exclusively for jury and trial court.

3. Criminal law §1144(16).

Jury will be presumed to have observed instructions, in absence of anything appearing to the contrary.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Alonzo W. Canyon was convicted of burglary, and he appeals. Affirmed.

M. H. Broyles, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

CRAIG, J. The appellant was convicted upon an information charging him with having on or about the 27th day of February, 1926, entered the dwelling house of a Mrs. M. Meyers, in the city of Los Angeles, with intent then and there to commit the crime of larceny. The jury returned a verdict of burglary in the first degree; a motion for new trial was presented, and denied; and he appeals from the ruling upon such motion and from the judgment.

[1, 2] It appears from the testimony of the complaining witness, Mrs. Meyers, that at about 1:30 a. m. of said date she awoke and discovered the defendant standing at the foot of her bed holding a portion of a broom handle; that she immediately jumped from her bed and commanded him to leave the house, whereupon the intruder ran into the kitchen and leaped out through the window; that a large electric light had been turned on in the kitchen, which enabled her to unmistakably identify the appellant as a man whom she had seen on an average of twice a week for a period of about two years at meetings of a society of which both were members. The witness testified that she then discovered that her pocketbook had been removed from her sewing machine and lay on the kitchen table; that her coin purse had been taken therefrom and all the money which she had left in the purse was gone; both the pocketbook and purse had been turned inside out; that a flashlight which she had placed on her dressing table was also in the kitchen beside the pocketbook. Other witnesses testified to having heard Mrs. Meyers' loud cries to "get out of here," and that there was a commotion and scuffling of feet at about the time in question in her apartment. Mrs. Meyers and a police officer both testified that she telephoned for the police on the same morning and that she stated that the name of the burglar was Canyon and that he lived on East Twentieth street, but that she did not know

his first name, nor the number of his place of residence.

There are many alleged errors assigned as grounds for reversal, but they may all be summarized concisely under the following heads: (1) Insufficiency of the evidence to sustain the verdict and judgment; (2) errors of the trial court in its rulings during the trial; and (3) errors in instructing the jury.

Criticism of the evidence consists mainly in assertions that the only eyewitness to the occurrence which we have related was Mrs. Meyers, and that no other person saw the defendant in or near the house, or connected him with the offense, from which it is argued that her testimony was improbable. However, her testimony was positive and direct, and when asked whether or not she was sure that the defendant was the man whom she found in her apartment, she answered:

"I would swear it—I would swear if you brought out a thousand men, that he was there that night. I don't need to have anybody else to tell me that; I know it was him."

Canyun testified that he was not in Mrs. Meyers' house on the night in question, and from his testimony upon preliminary examination which was read to the jury pursuant to stipulation, it appears that he accounted for his whereabouts during the night, and swore that he did not arrive home until about 2 o'clock a. m. of February 27th, whereas his wife testified that he returned home at about 11:15 p. m. and did not leave the house thereafter. Other witnesses testified to the defendant's good reputation for truth, honesty, and integrity.

The most that can be said of the evidence offered on behalf of the appellant is that it conflicted in some respects with that of the prosecuting witness. It is too elementary to require the citation of authority that the credibility of witnesses, the weight to be given to their testimony, and conflicts among them as to questions of fact, are exclusively for the jury and the trial court to decide, and will not be reviewed upon appeal. Mrs. Meyers was not impeached, and her evidence was sufficient if believed by the jury to sustain the verdict and judgment. *People v. Westlake*, 62 Cal. 303; *People v. Lamb*, 67 Cal. App. 263, 227 P. 969. It may also be added that the testimony of this witness was supported by many corroborating circumstances, and by the testimony of her neighbors.

It is contended that the trial court committed errors prejudicial to the defendant in its instructions to the jury, though none were requested in his behalf and our attention is not directed to any portion of the charge which appellant claims to have been erroneous. We have perused the instructions with care and are unable to coincide with such assertion.

[3] Also it is argued that the jury misconstrued the law as given them by the trial court, but there is no showing made which tends to support such conclusion. It will be presumed, in the absence of anything appearing to the contrary, that the jury observed the instructions given them. *People v. Dong Pok Yip*, 164 Cal. 143, 127 P. 1031; *People v. Durrant*, 116 Cal. 179, 207, 48 P. 75.

Other points attempted to be made are even less meritorious than some of the above, and a discussion of them is unnecessary.

The judgment and order appealed from are affirmed.

We concur: FINLAYSON, P. J.;
WORKS, J.

77 Cal. App. 727

DUTTON DREDGE CO. v. GOSS et al.
(Civ. 5353, 5605.)

(District Court of Appeal, First District, Division 2, California. May 3, 1926.)

1. Judgment ⇨297, 305.

Trial court has inherent power to amend judgment as entered to make it conform to decision actually rendered, notwithstanding signing of original judgment.

2. Appeal and error ⇨440.

Appeal from original judgment does not divest trial court of power to amend same to conform to decision actually rendered.

3. Appeal and error ⇨1122(2).

Appellate court has no power to make findings of fact.

4. Appeal and error ⇨1071(1)—Judgment based on inconsistent findings, some of which were outside of issues made by pleadings, held to require reversal.

In action to recover balance of purchase price, inconsistent findings to effect that one of defendants was trading under fictitious name, and that other defendants were not interested in business run under such name, but that goods were delivered to such other defendants, some of findings being outside of issues raised by pleading, held to require reversal.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by the Dutton Dredge Company against Charles E. Goss and others, a co-partnership doing business under the firm name and style Charles E. Goss & Son, for money due. Judgment for plaintiff, and defendants appeal. Reversed, with directions.

Hankins & Hankins and Olin F. Nuckolls, all of San Francisco, for appellants.

Edward J. Lynch, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendants to

recover a judgment for \$536.54, alleged to be the balance owing the plaintiff for hay purchased by defendants. In the first count the plaintiff pleaded an agreed price, in the second count it pleaded a common count as for a balance due on account, and in the third count it pleaded a sale for the reasonable value. The defendants appeared jointly, and as such interposed a demurrer to the complaint and a demurrer to each count. The demurrer was overruled, and the defendants jointly answered. In their answer to each count the defendants denied the allegations contained in each paragraph of each count contained in the complaint. The defendant H. E. Goss interposed a defense to the effect that he purchased one schooner load, consisting of 75 to 100 tons; that he received 85.41 tons and paid therefor, and that thereafter he purchased 128.55 tons for which he agreed to pay "the best price he could pay for said hay according to the quality of said hay and the market conditions at the time of handling the same"; that \$930.54 was the amount of the second purchase. At the end of the trial the trial court found against the defense last stated, and it also made a finding that by reason of the conclusions reached no finding was necessary on the second count and third count contained in the plaintiff's complaint and the answers thereto. The defendant H. E. Goss also pleaded a counterclaim for \$24.90. The first count of plaintiff's complaint was as follows:

"Complaint for Goods Sold and Delivered.

"Plaintiff above named complains of the above named defendants, and for cause of action alleges:

"I. That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the state of California, and having its office and principal place of business in the city and county of San Francisco, in said state.

"II. That the defendant Chas. E. Goss & Son is a copartnership, consisting of Charles E. Goss, Mary A. Goss and H. E. Goss, having their office in said city and county of San Francisco.

"III. That on or about the 10th day of August, 1923, the defendants agreed to purchase from the plaintiff certain hay belonging to the plaintiff, situated on the landing of Green Island ranch, Napa county, and to pay plaintiff therefor at the rate of eleven and 50/100 (\$11.50) dollars per ton f. o. b. said landing, said payment to be made upon delivery; that thereafter plaintiff delivered said hay to the defendants at said landing; that the total quantity of said hay so delivered by plaintiff to defendants was two hundred and thirteen and 96/100 (213.96) tons; that the total amount due for said hay, at the agreed purchase price, was the sum of two thousand four hundred and sixty and 54/100 (\$2,460.54) dollars; that defendants have paid no part thereof, excepting the sum of nineteen hundred and twenty-four (\$1,924.00) dollars, leaving a balance still due, owing and

unpaid from defendants to plaintiff, of five hundred thirty-six and 54/100 (\$536.54) dollars.

"IV. That although demand has been made upon defendants for the payment of said balance, the defendants have refused and still refuse to pay the same, and the entire amount of said sum of five hundred thirty-six and 54/100 (\$536.54) dollars is now due, owing and unpaid from defendants to plaintiff."

As stated above, each paragraph was denied. The counterclaim pleaded by the defendant H. E. Goss was as follows:

"I. That within two years last past in the city and county of San Francisco, state of California, said defendant H. E. Goss agreed to buy from plaintiff, and said plaintiff agreed to sell to said defendant, 24.90 tons, or thereabouts, of oats. That thereafter and prior to the commencement of this action, and at the request of said plaintiff, it was agreed by and between said defendant and said plaintiff that said contract or agreement of purchase of said oats should be rescinded and as a consideration for said rescission said plaintiff was to pay to said defendant the sum of \$1 per ton, or the total sum of \$24.90.

"II. That said contract for the purchase of said oats was by mutual consent of said plaintiff and said defendant rescinded and set aside, but said plaintiff did not, nor has not, paid to said defendant said sum of \$24.90, and the same was at the time of the commencement of this action and now is wholly due, owing and payable from said plaintiff to said defendant H. E. Goss."

No other allegations were contained in the pleadings of either party.

Thereafter the trial court made findings as follows:

"(1) That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the state of California, having its office and principal place of business in the city and county of San Francisco, in said state.

"That the defendant H. E. Goss, at all the times mentioned in the complaint, was transacting business under the fictitious name of Chas. E. Goss & Son; that the defendants Charles E. Goss and Mary A. Goss were not members of said firm of Chas. E. Goss & Son.

"(2) That on or about the 10th day of August, 1923, said defendant Charles E. Goss, doing business as Chas. E. Goss & Son, agreed to purchase from the plaintiff certain hay belonging to the plaintiff, situated on landing, Green Island ranch, Napa county, and to pay plaintiff therefor at the rate of \$11.50 per ton f. o. b. landing, said payment to be made upon delivery; that plaintiff delivered to said Chas. E. Goss & Son 213.96 tons of said hay; that a portion of the hay received by said defendant H. E. Goss at destination was in a damaged condition; that part of said damage occurred prior to the delivery of said hay and that the defendant H. E. Goss was entitled to a credit of \$160.00 on account of damage to hay prior to delivery; that the total amount which became due to plaintiff for the hay delivered by plaintiff to defendant was the sum of \$2,460.54; that the defendant paid on account thereof the sum of \$1,900; that defendant is entitled to a credit of \$24.90 as set forth in the answer and

second counterclaim to the first cause of action in plaintiff's complaint, and is also entitled to a credit of \$160 on account of damage to hay, as above stated, making total credits of \$2,084.90, and leaving a balance due plaintiff of \$375.64; that defendant has not paid the balance due of \$375.64, and said sum of \$375.64 is still wholly due, owing and unpaid from said defendant H. E. Goss to plaintiff.

"That all the allegations contained in plaintiff's answer to the first cause of action contained in plaintiff's complaint, are untrue, excepting the following:

"(1) The allegations of paragraph II, denying that the defendant Chas. E. Goss & Son is a copartnership consisting of Charles E. Goss, Mary A. Goss and/or H. E. Goss; and the court finds that it is not true that said Chas. E. Goss & Son is a copartnership, consisting of said persons.

"(2) The allegation of paragraph I of the answer and first counterclaim to plaintiff's first cause of action, alleging that some time about the 20th day of August, 1923, plaintiff offered to sell to defendant H. E. Goss a certain lot of hay, consisting of about 200 tons, at the price of \$11.50 per ton f. o. b. said land; the court finds that said last mentioned allegation is true.

"(3) That the allegation of paragraph VI of said answer and first counterclaim, alleging that defendant H. E. Goss advanced to plaintiff the sum of \$1,900 to be applied on account of the purchase price of hay, is true.

"That all the allegations of the answer and second counterclaim to plaintiff's first cause of action are true."

As conclusions of law the court ordered "judgment against the defendant H. E. Goss doing business under the name of Chas. E. Goss & Son for the sum of \$375.64." Thereafter, on March 20, 1925, a judgment was prepared, and the trial judge signed the same "that Dutton Dredge Company, a corporation, plaintiff, do have and recover from Charles E. Goss, Mary A. Goss and H. E. Goss, a copartnership doing business under the firm name and style of Chas. E. Goss & Son, and Chas. E. Goss & Son, said copartnership, defendants, the sum of \$411.64." Thereafter, on April 10, 1925, all of the defendants served and filed a notice of appeal from said judgment and the whole thereof. Thereafter, on the 21st day of August, 1925, the trial court made an order reciting many of the foregoing facts, and made an amended judgment that the plaintiff "do have and recover from the defendant H. E. Goss doing business under the firm name and style of Chas. E. Goss & Son the sum of \$375.64, together with the sum of \$36 interest, dated March 20, 1925." Thereafter, on September 12, 1925, all of said defendants appealed from the amended judgment. Both of said appeals are submitted on the record before us.

[1, 2] The second appeal presents no serious question. The trial court had the inherent power to make its record speak the truth and to amend the judgment as entered to make it conform to the decision which the court had actually rendered (*Goatman v. Fuller*, 191

Cal. 245, 216 P. 35); although the judge had signed the original judgment (14 Cal. Jur. 1001, § 75); and the power to make the amendment that was made in the instant case was not divested by the appeal taken from the original judgment (*Crawford v. Meadows*, 55 Cal. App. 4, 10, 203 P. 428).

[3, 4] The first appeal presents errors that are more troublesome. It will be noted that the trial court in one finding found that H. E. Goss, at all times mentioned in the complaint, was transacting business under the fictitious name of Chas. E. Goss & Son. In the next finding it will be noticed that the trial court found that Charles E. Goss, doing business as Chas. E. Goss & Son, agreed to purchase the hay, and plaintiff delivered to said Chas. E. Goss & Son the said hay. Except as we have quoted there is no finding of sale or delivery by plaintiff to any one. Moreover, as the findings stand in one paragraph, the finding is that H. E. Goss was doing business under the fictitious name of Chas. E. Goss & Son, and in another paragraph the finding is that Charles E. Goss was doing business as Chas. E. Goss & Son. In connection with the two findings just referred to, it will be further noted that the expression, "was transacting business under the fictitious name of Chas. E. Goss & Son," is wholly without any issue made by the pleadings.

There is a finding "that all the allegations contained in plaintiff's answer to the first cause of action," etc., are untrue, except —. As the plaintiff had no answer on file, we are left to make a guess that the finding contained a word by mistake and that the finding was intended to be "that all the allegations contained in defendants' answer to the first cause of action" are untrue, except —. But if we take that view we are then confronted with another finding, which is "that all the allegations of the answer * * * to plaintiff's first cause of action are true." These two findings are meaningless or hopelessly conflicting.

Wherein the court found that *Charles E. Goss* was doing business as Chas. E. Goss & Son, the respondent asks us to hold that a typographical error was committed, and that the finding should read, *H. E. Goss* was doing business as Chas. E. Goss & Son. We think we have no power to go as far as the respondent requests, because in doing so we would be making a finding of fact. This court has no power to make findings.

Those portions of the findings printed in italics are each and all without the issues made by the pleadings. Other points presented by the appellants, addressed to such nugatory findings, need not be considered.

The judgment is reversed, and the trial court is directed to allow the parties to amend their pleadings to conform to the proof, and thereupon the trial court will make such findings of fact, as, in its discre-

tion, determine the issues and order judgment in accordance therewith. | Chapman v. Hughes, 134 Cal. 641, 659, 660, 58 P. 298, 60 P. 974, 66 P. 982. It is further ordered that the appellants recover their costs.

We concur: LANGDON, P. J.; NOURSE, J.

77 Cal. App. 709

BUTLER-VEITCH, Inc., v. BARNARD.
(Civ. 3054.)

(District Court of Appeal, Third District, California. April 30, 1926. Hearing Denied by Supreme Court June 28, 1926.)

1. Fraud ⇨54.

Where buyer of motor truck alleged seller falsely represented that buyer could pay for truck out of hauling contract, evidence of similar transactions by seller held improperly excluded.

2. Fraud ⇨54.

Where fraud is charged, evidence of other frauds of like character, committed by same party at or near same time, is admissible to show intent or knowledge.

3. Fraud ⇨52.

In investigating question of fraud, court should be liberal in receipt of evidence tending to disclose true nature of transaction.

4. Trial ⇨178.

Motion for directed verdict is in nature of demurrer to evidence, and concedes as true evidence in behalf of adverse party, with all fair and reasonable inferences deducted therefrom.

5. Trial ⇨142.

Verdict should not be directed, except where evidence is so conclusive that reasonable minds could not differ as to result.

6. Fraud ⇨64(1).

Under Civ. Code, § 1574, providing that actual fraud is always question of fact, case tried on such theory after issues were joined should have been submitted to jury.

7. Trial ⇨194(2).

Direction to jury to render verdict on question of fact, where there is substantial evidence to justify decision, is invasion of province of jury, and contrary to constitutional provisions that judges shall not charge juries with respect to matters of fact.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Butler-Veitch, Inc., against W. J. Barnard, wherein defendant interposed a cross-complaint. Judgment for plaintiff and order denying a new trial, and defendant appeals. Reversed, and remanded for new trial.

W. E. Davies, of Marysville, and Thos. W. Forsyth, of San Francisco, for appellant.

Ray Maxwell, of Marysville, and Roy A. Bronson, of San Francisco, for respondent.

PULLEN, Justice pro tem. This action was brought by the respondent, as plaintiff, against the defendant and appellant for a specified sum, being the installment payments due it at the date of the commencement of the action under an executory contract of sale, wherein plaintiff had agreed to sell, and defendant had agreed to buy, a motor truck, the total price payable in installments.

Defendant answered, admitting the execution of the contract, but alleged that at the same time and place, and as a part of the same transaction, and at the instance of plaintiff, and as an inducement to the defendant to enter into said contract for the purchase of the truck, defendant entered into a hauling contract with respondent and one Mahoney. The answer further alleged that by agreement of the parties the balance of the purchase price of the truck was to be paid from the net earnings of the truck while in the service of Mahoney, and that, without fault of defendant, the net earnings of the truck were insufficient to pay the amounts specified in the contract. As a further answer defendant interposed a cross-complaint, in which it was alleged that defendant was induced to purchase the truck by the representations of plaintiff that plaintiff was interested with Mahoney, who had a contract for the hauling of a large quantity of cement, machinery, and other equipment, and also that, if defendant did purchase a truck from plaintiff, plaintiff would procure steady and profitable work for the truck during the season of 1923 with Mahoney, and that plaintiff would permit defendant to pay for the truck out of the net earnings from said hauling contract. Then followed the necessary and usual allegations that, relying thereon, defendant signed the agreement to purchase the truck, and as a part of the same transaction signed the hauling contract with Mahoney, and the allegations of tender to perform by defendant, refusal by Mahoney to furnish hauling, the falsity of the representations, and the damage sustained thereby.

Plaintiff, answering the cross-complaint, after specifically denying all the allegations thereof, alleged, after defendant purchased the truck, plaintiff introduced him to Mahoney and that thereafter defendant and Mahoney entered into a contract to do certain hauling, but that plaintiff was not interested in, and had nothing to do with, the contract whatsoever.

Upon the issues thus formed the cause was tried before a jury, and, after defendant had rested his case on his cross-complaint, plaintiff moved the court for a directed verdict on the ground of failure of proof of the allegations in the cross-complaint, and on the further ground that no connection had been shown nor evidence of privity adduced between plaintiff and Mahoney, and upon the

further ground that any representations made by plaintiff to defendant were mere expressions of opinion of the persons making them.

The motion was granted by the trial court upon the ground that defendant had failed as a matter of law to show fraudulent misrepresentations, and instructed the jury to return a verdict in favor of plaintiff, which was done, and upon that verdict judgment was entered accordingly, and this is an appeal from such judgment and from an order denying defendant's motion for new trial.

In support of the allegations of his cross-complaint, defendant introduced evidence showing that he was a resident of San Francisco, an engineer by profession; that during the month of February, 1923, he called upon Butler-Veitch at their truck department, and there talked to a salesman who told appellant "at the present they (Butler-Veitch, Inc.) had a contract with Mr. R. H. Mahoney in Marysville for hauling cement; and I (appellant) made all the inquiries regarding it, and he said there would be all kinds of work this summer, and at the present R. H. Mahoney had a contract with the Yuba Development Company for hauling cement, and it was \$7 a ton, and allowed six tons to the load, about, \$42 for twelve hours, double shift \$84 a day for all the work we could possibly do this season, not only that they had a contract out of Oroville, and when that was finished late this fall they also had another contract at Lost Creek, that is the one that was near Oroville and the other contract was Smartsville; that the road was a very good road, as soon as they got through the dam in 1923, they were going to start on the Smartsville job, and would be hauling all winter."

The day following defendant called at the office of Butler-Veitch, where he talked with the salesman who had the day before discussed the matter, and also with a Mr. Knuckey, the sales manager or manager of the truck department of Butler-Veitch, and "we went over the same grounds again in regard to buying the truck, and they told me they furnished work for the truck by which I would pay all the payments and a living besides." On the following day defendant testified he went to the office of Butler-Veitch, and the following occurred:

"I will ask you to look at this contract and ask you if you signed that? A. Yes, sir; also another contract I signed that day.

"Q. Who was present at the time you signed that contract? A. W. A. Knuckey.

"Q. Who else? A. Mr. D. O. Johnson.

"Q. When and where was that signed by you? A. This was signed by me at 1238 Market street.

"Q. Did Mr. Knuckey sign that contract in your presence? A. Yes, sir.

"Q. In the office of the Butler-Veitch Company in San Francisco? A. Yes, sir.

"Q. At the same time did you sign any other papers? A. Yes, sir.

"Q. What papers, if any, did you sign? A. I signed a cement hauling contract by R. H. Mahoney.

"Q. Who signed that contract? A. W. A. Knuckey told me he had the power of attorney to sign for Mr. Mahoney.

"Q. I will ask you if you have seen that before? A. Yes, sir.

"Q. Just look at the last page and tell us if your signature appears on that contract? A. My signature appears on that contract.

"Q. Who else? A. D. O. Johnson and Mr. Knuckey; D. O. Johnson was witness.

"Q. They signed that at that time? A. Yes, sir; same time.

"Q. What period of time elapsed between the signing of this contract for the purchase of the truck and the signing of that contract for the hauling—how long did it take? A. Maybe two or three minutes. Maybe one minute, not longer than that.

"Q. You were all together there? A. Yes, sir; we were all together there.

"Q. Both papers were signed at the same time? A. Yes, sir.

"Q. By all the parties present? A. Yes, sir.

"Q. Mr. Knuckey signed the name of Mahoney? A. Yes, sir; he told me he had the power of attorney to sign for Mr. Mahoney.

"Q. R. H. Mahoney by W. A. Knuckey? A. Yes, sir."

"Q. Then you signed it? A. I signed it."

Appellant has cited some twenty-two specifications of error, but we do not deem it necessary to comment on all of the points urged by appellant for reversal, as an examination of the record convinces us that the judgment must be reversed upon two of the grounds urged, namely, the failure of the court to admit evidence of other transactions by plaintiff of a character similar to the agreement between plaintiff and defendant herein, and, secondly, the error of the court in directing the jury to return a verdict in favor of plaintiff.

To show intent and knowledge of plaintiff, evidence was tendered by defendant of other alleged fraudulent representations by plaintiff of like character to the deal entered into between plaintiff and defendant at or near the same time. F. W. Clark was called as a witness in support thereof, and testified he purchased a truck from plaintiff about the same time as did defendant, dealt with the same persons who made practically the same representations to him as to the hauling contract with Mahoney.

"Mr. Clark: I wanted to get more of the details of it, and he (Mr. Knuckey), manager of the truck department says, 'We have this contract.' I says, 'How do you get this contract.' He says, 'You have to buy a truck from Butler-Veitch Company to enter the hauling contract.' Then he says, 'Our Mr. Mahoney at Marysville takes care of the hauling contract.' I says, 'Who is Mr. Mahoney?' He says, 'He is the man who has

charge of the cement hauling. You have to report to Mr. Mahoney after you buy the truck,' I says, 'Can I get on this job without buying a truck from Butler-Veitch,' and he says, 'Absolutely not.'"

Thereafter witness purchased a truck and proceeded to Marysville, where he reported to Mahoney. "Did you have any conversation with him (Mahoney)? Yes sir, I says, 'I am here to haul cement. W. A. Knuckey told me that the cement had been ordered and shipped, and would be ready to go to work on. Where is the cement?' He says, 'I don't know where in hell he got his information from.'" In about five months witness Clark testified he hauled one load only under his contract for Mahoney.

[1] The testimony of this witness was, on motion of plaintiff stricken out. Thereafter the testimony of William Cramer and D. K. Meade, witnesses called on behalf of defendant, was offered, which was substantially to the same effect as the testimony of Clark, and this testimony was, upon motion of plaintiff, also stricken out. This testimony should have been received and submitted to the jury for their consideration, for, if believed by them, it was sufficient, together with the other evidence on behalf of defendant, to establish palpable fraud.

[2] Evidence tending to show similar dealings with others should have been received, for fraud is an exception to the general rule that acts of others are not relevant to establish the fact, for, where fraud is charged, evidence of other frauds or fraudulent representations of like character committed by the same party at or near the same time is admissible to show intent or knowledge. *J. B. Colt Co. v. Freitas* (Cal. App.) 244 P. 916, and cases cited.

[3] It seldom happens that fraud can be proved by direct evidence, and no rigid rule can be applied to determine the admissibility of circumstances, so diversified are the conditions, relations, and conduct under which they arise.

"In the investigation of a question of fraud courts should be exceptionally liberal in the receipt of evidence tending to disclose the true nature of the transaction and at times very slight circumstances, apparently trivial in themselves, when joined with other facts may afford irrefragable proof of fraud." Bigelow on Fraud, p. 160.

From the fact of the identity of the parties making the representations, the similarity of the statements made, and the proximity of time, the testimony of the witnesses Clark, Cramer, and Meade should have been submit-

ted to the jury, and it was their province to determine, as a matter of fact, the question of knowledge of plaintiff, the relationship between Mahoney, plaintiff, and Knuckey, as well as the broad question of intent.

[4] Appellant with merit complains of the action of the trial court in granting the motion of plaintiff for a directed verdict. Such a motion is in the nature of a demurrer to the evidence, and is governed by practically the same rules, and concedes as true the evidence in behalf of the adverse party, with all fair and reasonable inferences to be deducted therefrom.

[5] A verdict should not be directed except in cases where the evidence is so conclusive that reasonable minds could not differ as to the result to be reached (*Paolini v. Fresno Canal, etc., Co.*, 9 Cal. App. 1, 97 P. 1130), and an examination of the evidence submitted by defendant cannot be said to be so entirely devoid of fair and reasonable inferences as to warrant the granting of the motion. In fact, the jury, after receiving the direction of the trial court to find for the plaintiff, returned into court, and through their foreman declared that they (the jury) "voted unanimously against signing the verdict," whereupon they were again admonished by the court to follow the instructions, and were sent back, and thereafter returned into court with a verdict in accordance with the direction of the court finding for the plaintiff.

[6] Inasmuch, therefore, as the issues were joined on the question of fraud, and the case was tried upon that theory, a question of fact arose therefrom, and, as provided by section 1574 of the Civil Code, actual fraud is always a question of fact, and such question should, we believe, have been submitted to the jury. *Bechtold v. Coney*, 42 Cal. App. 563, 183 P. 841; *Moore v. Copp*, 119 Cal. 429, 51 P. 630; *Kearney v. Bell*, 160 Cal. 661, 117 P. 925.

[7] "A direction to the jury to render a verdict on a question of fact submitted to it, where there is substantial evidence to justify a contrary decision thereon, is an invasion of the province of the jury and contrary to the constitutional provision that judges shall not charge juries with respect to matters of fact." 24 Cal. Jur. 916, citing numerous authorities.

For the reasons stated in the foregoing, the judgment should be, and is hereby, reversed, and the cause remanded for a new trial.

We concur: FINCH, P. J.; PLUMMER, J.

78 Cal. App. 29

**BERKELEY HILLSIDE PROPERTIES CO.
v. KELLY.** (Civ. 5155.)

(District Court of Appeal, First District, Division 1, California. May 13, 1926. Hearing Denied by Supreme Court July 8, 1926.)

1. Corporations ⇨175.

Only those in contractual relationship with corporation and who are registered on its books as stockholders are personally liable under a stock assessment.

2. Corporations ⇨174—Relation between stockholder and corporation is contractual.

Relation between stockholder and corporation is contractual, and can arise only when party has consented to become stockholder and corporation accepts him as such.

3. Corporations ⇨175—Sole legatee under will of stockholder who receipted for and retained stock without having it transferred on books held not personally liable as stockholder for unpaid assessment (Civ. Code, §§ 322, 324, 349).

Sole legatee under will of stockholder who receipted for and retained stock, but who had not complied with Civ. Code, § 324, requiring transfer on books of corporation, was not personally liable as stockholder for unpaid assessment under section 349, section 322 being inapplicable.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by the Berkeley Hillside Properties Company against Elizabeth Finley Kelly. Judgment for defendant, and plaintiff appeals. Affirmed.

R. M. F. Soto, of San Francisco, for appellant.

Harrison S. Robinson, Harry L. Price, and R. W. Macdonald, all of Oakland, for respondent.

TYLER, P. J. This action was brought under the provisions of section 349 of the Civil Code to collect by personal judgment the amount of a stock assessment. The complaint alleges that the certificate was made out in the name of A. S. Kelly, and was fully paid for, though never delivered to him; that Kelly died, and after his death the stock came into the hands of his executor; that Elizabeth F. Kelly was the sole devisee and legatee of the estate of A. S. Kelly, and upon distribution thereof the executor of the estate delivered to her and she signed a receipt for all the property so distributed, including the stock in question; that at all times since said distribution defendant has been and still is the owner and holder thereof; that she has never demanded transfer of the certificate on the books of the corporation, and the stock still stands of record in the name of the original owner, A. S. Kelly. The complaint proceeding then recites that on March 16, 1922,

and about two years after defendant acquired the stock in the manner mentioned, plaintiff corporation was and for more than six months prior thereto had been indebted in a certain sum, and was on said day unable to pay its said indebtedness, or any portion thereof, in the ordinary course of business, for which reason it levied an assessment of \$10 per share on each of the shares of its capital stock. The complaint contains recitals of the steps taken under the statute relating to the levy, and the election by the plaintiff to proceed by suit rather than by sale of the stock to collect the amount. No question is raised as to the regularity of the proceedings leading up to the assessment.

A demurrer was interposed to the complaint on the ground that it did not state a cause of action. The trial court sustained the demurrer upon the theory that, as the stock had never been transferred to defendant, she could not become liable on a personal judgment for the amount of the assessment. We are of the opinion that the demurrer was properly sustained.

[1, 2] Only those who have entered into a contractual relationship with a corporation are personally liable under an assessment. Such relationship and the liability incident thereto are limited and confined to those who are registered on the books of the corporation as stockholders. The relation between stockholder and corporation is one of contract, and can arise only when a party has consented to become a stockholder. *Welch v. Gillelen*, 147 Cal. 571, 82 P. 248; *Shattuck & Desmond Warehouse Co. v. Gillelen*, 154 Cal. 778, 99 P. 348; *California National Supply Co. v. O'Brien*, 51 Cal. App. 606, 197 P. 414. It exists only when the party has either expressly consented to such relation or his conduct has been such that in law his consent will be implied.

[3] In *California National Supply Co. v. O'Brien*, supra, it is held that to establish the relation it must appear that the minds of the parties have met, that the one to whom the stock was issued agrees to be and become a stockholder in the corporation, with the privileges and responsibilities of that relation, and that the corporation accepts him as such. A transfer on the books therefore is essential to a novation of the contract of membership under section 324 of the Civil Code. *Visalia Railroad Co. v. Hyde*, 110 Cal. 632, 43 P. 10, 52 Am. St. Rep. 136; *People's Home Savings Bank v. Stadtmuller*, 150 Cal. 106, 88 P. 280; *Geary St., etc., Railroad Co. v. Bradbury Estate Co.*, 179 Cal. 46, 175 P. 457; *Morawetz on Private Corp.* §§ 44, 163, 170.

The mere fact that defendant had the stock distributed to her as sole legatee under the will and receipted for and retained the same did not, as claimed, constitute her a

stockholder. The precise question has been passed upon by our Supreme Court. In *People's Home Savings Bank v. Stadtmuller*, supra, it was alleged that the testator of the defendant had become a subscriber to a portion of the capital stock of the plaintiff corporation; that he had subsequently died and the stock had been distributed to defendant who had, as here, accepted and receipted for the certificate, though she never had caused the same to be transferred to her name upon the books of the corporation. It was contended there, as here, that the acceptance of the stock under the circumstances alleged was sufficient to establish a privity between herself and the corporation so that she became a stockholder subject to all the rights, duties, and liabilities as such. This contention was rejected by the court, and it upheld the judgment based on a general demurrer to the complaint upon the same theory as the trial judge in the instant case. It was there held that under the provisions of section 324 of the Civil Code a transferee is not a stockholder as between himself and the corporation until he secures a transfer on the books of the company; that up to that time, as between himself and the corporation, he acquires only an equitable title in the stock, but does not become a stockholder. See, also, *People ex rel. Probert v. Robinson*, 64 Cal. 373, 1 P. 156. It is there further held that such a relation cannot be forced on one who has done no act to establish such privity, and the mere fact that a distributee or legatee of an estate takes the paper certificate, and does nothing more, cannot be said to be a compliance with section 324 of the Code. This doctrine was reaffirmed and followed in the later case of *Geary St., etc., Railroad Co. v. Bradbury Estate Co.*, supra.

We are cited by appellant to California cases which he claims hold a contrary doctrine. We do not consider a review of the authorities to be necessary, as they all deal with the question of a stockholder's liability. The liability of an unregistered transferee of stock to creditors of the corporation under section 322 of the Civil Code, and the liability to the corporation itself under section 349 of the same Code, is entirely distinct and rests upon different principles. This distinction is pointed out in *Visalia Railroad Co. v. Hyde*, supra. Section 322 of the Civil Code deals exclusively with the statutory liability of stockholders for their proportion of the corporate debts, and has nothing to do with an action by the corporation against its stockholders for the recovery of an assessment upon stock held by them. *People's Home Sav. Bank v. Rauer*, 2 Cal. App. 445, 84 P. 329; *Union Savings Bank v. Willard*, 4 Cal. App. 690, 88 P. 1098.

Defendant never having entered into any contractual relation with the corporation, it

has no cause of action against her to enforce a personal liability for an unpaid assessment. The right of the corporation to proceed and sell the stock is an entirely separate and distinct right, and is not here involved.

Judgment affirmed.

We concur: KNIGHT, J.; CASHIN, J.

78 Cal. App. 37

PEOPLE v. FITZPATRICK et al. (Cr. 1330.)

(District Court of Appeal, Second District, Division 2, California. May 14, 1926. Downs' Petition for Hearing Denied by Supreme Court July 8, 1926.)

1. Criminal law $\S$ 386—Witness may testify to conversation heard by him between defendant and bribe offeror, though unable to identify defendant where other testimony identified him.

Witness may testify to conversation heard by him between offeror of bribe and defendant, though he could not identify defendant, where other testimony identified him as participant in the conversation.

2. Criminal law $\S$ 696(7).

Motion to strike entire testimony of witness is properly denied, where part is admissible.

3. Criminal law $\S$ 507½—Undisputed evidence held to require finding that offeror of bribe to councilmen to influence votes was feigned accomplice.

Evidence that offeror of bribe to influence votes in city council subsequent to arrangements divulged plot to officials, and detectives, with knowledge thereof, waited outside when offeror paid money to defendants, held to require finding that offeror was a feigned accomplice.

4. Criminal law $\S$ 1186(4)—Refusal of instructions on whether bribe offeror was actual, or feigned, accomplice held harmless, since evidence required finding that he was a feigned accomplice (Const. art. 6, $\S$ 4½).

Refusal of requested instructions, in bribery prosecution of officers, on question whether offeror, being a witness, was an actual, or feigned, accomplice held harmless, if error, under Const. art. 6, $\S$ 4½, since undisputed evidence required finding that he was feigned accomplice.

5. Criminal law $\S$ 33—Rule that act done through ignorance or mistake of fact is not criminal held inapplicable in bribery prosecution under contradictory evidence that money was taken to influence official vote and as campaign contribution (Pen. Code, $\S$ 26).

Under conflicting evidence in bribery prosecution that money was taken to influence official vote, and that it was taken as campaign contribution, rule that act done through ignorance or mistake of fact, disproving intent, is not criminal (Pen. Code, $\S$ 26) is inapplicable, and case was for jury.

6. Criminal law — 829(1).

Refusal of requested instructions is correct, when covered by instruction that was given.

7. Criminal law — 772(6).

Instruction that, if action of bribe offeror and authorities was taken to detect crime, with reasonable ground to suspect accused officials of accepting bribes, and bribe was accepted, they are guilty, but, if taken to induce crime, they are not guilty, *held* sufficient charge on entrapment.

8. Bribery — 1(1)—Statute against receiving and agreeing to receive bribe held satisfied, if proven that defendant "agreed" and intended in his own mind to receive bribe (Pen. Code, § 165).

Defendant may be guilty of receiving and agreeing to receive a bribe, under Pen. Code, § 165, notwithstanding person who paid and agreed to pay did not act with criminal intent, if proven that he "agreed" or intended in his own mind to receive a bribe.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Joseph Fitzpatrick and Charles E. Downs were convicted of bribery, and defendant Downs appeals. Affirmed.

Jerry Giesler and Leon R. Yankwich, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

WORKS, J. Defendants were charged jointly with the crime of bribery, in that defendants Fitzpatrick and Downs received, and agreed to receive, from one William C. Hodges a bribe for the purpose of influencing their action as members of the city council of the city of Los Angeles in a certain matter pending before that body, and in that defendant Murphy aided and abetted his codefendants in the commission of the offense. Murphy was acquitted, and Fitzpatrick and Downs were convicted. The two latter defendants appealed from the judgment of conviction and from an order of the trial court denying their motion for a new trial, but the appeal of Fitzpatrick was later dismissed.

It was the theory of the prosecution that Murphy was a go-between, whose office in the commission of the crime was in bringing Hodges into direct communication with Fitzpatrick and Downs. Hodges testified to a conversation that he had with Murphy in a downtown office building; the evidence thus given being damaging not alone to Murphy but to his codefendants as well. Hodges also testified that one J. Howard Murphy was concealed in a closet opening from the room in which he had the conversation with defendant Murphy during the time when the conversation occurred. J. Howard Murphy will hereafter be referred to as the witness Murphy in order to distinguish him from the defendant

Murphy. The witness Murphy, when put upon the witness stand, corroborated Hodges as to the substance of the conversation between the latter and defendant Murphy. On his direct examination, also, the witness Murphy made it appear that from his hiding place he had seen both Hodges and defendant Murphy as the conversation proceeded between them. On cross-examination, however, it was clearly established that the witness Murphy saw only Hodges, as he was so placed in the closet as to be unable to see the other party to the conversation. Moreover, it was shown that the witness Murphy did not know defendant Murphy's voice, and that he possessed no other means of identifying the person from whom the voice proceeded. He could hear the man who, according to the testimony of Hodges, was defendant Murphy, but did not himself know that it was defendant Murphy who spoke. When this situation was developed upon the cross-examination, defendants moved that the entire testimony of the witness Murphy be stricken, and the motion was denied. It is now contended that the ruling was error.

[1, 2] In making this contention appellant cites abundant authority in support of the well-established rule that testimony may not be given of a conversation alleged to have been participated in by a particular person, unless the person first be identified as one of the parties to the conversation. There is no rule of evidence, however, which requires that every witness to a conversation shall himself identify the participants in it. Here Hodges swears that the conversation was between himself and defendant Murphy. Here Hodges also swears that the witness Murphy was concealed in the closet while the conversation progressed. Here the witness Murphy swears that at the time fixed by Hodges he was in the closet and heard a conversation between Hodges and some man to him unknown. These items of evidence would seem to lay a sufficient foundation upon which to permit the witness Murphy to detail the substance of the conversation. In a case decided in Illinois, one Mrs. Obert was permitted, as against a party for whom one Slyder was an agent, to testify to a conversation she had over the telephone with a man who said he was Slyder. She had no means of identifying the man as Slyder, as she had never heard his voice, but there was testimony from other witnesses which tended to show that it was probably Slyder with whom she talked. It was contended on appeal that the trial court erred in admitting Mrs. Obert's testimony. The appellate court said in disposing of the point:

"There being evidence Slyder desired to communicate with Heeren by telephone through Mrs. Obert, it was a question of fact for the jury from all the evidence before them whether he was the

party or not." *Rogers Grain Co. v. Tanton*, 136 Ill. App. 533.

There is other authority which supports the rule thus stated (*Wolfe v. Missouri Pac. Ry. Co.*, 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331; *Godair v. Ham Nat. Bank*, 225 Ill. 572, 80 N. E. 407, 116 Am. St. Rep. 172, 8 Ann. Cas. 447; *Conkling v. Standard Oil Co.*, 138 Iowa, 596, 116 N. W. 822), and we think the rule is directly applicable here. It was not error to allow the witness Murphy to relate the conversation that he heard from his hiding place, and, as the motion to strike was directed at his entire testimony, it was properly denied. Nor do we decide whether the testimony of the witness on direct examination to the effect that he identified defendant Murphy as one of the parties to the conversation could have been stricken upon a more specific motion merely because the complexion of the testimony was changed on cross-examination.

[3, 4] As Hodges would have been chargeable with the same offense as that with which defendants were charged, if he were their accomplice in the commission of the acts out of which the charge against them arose, a question that naturally presented itself at the trial was whether Hodges was an actual accomplice with defendants, or merely a feigned accomplice. The trial court gave to the jury several instructions which were appropriate to such a question, but refused to give certain instructions requested by defendants upon the same subject. It is contended that in this refusal there was error. If we concede, without deciding, that the court erred in refusing the requested instructions, we must at once observe that the error was utterly harmless. The testimony at the trial showed without dispute that, after Hodges had his conversation with defendant Murphy, he also had a meeting with Fitzpatrick and Downs; that at that meeting arrangements were made for the payment to them by Hodges of money; that, after the meeting, Hodges disclosed the plot, as far as it had then progressed, to two men who were members of the city council along with Fitzpatrick and Downs; that thereupon these councilmen went with Hodges to the district attorney of Los Angeles county, when Hodges divulged the story of the plot to that official; that a parcel of paper money was then made up to be given Fitzpatrick and Downs, the district attorney taking note of the number of each of the bills which was placed in the parcel; that three detectives who were associated with the district attorney's office were made acquainted with the plot, were given the numbers of the bills, and were instructed to be, at a certain time, immediately outside a certain room in which Hodges had agreed to meet Fitzpatrick and Downs; that it was arranged that, after Hodges met the two men, he should

emerge from the room with his hat in his hand as a signal to the detectives that he had passed the money to them; that the detectives went to the appointed place at the time set; that, while they were waiting outside the room, Hodges came from it with his hat in his hand; and that the detectives thereupon rushed into the room, found Fitzpatrick and Downs there, and found one-half of the marked bills in the possession of each of them. With this undisputed evidence in the record it was impossible for the jury to find that Hodges was an actual accomplice of defendants. Conversely, the jury could not have avoided a finding that he was a feigned accomplice. If then, it was error for the trial court not to give the requested instructions, the error cannot require a reversal under the provisions of section 4½ of article 6 of the Constitution, to the effect that no error shall work a reversal of a judgment unless it has resulted in a miscarriage of justice. It is therefore unnecessary to decide whether the refusal to give the requested instructions was erroneous.

[5] Section 26 of the Penal Code reads, in part:

"All persons are capable of committing crimes except those belonging to the following classes:
* * * 4. Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent."

There is some evidence in the record here that Fitzpatrick and Downs intended to take the money which Hodges delivered to them as a contribution to their expenses incurred during an election campaign through which they had recently gone, and which resulted in their election as members of the city council, and that they believed that they had the right to take the money as such contribution. In view of this evidence, they requested the trial court to give to the jury the following instruction:

"If the jury should believe from the evidence or should entertain a reasonable doubt therefrom that the defendants received, or agreed to receive, the \$2,000 alleged in the indictment under an ignorance or mistake of fact as to the purpose for which said sum was received, or agreed to be received, and, if you should further believe from the evidence or entertain a reasonable doubt therefrom that such ignorance or mistake of fact disproves any criminal intent upon the part of the defendants to receive, or agree to receive, said amount as a bribe as charged in the indictment, then it will be your duty to find the defendants not guilty."

The requested instruction was refused, and it is now contended that the refusal was error. We think it was not. The evidence upon which the instruction was based did not furnish room for the application of subdivision "4" of section 26 of the Penal Code. Appellant was charged with receiving, or agreeing

to receive, a bribe for the purpose of influencing his official action as a member of the city council. If the jury believed from the evidence that the money which Hodges paid to appellant was not taken by him for such a purpose, but was taken solely as a contribution to his campaign expenses, the charge was not proven. In other words, appellant took the money with the intent that it should influence his official action, or he did not. There was ample evidence that he took it with that intent. There was some testimony that he took it as a contribution to his election expenses. As between these conflicting items of evidence the question was, simply, Which was the jury to believe? We can perceive no element of "ignorance or mistake of fact," within the contemplation of section 26, arising from either of these branches of the evidence, or from both of them when considered together. They presented to the jury merely a conflict upon which was to be answered the question, Is appellant guilty or is he innocent?

Appellant requested the trial court to give to the jury two certain instructions upon the law of entrapment, and both were refused. The first of the two read:

"The defense of entrapment is based upon public policy. In considering such defense, a clear distinction founded upon principle is to be observed between measures used to entrap a person into crime in order, by making him a criminal, to aid the instigator in the accomplishment of some corrupt private purpose of his own and artifice used to detect persons suspected of being engaged in criminal practices. If the jury should believe from the evidence, or entertain a reasonable doubt therefrom, that the entrapment was brought about by instigation to aid the instigator in the accomplishments of some corrupt private purpose of his own rather than for the purpose of apprehending and prosecuting persons reasonably suspected of crime, then it would be the duty of the jury to find the defendants not guilty of such offense."

The second refused instruction upon the same general subject was as follows:

"In cases where entrapment into crime is a defense, to warrant a conviction one of two conditions must be present: Either, first, there must have been reasonable suspicion and grounds therefor on the part of the authorities and those working with them that the defendants in the case were engaged in the commission of a crime or about to so engage; or, second, the original suggestion or initiative to commit the offense must have come from the defendants themselves. If, after a careful consideration of the case, the jury entertain a reasonable doubt as to whether or not either under the first plan there was not sufficient reasonable grounds upon which to base a suspicion that the defendants were committing or about to commit crime, or, under the second plan, that the original suggestion or initiative did not come from the defendants, but was implanted in their minds at the instigation and inducement of the authorities or those acting with them, then it will be their duty in either event to give the

defendants the benefit of such reasonable doubt, and find such defense of entrapment to exist, and find the defendants not guilty."

[6, 7] It is contended that the refusal to give these requested instructions was error. We think the refusal was correct in each instance, for the reason that the court covered the subject involved in the two proposed instructions by one that was given. It read:

"If the witness Hodges and the authorities had reasonable grounds to suspect the defendants Downs and Fitzpatrick of committing or attempting to commit the crime of receiving or agreeing to receive a bribe, and the action of the authorities and that of the witness Hodges as testified to in this case was taken in an effort to detect crime and not to induce its commission, then such action on their part was lawful, and, if you should find from the evidence and beyond a reasonable doubt that the defendants Downs and Fitzpatrick did commit the crime as charged in the indictment, they would be guilty. On the other hand, if you should find from the evidence, or entertain a reasonable doubt therefrom, that the action of the authorities and the witness Hodges, or either of them, was taken in bad faith, and for the purpose of inducing and enticing the defendants Downs and Fitzpatrick to commit the offense charged, and that they or either of them in fact induced the original intent on the part of the defendants to do the acts charged as a crime, then it will be your duty to find the defendants not guilty."

The rules of law stated in the refused instructions are but amplifications or expansions of those as to which the jury was informed in the instruction which was read to its members. We think that by the latter the jury was sufficiently charged concerning the defense of entrapment. It is the duty of a trial judge not to burden the jury with a useless multiplication of instructions upon a given subject. A restatement of a rule of law in different forms, instead of inducing clarity, often leads to confusion in the minds of the jurors. We think that danger was properly avoided in the present instance.

[8] Appellant insists that the trial court erred in its refusal to give the following requested instruction:

"Unless you should find from the evidence beyond a reasonable doubt that the witness Hodges acted with a criminal and corrupt intent, and that the defendants did likewise, then it will be your duty to find the defendants not guilty, for the reason that, to complete the offense charged against the defendants, both the parties agreeing to pay and paying over the alleged bribe and the parties receiving and agreeing to receive the same must act with corrupt intent, otherwise there does not exist such agreement or understanding which the law has established as an essential ingredient of the crime alleged in the indictment in the case before you."

This proposed instruction does not state the law. The agreement referred to in it and in section 165 of the Penal Code, under which appellants were charged, is not the

kind of agreement contemplated by the civil law of contracts, under which there must be an actual meeting of the minds of contracting parties in order to form an agreement. So to hold would be to allow the escape from punishment of grossly corrupt public officials in those cases in which others might feign to be their accomplices, and in which no evidence against the defendants exists, except that to come from those feigned accomplices. The terms of the statute are met, if it is proven to the satisfaction of a jury that the defendants have "agreed" or intended in their own minds to receive a bribe. There is nothing inconsistent with this view in *People v. Bunkers*, 2 Cal. App. 197, 84 P. 364, 370; *People v. Emmons*, 7 Cal. App. 692, 95 P. 1032; and *People v. Coffey*, 161 Cal. 433, 119 P. 901, 39 L. R. A. (N. S.) 704, all of which are cited by appellants. In truth, the conviction which resulted in *People v. Emmons* was procured partially through the testimony of feigned accomplices.

Judgment and order affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

78 Cal. App. 1

CHRISTIAN CHURCH OF VACAVILLE et al. v. CRYSTAL et al. (Civ. 3070.)

(District Court of Appeal, Third District, California. May 7, 1926. Hearing Denied by Supreme Court. July 6, 1926.)

1. Religious societies ⇨23(2)—Rights of separate bodies after schism to use property of congregation recognizing no higher governmental authority must be determined by principles governing voluntary associations.

On separation of congregation, owing no fealty to higher governmental authority, into two distinct, conflicting bodies, their rights to property held in trust solely for congregation's use as religious society must be determined by ordinary principles governing voluntary associations.

2. Religious societies ⇨23(2)—Minority separating from majority ruled congregation and not recognizing governing body's authority, has no rights in property.

Minority separating from congregation ruled by majority, and refusing to recognize authority of governing body, has no rights in property of congregation, irrespective of change in religious opinions of those comprising regular organization.

3. Religious societies ⇨7.

Minority seceding from highest governing body of church abandons church, except in case of usurpation of power or radical change of faith as to constitute essentially different organization or religion.

4. Religious societies ⇨23(2)—Minority seceding from congregation, because of decision to discharge pastor and postpone calling another, abandoned congregation and rights in its property.

Minority seceding from congregation and refusing to recognize its supreme governmental authority, not because of change in doctrinal beliefs or practices, but because of decision to discharge pastor and not call another immediately, held to have abandoned congregation and any right to control or use its property.

5. Religious societies ⇨21—Congregation cannot acquire property of independent, self-governing congregation of same faith in same community because not used for purposes for which acquired.

One of two independent self-governing congregations of same religious faith in same community cannot acquire other's property by legal action on ground that latter is not using it for purposes for which acquired.

6. Religious societies ⇨23(3).

Majority of congregation, from which minority separated, did not forfeit right to use property for religious purposes by temporarily leasing it for other uses and uniting in worship with congregations of other denominations.

7. Religious societies ⇨21—Congregation temporarily uniting in worship with congregations of other denominations under name "Community Church" held not to have lost identity and forfeited right to use property as matter of law.

Congregation temporarily uniting in worship with congregations of other denominations under name of "Community Church" held not to have lost identity and forfeited right to use property, as matter of law; such name signifying federation of churches retaining separate identity and distinctive doctrines.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Community.]

Appeal from Superior Court, Solano County; Percy S. King, Judge.

Action by the Christian Church of Vacaville and others against E. C. Crystal and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

H. W. Brunk, of Berkeley, and J. E. Pemberton, of San Francisco, for appellants.

W. U. Goodman, of Fairfield, for respondents.

FINCH, P. J. The plaintiffs sued to quiet their alleged title to a certain parcel of land, together with a church building and a parsonage thereon, situated in the town of Vacaville. The defendants were given judgment, and the plaintiffs have appealed.

For more than 40 years before the commencement of the action, there was in the town of Vacaville a congregation of the Christian Church, or Disciples of Christ; the two names being used synonymously. Three tenets of that church are material to the

questions raised by the appeal and are as follows: (1) That immersion is the only authorized baptism; (2) that the Lord's Supper should be observed on the first day of every week; (3) that the church government is congregational in form, every local congregation being strictly independent of all other ecclesiastical organizations and in no manner subject to control or supervision by any higher or superior church authority. On the 14th day of January, 1892, the land in dispute was conveyed to "J. R. Rogers and J. S. Cunningham, * * * trustees of the Christian Church of Vacaville, the parties of the second part, * * * to have and to hold * * * unto the said party of the second part, and to their successors in office forever in trust for the use and benefit of the Christian Church of Vacaville." It is admitted by the pleadings that such trustees were chosen "by the congregation of said church," and that the land was purchased and the church building and parsonage thereon were erected "with money donated solely for the purpose of procuring and having a building for religious worship according to the tenets" of the Christian Church and for a residence of the pastor thereof.

In the year 1912 the congregation decided only one member voting in the negative, to receive and give "a church home" to the "pious unimmersed" of other churches without requiring them to be immersed. One of the defendants testified:

"I did not look at it as a vote to join the church. I understand it was a vote to affiliate."

Another testified:

"We never voted to take anybody in by any other method, nor would any of us have stood for taking anybody in by any other method except by immersion, primarily."

A very few persons were received into the congregation, under this "open fellowship" doctrine, without immersion, but all who were so received ceased to be members prior to the division of the congregation into two bodies, in the manner hereinafter stated, and neither of such bodies thereafter admitted any person to membership who had not been immersed, nor is there any evidence that either division taught or advocated such a doctrine. It is deemed unnecessary, therefore, to give further consideration to the contention that the division which the defendants represent "has abandoned the distinctive feature of the church in regard to baptism by immersion."

On account of certain dissensions among the members and of the dissatisfaction of some of them with the pastor of the church, a meeting of the congregation was called by the official board to be held on the 5th day of December, 1920. Practically all of the members attended and participated in the meeting. By a vote of 44 ayes to 32 noes, a motion was adopted to

discharge the pastor and "not to call a minister immediately, but until such time as a suitable one could be procured." Other motions were carried by about the same majority. The members of the minority group thereupon withdrew from the congregation and organized as a separate congregation under the name, "Disciples of Christ," and at all times since January, 1921, they have conducted regular services in accordance with the doctrines of the Christian Church, holding their meetings generally in the Methodist Church building in Vacaville, but sometimes in that of the Baptist Church. During that time they have regularly employed a pastor and have sent delegates to the annual state convention. The majority group remained in possession of the church buildings and conducted Sunday school and communion services therein regularly for about six months after the meeting of December 5, 1920, but did not employ a pastor. No religious services have been held in the Christian Church building since some time in June, 1921. Prior to that time the Presbyterian and Baptist churches of Vacaville had formed a federation and were holding joint services, each church, however, retaining its identity as a separate church organization. The majority group of the Christian Church was admitted to the federation upon presentation of a petition signed by the members of that group and reading as follows:

"We the undersigned members of the Christian Church of the Town of Vacaville favor the federation of our church with the federation of churches now existing in Vacaville, provided that our proposal of federation meets with their approval. And it is further provided that we retain our identity as an organization as the churches now federated retain theirs, that is in all missionary enterprises."

This petition was signed by 43 members of the Christian Church. The federation of the three churches is known as the Community Church. Defendant Crystal testified:

"We * * * celebrate the Lord's Supper regularly monthly. Sometimes the Presbyterian and sometimes the Baptist minister officiates. I have officiated as a member of the Christian Church, being an elder. I am not a minister of the church. * * * I am not an elder in that Community Church; I am an officer. We are still functioning as the Christian Church. * * * We still hold our identity, the same as the Presbyterians and the Baptists. We are simply worshipping as a matter of expediency, the three congregations together. * * * I am an officer of that Community Church. * * * It is served at present by a Presbyterian minister. * * * There was formal action taken by our congregation about affiliating with the Community Church * * * Notice was given to every member and we met and voted as a matter of expediency for a time to go there. No definite time, as long as we saw fit, thinking that sometime we would use our own church building when matters would get so we could. I am not sure anything was said

about that in the resolution; that was the general understanding that we could do that as we saw fit."

The pastor of the Presbyterian Church testified as follows:

"The Baptist congregation and the Christian Church congregation affiliate in holding services with us at this time. * * * We just simply have agreed to worship and work together, keeping our identity. * * * We agreed not to interfere with any denominational creeds or differences, allowing each denomination to carry on just as it saw fit and our community efforts did not interfere with any church observance whatsoever. * * * The individuals contribute to the Community Church, and all the benevolences of the denominations are handled separately by the denomination. * * * The official board of the Community Church is made up of the officers of the three denominations. * * * We have no written constitution or articles of confederation. No writings. We just have agreed to worship together and work together as Christian brothers, and we agreed that anybody who is a member of the three denominations represented is a member of the Community Church, provided he so desires to be, and if anybody coming into the federation, if they desire to come in through either one of the three denominations represented, very well, that has been the agreement so far."

On the 1st day of July, 1921, the defendants leased the church building to the trustees of the high school district for a term of one year, reserving the right to use the building "for religious or other purposes upon Sundays and holidays, when same is not in use by the lessee, and during one night of each week of the said term." The lessee went into possession of the premises under the lease and used the same for high school purposes, and the premises were being so occupied and used at the time of the trial, which commenced October 4, 1923. The defendants have also leased the parsonage to a tenant who is not a minister. Defendant Crystal testified:

"On account of crowded condition of the schools we have let the church building for school purposes. No alterations made in it but the seats were removed. They are still in a part of the basement. * * * The parsonage has been rented and rent collected for it, \$15 to \$20 per month or something like that. The church building was rented for a like sum. The money has been put in the church treasury. We pay our taxes out of it and insurance and other things, upkeep and repairs."

The membership record of the minority group originally contained the names of 29 members. Four members were thereafter received into the congregation of that group; 2 members died and 5 moved to other localities, leaving a net membership of 26 at the time of the trial. May 12, 1922, the minority group organized the plaintiff corporation. June 24, 1922, the pastor thereof was directed by the plaintiff trustees to consult an attorney "about the recovery of the church property." The record does not show when the original

complaint was filed herein, but the second amended complaint was filed December 12, 1922.

[1, 2] In *Watson v. Jones*, 13 Wall, 679, 20 L. Ed. 666, it is said:

"When the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority, * * * with no other specific trust attached to it in the hands of the church than that it is for the use of that congregation as a religious society," in the case of a "schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations. If the principle of government in such cases is that the majority rules, then the numerical majority of members must control the right to the use of the property. If there be within the congregation officers in whom are vested the powers of such control, then those who adhere to the acknowledged organism by which the body is governed are entitled to the use of the property. The minority in choosing to separate themselves into a distinct body, and refusing to recognize the authority of the governing body, can claim no rights in the property from the fact that they had once been members of the church or congregation. This ruling admits of no inquiry into the existing religious opinions of those who comprise the legal or regular organization; for, if such was permitted, a very small minority, without any officers of the church among them, might be found to be the only faithful supporters of the religious dogmas of the founders of the church. There being no such trust imposed upon the property when purchased or given, the court will not imply one for the purpose of expelling from its use those who by regular succession and order constitute the church, because they may have changed in some respect their views of religious truth."

[3] In *Horsman v. Allen*, 129 Cal. 131, 135, 61 P. 796, 797, it is said:

"The radical division of the church * * * had its origin in the secession of a small minority from the general conference—"The highest legislative and judicial body * * * in the church." In such a case the seceding body must, in general, be regarded as abandoning the church; nor is there any exception to this rule unless in the case of a usurpation of power in the governing body so revolutionary in its character as to result either in the creation of a new and essentially different organization, or in such a radical change of the articles of faith as to constitute an essentially different religion from that previously followed by the church."

The court referred to *Watson v. Jones*, supra, "as the leading case, and as such conclusive, upon the question."

[4] Since the local congregation involved in this case is supreme in governmental authority, the principles stated in the case last cited are controlling. Appellants rely upon the case of *Christian Church v. Church of Christ*, 219 Ill. 503, 76 N. E. 703, where it is said:

"When the members of a religious congregation divide and one faction breaks away from the congregation and forms a new organization, the title to the property of the congregation will remain in that part of the congregation which adheres to the tenets and doctrines originally taught by the congregation to whose use the property was originally dedicated."

The rule thus announced in no manner helps the appellants' case, because when they seceded from the congregation and refused to recognize its authority, both factions were adhering to "the tenets and doctrines originally taught by the congregation," and the old congregation continued to adhere strictly to such tenets and doctrines for at least six months thereafter. The separation of plaintiffs from the original congregation was as complete as if it had existed for many years, and it must be held that by such voluntary separation they abandoned, not only the congregation, but also any right which they theretofore had to the control or use of the property. *Committee of Missions v. Pacific Synod*, 157 Cal. 105, 127, 106 P. 395. They separated into a distinct body and refused to recognize the authority of the original congregation, not by reason of any change in doctrinal beliefs or practices on the part of the congregation, but because the congregation decided, by a majority vote of the entire membership, to discharge the pastor and "not to call a minister immediately, but until such time as a suitable one could be procured." They immediately ceased to attend the religious services thereafter regularly conducted during the succeeding six months by the old congregation at the usual place of worship and organized themselves into a separate congregation, having its own officers and pastor, and thenceforth regularly conducted religious services apart from the original congregation, and at a different place of worship. By their own voluntary acts they became as distinctly a separate congregation as if they had never been connected with the original congregation.

[5] The rights of the parties must be determined, therefore, upon principles which would apply if the two congregations had been separate and independent of each other from the beginning and the congregation represented by defendants had acquired the property for its own religious uses, without any assistance from the plaintiffs. If the plaintiffs have any standing to maintain this action it must be based upon some fact other than that their members were once members of the congregation represented by the defendants. If the members of the plaintiff organization had retained their membership in the original congregation, and thereby their interest in the property, they would now be in a position to insist, even though in the minority, that the property be devoted to the use for which it was acquired. Such a case was under consideration by the court in *Baker v. Ducker*, 79 Cal. 365, 374, 21 P. 764, 765, where it is said:

"The property in question was held by the Reformed Church in trust for its members, and the defendants, even though they constitute a majority of the members, had no right and no power to divert it to the use of another and different church organization."

No case has been cited or discovered, however, which holds that, where two independent and self-governing congregations of the same religious faith exist in the same community, one of the congregations can, by legal action, acquire the property of the other on the ground that such other congregation is not using the property for the purposes for which it was acquired. If such an action can ever be maintained, it must be based upon acts or omissions more radical and revolutionary in character than those shown by the evidence in this case.

[6] The defendants have not abandoned the property or permanently devoted it to uses other than those for which it was acquired. They certainly were not required to leave the property unoccupied during the time they were unable to use it for religious purposes. Where a small congregation separates into two smaller congregations, it is not unusual for them to experience financial difficulties in maintaining regular church services and activities. Appellants say that the minority group "represented the bulk of the working, active part of the congregation and those who were supporting the church financially." This may account for some of the difficulties which the majority experienced in maintaining themselves as an independent congregation. Under all the circumstances it cannot be said that the facts are such as to require a finding to the effect that the members of the majority group have forfeited their right to the use of the property by leasing it temporarily for other than religious uses and "as a matter of expediency for a time" uniting with the Presbyterians and the Baptists for the purposes of religious worship.

[7] The name "Community Church" does not signify a religious association which has distinctive doctrines and beliefs, but rather a federation of two or more churches, all retaining their separate identity and their distinctive doctrines. Such federations are not uncommon. It certainly cannot be held as a matter of law that, by temporarily becoming a member of such a federation, a congregation necessarily loses its original identity and forfeits its right to the use of its property, in the absence of any ecclesiastical law or regulation on the subject, especially where the federation is formed with the express understanding that each congregation shall retain its own identity as a separate organization.

Appellants rely upon certain cases involving the carrying out of the terms of express trusts created by the donors of property. Those cases are not applicable to the questions here involved. The distinction between

the two classes of cases is clearly pointed out in *Watson v. Jones*, supra, and *Committee of Missions v. Pacific Synod*, supra, and need not be repeated here.

The judgment is affirmed.

We concur: HART, J., PLUMMER, J.

77 Cal. App. 766

PALMER et al. v. EMANUEL et al. (SHANNON, Intervener). (Civ. 5524.)

(District Court of Appeal, First District, Division 2, California. May 6, 1926. Hearing Denied by Supreme Court July 2, 1926.)

1. Corporations ⇐121(5).

In action for installments of purchase price of corporate stock sold to defendant under contract providing that payment should be due on payment of certain outstanding mortgages, evidence that mortgages were given in renewal held to support finding that original mortgages were not paid.

2. Payment ⇐67(1).

Burden of showing express agreement that note was in payment of debt rests on party relying on it.

3. Corporations ⇐118.

Payments under contract of sale of corporate stock to become due after payment of mortgages on property held not to become due on giving of renewal mortgages.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by E. J. Palmer and another against M. Emanuel and another, wherein Jennie L. Shannon intervened. From the judgment, plaintiffs appeal. Affirmed.

See, also, 247 P. 611.

T. John Butler and W. W. Watson, both of San Francisco, for appellants.

John J. Goldberg and David L. Livingston, both of San Francisco, for respondent Emanuel.

A. M. Marks and J. M. Thomas, both of San Francisco, for respondent R. T. Shannon.

E. J. Talbott, of San Francisco, for intervener J. L. Shannon.

STURTEVANT, J. Some time prior to 1913 the Ellis Landing & Dock Company was organized as a corporation, having 1,000 shares of the par value of \$500 each. On June 26, 1914, the corporation was indebted to George E. Ellis and Selina Ellis in the sum of \$150,000, evidenced by a promissory note and secured by a mortgage on lands at Richmond, Contra Costa county; said indebtedness being a part of the purchase price. The corporation was also indebted to Louis Saroni in the sum of \$100,000, evidenced by

a promissory note secured by a second mortgage. On June 26, 1914, E. J. Palmer, Daniel Corcoran, and R. T. Shannon were the owners of 499 shares of the capital stock of the Ellis Landing & Dock Company and each owned an undivided one-third interest. At the same time M. Emanuel owned 499 shares and two shares stood in the name of N. A. Eisner for the purpose of qualifying him to act as a director. On the date last mentioned E. J. Palmer, Daniel Corcoran, and R. T. Shannon, as vendors, entered into an executory contract to sell to the defendant M. Emanuel their stock. The contract provided for numerous partial payments. On the 20th day of November, 1918, E. J. Palmer and Daniel Corcoran commenced this action against M. Emanuel to recover certain installments, to wit, installments alleged as becoming due between October 1, 1916, and November 20, 1918, and which the plaintiffs alleged had not been paid. As R. T. Shannon refused to join the plaintiffs they made him a defendant. On the 9th day of August, 1920, the plaintiffs filed a supplemental complaint. The defendants answered separately. The record shows that other persons intervened, but no questions regarding the rights of such persons are involved on this appeal, and for the purpose of keeping the record clear no further mention of them will be made.

On October 26, 1920, the action came on for trial before the trial court sitting without a jury. During the trial it transpired that the defendants Shannon and Emanuel had so settled their own differences that the ratable amount payable to Shannon under the executory contract had been paid. The defendant Shannon, therefore, is not interested in this appeal.

In its judgment the trial court awarded to the plaintiffs all relief asked by them excepting an installment of \$18,800. As to that installment the court ruled against the plaintiffs and in favor of the defendant M. Emanuel and made findings accordingly. All rulings and findings made on the specific subject of the allowance or disallowance of plaintiffs' claim to be entitled to judgment for the said \$18,800 are presented on this appeal, but no other question.

The passage in the executory contract of purchase which is the subject of this controversy, is recited by the trial court in the second finding, as follows:

"That on or about June 26, 1914, plaintiffs and defendant R. T. Shannon on the one part made and entered into an agreement in writing with defendant M. Emanuel wherein and whereby plaintiffs and defendant R. T. Shannon sold to defendant M. Emanuel, and defendant M. Emanuel bought from plaintiffs and defendant R. T. Shannon four hundred ninety-nine (499) shares of the capital stock of the Ellis Landing & Dock Company, a corporation, for the consideration of forty thousand dollars (\$40,000.00),

and that it was provided in said agreement that defendant M. Emanuel should pay the said purchase price of forty thousand dollars (\$40,000.00) as follows: * * * And the balance of said purchase price in the sum of eighteen thousand eight hundred dollars (\$18,800.00) within six (6) months after the indebtedness of one hundred fifty thousand dollars (\$150,000.00) and interest due to George E. Ellis and Selina E. Ellis on the first mortgage held by George E. Ellis and Selina E. Ellis against the real property of the Ellis Landing & Dock Company, and the indebtedness of one hundred thousand dollars (\$100,000.00) and interest due to Louis Saroni on the second mortgage held by said Louis Saroni against the real property of said the Ellis Landing & Dock Company, and all additional sums of money loaned said corporation by said Louis Saroni shall have been fully paid, satisfied, discharged and released. * * *

The eighth finding is as follows:

"It is provided in paragraph VIII of said agreement that in addition to the installment payments to be made by defendant M. Emanuel to parties of the first part aggregating the sum of twenty-one thousand two hundred dollars (\$21,200.00), defendant M. Emanuel should pay to said parties of the first part the sum of eighteen thousand eight hundred dollars (\$18,800.00) within six (6) months after the indebtedness of one hundred fifty thousand dollars (\$150,000.00) and interest due to George E. Ellis and Selina E. Ellis on the first mortgage held by said George E. Ellis and Selina E. Ellis against the real property of said corporation, the The Ellis Landing & Dock Company, and the indebtedness of one hundred thousand dollars (\$100,000.00) and interest due to Louis Saroni on the second mortgage held by said Saroni against the real property of said corporation, the The Ellis Landing & Dock Company, and all additional sums of money loaned said corporation by said Louis Saroni shall have been fully paid, satisfied, discharged and released; *said indebtednesses in this paragraph set forth have not been paid and the condition upon which the right of the parties of the first part to said eighteen thousand eight hundred dollars (\$18,800.00) shall accrue has not yet occurred.*"

The court further found that the \$18,800 had not been paid.

The appellants' case presents the question as to whether that portion of finding VIII which we have italicized is sustained by the evidence.

[1] The mortgage by the Ellis Landing & Dock Company to George E. Ellis and Selina E. Ellis for \$150,000 was executed December 4, 1913. A release reciting that said mortgage, "together with the debt thereby secured is fully paid, satisfied and discharged," was recorded February 26, 1920, at 50 minutes past 11 o'clock a. m. The mortgage of \$100,000 to Louis Saroni was executed on the 5th day of December, 1913. A release reciting that said mortgage, "together with the debt thereby secured, is fully paid, satisfied and discharged," was recorded December 3,

1919, at 2 minutes past 4 o'clock p. m. The record shows that a mortgage for \$140,000 executed by the Ellis Landing & Dock Company to Selina E. Ellis individually and as executrix of the last will of George E. Ellis, was recorded February 26, 1920, at 48 minutes past 11 o'clock a. m. It also shows that a mortgage by the same company in favor of Louis Saroni to secure a promissory note of \$29,700 was recorded February 26, 1920, at 52 minutes past 11 o'clock a. m. At the time of the trial of the case George E. Ellis was dead. Selina E. Ellis was not called as a witness. Louis Saroni was called as a witness, and testified that the mortgage executed to him in 1920 was a substitute for the mortgage executed to him in 1913 and that nothing was said and no agreement was had between the parties to the effect that the second mortgage was taken in payment of the first mortgage. M. Emanuel was called as a witness and gave the same testimony regarding the second mortgage executed to Saroni. He also testified that the second mortgage given to Selina E. Ellis was given as a substitute for the old mortgage and that nothing was said by the parties to the effect that the second mortgage was taken in payment of the earlier mortgage. No witness testified that the second mortgage to Selina E. Ellis or the second mortgage to Saroni was given in absolute payment of the prior mortgage. There was no evidence that the old notes or the mortgages executed to secure them were delivered or surrendered to the makers.

[2, 3] In *Comptoir D'Escompte v. Dresbach*, 78 Cal. 15, at page 20, 20 P. 28, 30, the court said:

"It has been repeatedly held by this court that the acceptance of a note for a debt does not discharge the debt unless expressly agreed to be payment; that in such case the right of action on the debt is suspended until the maturity of the note given, and suit may be brought on the original debt in case of the non-payment of the accepted note."

The burden of showing that an express agreement has been made rests on the party relying on it, and the presumption is that the later notes were not taken in absolute payment. *Bridge v. Connecticut Mut. Life Ins. Co.*, 167 Cal. 774, 781, 141 P. 375. A receipt in full does not prove the existence of the agreement. *Comptoir D'Escompte v. Dresbach*, supra. Neither does a formal release. *Tolman v. Smith*, 85 Cal. 280, 290, 24 P. 743. Nor that the note was marked canceled. *Steinhart v. National Bank*, 94 Cal. 362, 367, 29 P. 717, 23 Am. St. Rep. 132. The foregoing rules were applied to a debt secured by mortgage. *Van Sandt v. Alvis*, 109 Cal. 165, 41 P. 1014, 50 Am. St. Rep. 25. In *White v. Stevenson*, 144 Cal. 104, at page 108, 77 P. 828, 830, the court said:

"The acceptance by the plaintiff of the note and mortgage of 1895 as a renewal of the note and mortgage of 1890, or in substitution there-

for, did not of itself operate as an extinguishment or discharge of the latter. One executory agreement is not extinguished by the execution of another between the same parties; nor is a security for an obligation merged in another security of the same degree which is accepted for the same obligation. It is a well-settled rule that, in the absence of an agreement to that effect, a promissory note is not paid by the execution of another note, but that the time for its payment is thereby merely suspended until the maturity of the new note."

Miguel v. Miguel, 184 Cal. 311, 193 P. 935, is a parallel case. Commencing on page 313 (193 P. 936) the court said:

"The finding of the court, which was in effect that payment was not to be made to the plaintiff until the defendant had been able to remove the burden of the partnership debt which he assumed, is sustained by both the considerations mentioned. The manifest object of the arrangement was to give the defendant time to work out the two obligations, the one to Silva and the one to the plaintiff, by making the latter not payable until the first had been paid. The case was one of a sale of an interest in a business which was in debt. It was a very natural understanding that the purchase price of the interest should not be payable until the debt to which the interest was subject had been worked out. This object would not be accomplished if the purchase price should become payable upon the substitution merely of another as the creditor of the defendant on his obligation to Silva. The essence of the purpose of the understanding must have been that the burden of that debt should be removed from the defendant before he was required to pay the plaintiff."

In view of the foregoing authorities it is quite clear that the findings of the trial court in the instant case were supported by the evidence and that the findings support the judgment.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

77 Cal. App. 772

PALMER et al. v. EMANUEL et al. (SHANNON, Intervener). (Civ. 5596.)

(District Court of Appeal, First District, Division 2, California. May 6, 1926. Hearing Denied by Supreme Court July 2, 1926.)

1. Pleading $\hookrightarrow$ 354(2)—If answer was sufficient to sustain any one of theories of defense, motion to strike out should have been denied.

If answer in action for purchase price of stock was sufficient to sustain any one of defenses that plaintiffs' right to recover was conditional on their performance of conditions subsequent, or that, on plaintiffs' breach, defendant was entitled to liquidated damages, or entitled to prove and recover actual damages, motion to strike out should have been denied.

2. Pleading $\hookrightarrow$ 355—Pleading, alleging breach of covenant not to assign contract, held improperly stricken out (Code Civ. Proc. $\S$ 453).

Pleading, alleging breach of agreement not to assign contract, held improperly stricken out, under Code Civ. Proc. $\S$ 453, authorizing striking out of sham and irrelevant answers and irrelevant and redundant matter.

3. Pleading $\hookrightarrow$ 364(1).

Part of answer setting up contract providing that sellers should do nothing to damage or injure property after sale, separable, under Civ. Code, $\S$ 1599, from other illegal portions, held improperly stricken out as sham, or irrelevant or redundant matter, in defense to action for balance of purchase price.

4. Pleading $\hookrightarrow$ 373.

It is not necessary to offer to prove allegations which have been stricken out.

5. Pleading $\hookrightarrow$ 355.

Motion to strike is not proper remedy, where provisions of contract were overpleaded by defendant.

6. Contracts $\hookrightarrow$ 137(1).

Under Civ. Code, $\S$ 1599, as to partial invalidity, courts have jurisdiction, where no valid contract on subject was executed by parties.

7. Corporations $\hookrightarrow$ 121(1)—Where vendors of corporate stock all received part of consideration, violation by one of them of covenants of contract gives right of action against all (Civ. Code, $\S$ 1659).

Under Civ. Code, $\S$ 1659, providing that promise from which all parties received some benefit is joint and several, where each of vendors of corporate stock received part of consideration, a violation of covenant by any one of them gives right of action against all.

Appeal from Superior Court, City and County of San Francisco, George H. Cabaniss, Judge.

Action by E. J. Palmer and another against M. Emanuel and another, wherein Jennie L. Shannon intervened. From the judgment, the defendant named appeals. Reversed.

See, also, 247 P. 609.

John J. Goldberg and David L. Livingston, both of San Francisco, for appellant.

T. John Butler and W. W. Watson, both of San Francisco, for respondents Palmer and Corcoran.

A. M. Marks and J. M. Thomas, both of San Francisco, for respondent R. T. Shannon.

E. J. Talbott, of San Francisco, for intervener J. L. Shannon.

STURTEVANT, J. Plaintiffs commenced an action to recover moneys alleged to be due under the terms of an executory contract for the sale of shares of stock in a corporation. Attacks on some of defendant's pleadings were sustained. Later the defendant

filed a second amended answer, and still later, with the consent of the court, he filed amendments thereto. The plaintiffs again demurred to the defendant's answer as amended and again interposed a motion to strike out parts thereof. The trial court overruled the demurrer and granted the motion to strike out. Thereafter the action went to trial and judgment was rendered in favor of the plaintiffs and against the defendant for a part of the relief prayed for by the plaintiffs. From so much of the judgment as was rendered in favor of the plaintiffs the defendant has appealed and has brought up bills of exception. In support of his appeal the appellant contends that the order striking out had the result of preventing the appellant from presenting any affirmative defense in the trial court. As the cause went to trial on the plaintiffs' complaint and supplemental complaint and the second amended answer, out of which parts had been stricken by virtue of the order hereinabove last mentioned, it is unnecessary to consider the order striking out parts of the original answer. There was a complaint in intervention, answer thereto, motion to strike out, order granted, etc., but as no affirmative relief was granted to the intervener against the appellant there is no necessity of passing on that ruling in any further detail than to state that in all respects the pleadings were the same and that this decision applies equally to the order striking out parts of appellant's answer to the complaint in intervention.

Prior to the 26th day of June, 1914, the Ellis Landing & Dock Company, a corporation, was engaged in subdividing, platting, and selling a tract of land located near Richmond, in Contra Costa county. The capital stock had all been issued. Of the total of 1,000 shares the appellant owned 499 shares, and E. J. Palmer, Daniel Corcoran, and R. T. Shannon owned 499 shares; each having an undivided one-third interest therein. On the said 26th day of June, 1914, the parties entered into an executory contract in writing, under the terms of which E. J. Palmer, Daniel Corcoran, and R. T. Shannon sold to the appellant, M. Emanuel, their 499 shares of stock for the sum of \$40,000, without interest. The purchase price was payable \$2,164.50 cash, the surrender by appellant of a promissory note held by him against one of the vendors, Palmer; the balance due thereon being \$2,835.50; and the remaining amount being payable in installments. The appellant made payments down to and including the month of October, 1916, and then refused to make further payments. In their complaint and supplemental complaint the plaintiffs claimed to be entitled to judgment in the sum of all the remaining payments. The trial court refused to give them judgment for \$18,800, holding that under the terms of the contract that amount was payable on the happening of a condition and

that said condition had not yet occurred. That portion of the judgment was appealed from by the plaintiffs and has been affirmed in the case entitled Palmer v. Emanuel, No. 5524, this day filed. However, the trial court awarded judgment in favor of the plaintiffs for all of the remaining installments, together with interest, and it is of that ruling the appellant complains.

In his second amended answer, as amended by amendments subsequently filed, the defendant pleaded the entire contract in *hæc verba*. He also pleaded paragraphs 12, 13, and 16, according to their legal effect. Those paragraphs are as follows:

"(12) And it is further agreed by and between the said parties hereto that none of said parties hereto shall, directly or individually, do, commit, or cause to be done or committed, any act or injury to the detriment of the property or business of the said corporation, the Ellis Landing & Dock Company, or any of its officers or employees or agents, nor commit any act or deed, nor say or do anything detrimental to the character or reputation of any of the parties hereto, and that should the said E. J. Palmer, Daniel Corcoran or R. T. Shannon, or any of them, directly or indirectly do, say, write, print, indite or publish, or cause to be done or published, or in any other way cause damage or injury to the property of said corporation, or defame the character or reputation of the said M. Emanuel, and should they or any of them be found guilty thereof, by P. A. Bergerot, representing said Palmer, Corcoran and Shannon, and Henry H. Davis, representing said M. Emanuel and said corporation, the Ellis Landing & Dock Company, then the said Palmer, Corcoran and Shannon, or any of them, shall lose their and each of their right, title and interest to any part or portion of the unpaid purchase price of said forty thousand dollars (\$40,000) which shall be considered and charged as liquidated damages suffered and sustained by the said corporation the Ellis Landing & Dock Company, or the said M. Emanuel, or both, by reason of such act or acts committed by the said Palmer or Corcoran or Shannon, or any of them; and should the said Bergerot and Davis fail to agree on a finding of guilt or innocence in said matters, then the said Louis Saroni shall be called in as umpire, and his decision shall be a final adjudication of said matter, without any right, power or authority of said Emanuel, Palmer, Corcoran or Shannon, or any of them to resort or appeal to any court or other tribunal for relief of any nature or kind whatsoever from the judgment of the said Bergerot and Davis, or in the event of their failure to agree, then from the judgment of the said umpire, Louis Saroni.

"(13) No part or portion of this agreement or any interest of any of the parties is assignable or transferable, except upon first obtaining the written consent of said Emanuel thereto; it being specially agreed that no assignments or transfers of any interest nor any incumbrance of any interest of said E. J. Palmer, Daniel Corcoran or R. T. Shannon, any or all, can be made or be valid without first obtaining the written consent of said M. Emanuel thereto. * * *

"(16) Should the said E. J. Palmer, Daniel Corcoran or R. T. Shannon, or any or all of them, commit any breach of this agreement on their part or by any of them, then such portion of the unpaid balance of said forty thousand dollars (\$40,000) shall be considered and held by said M. Emanuel as liquidated damages sustained by said Emanuel by reason of such breach of this agreement."

He then pleaded what he claimed to be breaches of the covenants contained in paragraphs 12 and 13. The substance of the pleading may be stated as follows: On the 26th day of June, 1914, the date that the contract was made, the Ellis Landing & Dock Company was engaged in subdividing, platting, and selling a tract of land situated in the city of Richmond, in Contra Costa county. At the same time the Richmond East Shore Realty Company, a corporation, was likewise engaged in the sale of another tract of land located in the same city. The defendant was the president and active business manager of the Ellis Landing & Dock Company. E. J. Palmer, Daniel Corcoran, R. T. Shannon, and Jennie Shannon, his wife, were the sole owners and stockholders of the Richmond East Shore Realty Company and continued as such during the remainder of the existence of that company. That under and by virtue of the provisions of paragraph 12 of the contract the vendors agreed that neither of them should directly or indirectly commit or cause to be done or committed any act or injury to the detriment of the property or the business of the Ellis Landing & Dock Company, or any of its officers, or do anything detrimental to the character of the vendee. It is then pleaded that, notwithstanding the provisions of the contract, the vendors, and each of them, on numerous occasions, both before and after the 1st day of October, 1916, committed many breaches of said covenants. Said breaches were meticulously pleaded by the defendant. Then the defendant pleaded that said breaches damaged him "in a large sum of money in excess of \$50,000, the exact amount of which it is not possible for this defendant to ascertain. * * *" Having so constructed his pleading, the defendant then pleaded facts showing or tending to show that he was entitled to rely on the covenant for liquidated damages; that is, that the plaintiffs had forfeited their right to further payments and that such unpaid payments should be treated as liquidated damages.

The defendant then pleaded another defense to the effect that by the provisions of paragraph 13 of the contract the vendors undertook not to assign. Thereafter he proceeded in the same full and complete manner to plead a breach of said covenant by the vendors on the 16th day of July, 1914. Connected with this second defense the defendant likewise pleaded the provisions of paragraph 16 relative to liquidated damages.

Continuing, the defendant pleaded the provisions contained in paragraph 12 which provide for an arbitration of any breaches of said paragraph 12. In this connection he pleaded the facts showing or tending to show that he had complied, or attempted to comply, with the provisions of the contract providing a procedure for the settlement of disputes between the parties by arbitration.

The motion as made by the plaintiffs, and the order of the trial court striking out, did not extend to all of the new matter set forth in the defendant's pleading. However, it did extend to those portions of the pleading which pleaded paragraphs 12, 13, and 16 of the contract, according to their legal effect, and to all allegations of the breaches of said paragraphs and to all of the allegations of the defendant regarding his acts looking toward an arbitration.

At this time the appellant concedes that the provision for arbitration as contained in the contract is unenforceable. The respondents contend that such provisions are void and unenforceable. It is therefore unnecessary for us to further consider the ruling striking out those passages dealing solely with the subject of arbitration.

[1] Regarding the other portions stricken out, the appellant contends that he was entitled to defend and present all of the facts, and to ask for relief on any one of three different theories: First, that the right of the plaintiffs to recover any payments was a right conditional on their performance of the conditions subsequent; second, if plaintiffs breached their contract, that the defendant was, under the terms of the contract, entitled to liquidated damages as provided in the contract; third, that, if the plaintiffs breached their contract, then the defendant was entitled to prove and recover such actual damages as he was able to prove. As the appeal presents a ruling on a motion to strike out, it is not necessary for us to consider each of the foregoing theories. If his pleading was sufficient to sustain any one of those theories, then the motion to strike out should have been denied and the judgment should be reversed.

[2] Taking up first the alleged breach of the covenant not to assign, we find no frailty in the pleading on its face. The power to strike out extends to sham and irrelevant answers and irrelevant and redundant matter. Code Civ. Proc. § 453. The respondents in their brief have given no reasons showing that such defense fell within any one of the categories designated in the Code section. The defense should have been allowed to stand and a hearing should have been had on the merits thereof.

[3] Passing to the other defense regarding the alleged breaches of the provisions of paragraph 12 of the contract, we find a similar condition. Commencing with the begin-

ning of paragraph 12 of the contract and ending with the words "character or reputation of the said M. Emanuel," in about the middle of said paragraph, the respondents do not claim that any part or portion is illegal for any reason. Commencing with the words immediately following, "and should they or any of them be found guilty thereof by P. A. Bergerot," etc., down to the end of the paragraph, it may be conceded, as both parties contended, that the provisions regarding arbitration are illegal. We may further assume, for the purposes of this decision, and solely for such purposes, that the provisions regarding liquidated damages are also illegal. In that event the latter portion of paragraph 12 will all be treated as illegal. However, as the first portion above mentioned is entirely legal and separable from the rest of the paragraph, it was enforceable. Civ. Code, § 1599; 6 Cal. Jur. p. 149. We see no reason why the defense, founded thereon and claiming actual damages, may properly be said to be sham, or irrelevant or redundant matter.

[4, 5] The respondents contend that the part stricken cannot be identified. It is quoted in the order in *hæc verba* and there is no difficulty about identifying it. On the trial of the case, through an abundance of precaution, the appellant offered to prove the allegations which had been stricken out. He was under no duty to make that offer, and whether his offer was sufficient or insufficient need not be discussed. The respondents claim that the defendant overpleaded the provisions of the contract. It will suffice to state that a motion to strike was not the proper remedy if respondents were attempting to make any such contention. Regarding the contention of respondents that paragraph 12 contained provisions that were void, we have indicated our views above and we need not again take up those contentions of the respondents.

[6] Respondents make the further point that, if any court should find that the respondents have been guilty of violating the covenants contained in paragraph 12 and fix the damage therefor, such court would be making a new contract for the parties. When the Legislature enacted section 1599 of the Civil Code, it certainly did not think that it was conferring power on the courts to make contracts, but it undoubtedly thought it was providing that under certain circumstances the courts might proceed to exercise a jurisdiction that would exist where there was no valid contract on the subject executed by the parties.

[7] Taking up paragraph 12 item by item, the respondents contend that, if one of the vendors violated the covenants of the paragraph, the defendant's right of action would be against the guilty person only. But, under the uncontroverted facts, each of the

vendors received a part of the consideration. Furthermore, the language of the covenants contained in paragraph 12 is clearly the language of joint and several promises. Moreover:

"Where all the parties who unite in a promise receive some benefit from the consideration, * * * their promise is presumed to be joint and several." Civ. Code, § 1659.

The respondents earnestly contend that the latter part of paragraph 12 attempts to preclude the vendees from giving testimony in court; that it also attempts to suppress evidence; and that it attempts to oust the courts of their jurisdiction, and is therefore void. Thereupon they proceed to contend that because of the invalidity of a part of the paragraph the defendant Emanuel should be, by the judgment of the courts, prevented from giving testimony in court; that the evidence of his witnesses should be suppressed; and that the courts should be ousted of their jurisdiction to hear the defense of the defendant. To state the contention is to answer it.

So much of the judgment as was appealed from is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

77 Cal. App. 627

NICHOLS v. SUNDERLAND, Com'r of Public Safety and Welfare, et al. (Civ. 5637.)

(District Court of Appeal, First District, Division 2, California. April 29, 1926. Hearing Denied by Supreme Court June 28, 1926.)

1. Municipal corporations $\S$ 185(3)—Writing stating detective was dismissed, with note that person dismissed might demand hearing on dismissal, held not void as absolute "dismissal" (National Prohibition Act [U. S. Comp. St. Ann. Supp. 1923, § 10138¼ et seq.]).

Writing giving the reasons for removing detective sergeant under civil service, stating he was dismissed because indicted for conspiracy to violate National Prohibition Act (U. S. Comp. St. Ann. Supp. 1923, § 10138¼ et seq.), with note that person dismissed might answer and demand hearing on dismissal, held not void because absolute dismissal beyond authority of dismissing officer; "dismissal" being used to mean temporary removal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dismissal.]

2. Municipal corporations $\S$ 218(2)—Ordinance authorizing appointing officer to "dismiss" civil service employee held not broader than charter, in authorizing absolute discharge without opportunity for hearing.

Ordinance authorizing appointing officer to "dismiss" civil service employee, and providing for notice and hearing, held not unreasonable as broader than charter in authorizing absolute discharge without notice and opportunity for

hearing; "dismiss" being used to mean removal temporary or permanent in harmony with context.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dismiss.]

3. Municipal corporations ⇨218(2).

Ordinance under Fresno City Charter, art. 3, §§ 19, 22, as to removal of civil service employees, *held* to authorize (1) permanent removal, (2) suspension for disciplinary purposes, (3) suspension to promote efficiency of service.

4. Municipal corporations ⇨185(7)—Writing giving reasons for removal of detective held sufficient without stating acts of malfeasance or nonfeasance (Fresno City Charter [St. 1921, p. 1832, art. 3, § 22]).

Writing stating reasons for removal of detective sergeant under city civil service *held* not to need to state acts of malfeasance or nonfeasance, viewing the writing as made to promote the efficiency of the service under Fresno City Charter, art. 3, § 22.

5. Municipal corporations ⇨185(7)—Failure of writing, giving reasons for removal of detective, to state acts of malfeasance or nonfeasance, held not fatal, where amendment designated specific charges (Fresno City Charter [St. 1921, p. 1832, art. 3, § 22]).

Failure of writing, giving reasons for removal of detective sergeant under civil service, to state acts of malfeasance or nonfeasance, *held* not fatal under Fresno City Charter, art. 3, § 22, where subsequent amendment designated specific charges.

6. Municipal corporations ⇨185(7)—Writing stating reasons for removal of detective held amendable (Fresno City Charter [St. 1921, p. 1832, art. 3, § 22]).

Writing stating reasons for removal of detective sergeant *held* to be capable of amendment, in view of Fresno City Charter, art. 3, § 22, providing that Civil Service Board is not bound by technical rules of pleading.

7. Municipal corporations ⇨218(8).

Amendment to writing, stating reasons for removal of civil service employee, not changing cause of action, relates back to date of filing original writing.

8. Municipal corporations ⇨218(8).

If amendment to writing, stating reasons for removal of civil service employee introduces new cause of action, it relates back to date of filing amendment.

9. Municipal corporations ⇨185(7)—Where writing stated indictment as reason for dismissal of detective, amendment adding inefficiency and bribery may not be assumed to state new cause (National Prohibition Act [U. S. Comp. St. Ann. Supp. 1923, § 10138¼ et seq.]).

Where writing stated, as reason for removal of detective sergeant under civil service, indictment for conspiracy to violate National Prohibition Act (U. S. Comp. St. Ann. Supp. 1923, § 10138¼ et seq.), amendment stating as reasons the indictment, incompetency, inefficiency, and accepting bribes from persons known

to employee to be unlawfully selling intoxicating liquors, may not be assumed to state a new cause of action.

10. Municipal corporations ⇨185(7)—Writing stating indictment as reasons for dismissing detective held not so defective as being incapable of amendment (Fresno City Charter [St. 1921, p. 1832, art. 3, § 22]; National Prohibition Act [U. S. Comp. St. Ann. Supp. 1923, § 10138¼ et seq.]).

Writing stating reasons for dismissing detective sergeant, stating that, having been indicted for conspiracy to violate National Prohibition Act (U. S. Comp. St. Ann. Supp. 1923, § 10138¼ et seq.), "for the good of the service, and in harmony with the civil service rules, you are * * * dismissed," *held* not so defective as to be incapable of amendment under Fresno City Charter, art. 3, § 22.

11. Pleading ⇨229.

Court should allow amendment to pleading if it does not change entire gravamen of pleading.

12. Municipal corporations ⇨218(8).

Civil service board, under Fresno City Charter (St. 1921, p. 1832) art. 3, § 22, should allow amendment to writing, stating reasons for removal of employee, if it does not change entire gravamen.

13. Municipal corporations ⇨218(9).

Unless charges under Fresno City Charter (St. 1921, p. 1832) art. 3, § 22, against civil service employee are so defective as to be void, sufficiency may not be raised in court for first time.

14. Municipal corporations ⇨185(7)—Writing giving reasons for removing detective, stating he was removed because indicted for felony, and amendment stating inefficiency and bribery, held not void (Fresno City Charter [St. 1921, p. 1832, art. 3, § 22]).

Writing giving reasons for removing detective sergeant stating that he was removed because of indictment for felony and amendment stating also incompetency, inefficiency, and accepting bribes and money from persons unlawfully selling intoxicating liquors, *held* not so defective as to be void and as not to give civil service board jurisdiction under Fresno City Charter, art. 3, § 22.

15. Municipal corporations ⇨185(12).

Where civil service board has jurisdiction over removal of employee for cause, all questions of fact *held* for its determination under Fresno City Charter (St. 1921, p. 1832) art. 3, § 22.

16. Municipal corporations ⇨186(4)—Detective suspended more than 30 days in removal proceedings held not entitled to salary (Fresno City Charter [St. 1921, p. 1832, art. 3, § 22]).

That detective sergeant was suspended for more than 30 days in removal proceedings under civil service rules did not entitle him to salary since suspension in removal proceedings was without limit in time under Fresno City Charter.

ter, art. 3, § 22, especially where employee caused delay beyond 30 days.

17. Municipal corporations **§ 218(9)**—Questions other than sufficiency of writing, stating reasons for removal, must be addressed first to civil service board (Fresno City Charter [St. 1921, p. 1832] art. 3, § 22).

All questions other than sufficiency of writing, stating reasons for removing civil service employee to initiate proceedings for his removal, must be addressed in first instance to civil service board under Fresno City Charter, art. 3, § 22.

Application by E. A. Nichols for writ of mandate to be directed to A. E. Sunderland, as Commissioner of Public Safety and Welfare of the City of Fresno, and another, requiring and directing them to pay petitioner's salary as police officer. Writ denied.

B. W. Gearhart and Lindsay & Gearhart, all of Fresno, for petitioner.

Loren A. Butts, City Atty., of Fresno, for respondents.

STURTEVANT, J. The petitioner was a police officer of the city of Fresno. On or about the 7th day of November, 1925, the petitioner, together with eleven other police officers of the city of Fresno, was indicted by the federal grand jury, charged with the crime of conspiracy to violate the National Prohibition Act (U. S. Comp. St. Ann. Supp. 1923, § 10138½ et seq.). On November 9, 1925, the respondent A. E. Sunderland, commissioner of public welfare and head of the police department, delivered to the petitioner a writing in words and figures as follows, to wit:

"Civil Service Board, City of Fresno, California.

"Dismissal.

"Date, November 9, 1925, 11:00 a. m.

"Mr. E. A. Nichols, Detective Sergeant, 2659 White Ave., Fresno, Calif.: For the reasons stated below, you are hereby dismissed from the position of detective sergeant in the department of police, effective immediately. Reasons for dismissal: Having been indicted by the federal grand jury charging you with a felony, to wit, conspiracy to violate the National Prohibition Enforcement Act; therefore, for the good of the service, and in harmony with the civil service rules, you are hereby dismissed as an employee of the Fresno police department, effective immediately.

"You will please deliver to the officer in charge at police headquarters, of the city of Fresno, all property of the said city now in your possession, and oblige.

"A. E. Sunderland, Head of Department.

"Note: Any person dismissed from the service may file a written answer and demand a hearing before the civil service board, providing such answer or demand is filed with the board within five (5) days after the serving of the notice of such dismissal. See rule XI, Ord. 972."

Since that date the petitioner has not been recognized by said respondent nor assigned to any duty whatsoever. Thereafter, on the 12th day of November, 1925, the petitioner served on said respondent a written answer, demanding a hearing, and thereupon both writings were delivered to the civil service commission of Fresno. The matter was set for hearing, and before the day appointed for the hearing the petitioner requested in writing that the matter be continued indefinitely by the civil service board. The request was granted. After petitioner's trial in the federal court was concluded about February 1, 1926, said respondent filed and served on the petitioner a writing in words and figures as follows:

"Civil Service Board, City of Fresno, California.

"Amended Notice of Dismissal.

"Date, February 1, 1926.

"Mr. E. A. Nichols, Detective Sergeant, 2659 White Ave. Fresno, Calif.: You are hereby notified that the notice of your dismissal as a member of the police department of the city of Fresno, effective November 9, 1925, a copy of which has been heretofore furnished you, is hereby amended to read as follows:

"Having been indicted by the federal grand jury, charging you with a felony, to wit, conspiracy to violate the National Prohibition Act, and in addition thereto, during the last two years, you, as a police officer of the city of Fresno, have performed your duties in an incompetent and inefficient manner, and in addition thereto you have accepted bribes and money from persons known to you at the time to be engaged in the business of selling intoxicating liquors unlawfully, all of which was and is a violation of your oath of office as such police officer of the city of Fresno.

"In harmony with the civil service rules, and to promote efficiency of the public service, you were dismissed as a member of the police department and as an employee of the city of Fresno.

"A. E. Sunderland, Head of Department."

"Note: Any person dismissed from the service may file a written answer and demand a hearing before the civil service board, providing such answer or demand is filed with the board within five (5) days after the serving of the notice of such dismissal. See rule XI, Ord. 972."

Within five days thereafter the petitioner filed an answer thereto. The matter was set for hearing, but was continued for the reason that an action had been filed in the superior court of the county of Fresno by one Oliver P. Durr, who sought to permanently enjoin the civil service commission from taking any further step or proceeding in the matter of hearing said charges, which charges were identical with those in the above-entitled action now under consideration, and, pending the hearing of that action in the superior court, the civil service board was temporarily restrained from proceeding in the

matter. Immediately after the termination of that action in the superior court, the petitioner applied to this court for a writ of mandate directed to the respondent A. E. Sunderland, as head of the police department of the city of Fresno, and directed to William Glass, as commissioner of finance of said city, requiring and directing respondents to cause to be paid to the petitioner his salary accruing subsequent to the 9th day of November, 1925. Both commissioners have appeared by filing demurrers and answers. As the respondent Glass is merely a formal party, in the interest of clarity we will hereinafter use the word respondent as designating and referring to the commissioner of public welfare.

The petitioner contends that the paper dated November 9, 1925, on its face purports to be an absolute dismissal; that, the respondent A. E. Sunderland, as commissioner of public safety and welfare, has no power under the charter of Fresno and the ordinances of said city to dismiss a police officer, and that said paper is a void act. The respondent replies that the paper was not a void act, and he cites section 22 of article 3 of the Charter of Fresno (Statutes of 1921, p. 1821). That section, among other things, provides:

"No officer or employee of the city may be removed except for reasons that will promote the efficiency of the public service; and after the lapse of the probationary period, except as in this charter otherwise provided, no officer or employee may be removed except for reasons given in writing by the appointing officer, and the person whose removal is sought shall be furnished with a copy of the reasons for his removal and of any charges preferred against him and be allowed a reasonable time for personally answering the same in writing, and in such answer may demand a hearing upon the charges. If such demand is made, the appointing officer shall furnish the civil service board with the complaint or charges and answer, and the civil service board shall then fix a time and place for, and, according to such rules and regulations as it may adopt, shall conduct a hearing upon the charges and answer, and the party whose removal is sought shall attend such hearing and may be heard in person or by attorney and produce witnesses. The civil service board * * * shall not be bound by the technical rules of evidence and pleading, and upon said hearing the civil service board may order the charges to be dismissed, in which case the officer or employee shall be restored to duty without prejudice, but if the charges are sustained, the officer or employee shall by virtue of said findings be removed unless the finding in either case is set aside by the city commission. There shall be no appeal from the judgment of the civil service board as a matter of right on the part of * * * the officer or employee whose removal is sought, but the city commission shall have power in its discretion to hear and determine appeals from the decisions of the civil service board. * * * Pending the hearing of any charges, * * * the officer seeking to make

the removal may suspend the officer or employee whose removal is sought, such suspension to be without pay, unless the charges are dismissed."

Respondent also cites section 19 of article 3, which provides:

"In addition to the foregoing matters, the civil service rules shall provide: * * * Subd. 6. For the regulation of removals from office subject to the provisions of this charter."

Respondent also cites parts of rule XI of the civil service board as enacted by Ordinance No. 972, as follows:

"Section 1. *Removals or Reductions.* (a) Removals * * * of a person in the classified service shall be made only after such person has been presented with the reasons for such removal or reduction, specifically stated in writing, by the appointing officer, but such person has the right to answer and demand a hearing, as provided by these rules. A removal or reduction has the same effect as to compensation as in case of suspension. A statement of the reasons and the reply must be forthwith filed, as a public record, with the board.

"(b) Nothing herein contained shall limit the power of any superior officer to suspend a subordinate for a reasonable period, not exceeding thirty days, pending hearing and decision. Every such suspension shall be without pay; provided, however, that the board shall have authority to investigate every such suspension, and in case of its disapproval, it shall have power to restore pay to the employee so suspended.

"(c) Nothing herein contained shall limit the power of any appointing officer to suspend or dismiss a subordinate for any cause which will promote the efficiency of the service, and within five days thereafter file with the board written reasons for such action, containing the charges preferred and order of removal, if any, and forthwith serve the person whose removal is sought with a copy thereof. * * * Such appointing officer shall certify to the said service and immediately file the same with the board. The person so served may personally in writing answer the charges preferred against him and file such answer with the board, also affidavits in support thereof, if he so desires, and may demand a hearing on the charges, and a failure to so file an answer or demand a hearing on the charges within said time shall be considered as a resignation of such person, in which case no trial shall be required, except at the request of the officer making or seeking the removal, and then only at the discretion of the board. The board may reinstate any officer or employee so removed after proper hearing. * * *

"Sec. 3. *Suspensions.* Pending action for removal or for disciplinary reasons, an employee may be suspended for a period not to exceed thirty days, without pay, but the reasons for suspension shall forthwith be furnished in writing to the civil service board. No employee in the classified service shall be suspended except for reasons which will promote the good of the service.

"Sec. 4. *Procedure.* Each hearing upon charges and answer shall be had as soon as practical after answer is filed. * * * and up-

on said hearing the board may order the charges dismissed, in which case the officer or employee shall be restored to duty without prejudice, but if the charges are sustained, the officer or employee shall by virtue of such findings be dismissed unless such findings be set aside by the city commission."

[1-3] Thereupon respondent contends that the writing dated November 9, 1925, although it uses the word "dismissal," does not use that word as a finality, but as a temporary deprivation of the petitioner from his office. There is force in the contention, otherwise the note appended at the end of the writing is given no force or effect, although that note advised the petitioner that he would be given a hearing as provided under rule XI if he filed an answer and demanded a hearing. Moreover, the petitioner so understood the paper. He promptly put in his answer and demanded a hearing. This act on his part finds no support in the charter and ordinance when a suspension or removal has become permanent—has ripened into an absolute dismissal. *Stadler v. Detroit*, 13 Mich. 346. The petitioner urges in this connection that the ordinance is unreasonable as being broader than the provisions of the charter. The point cannot be sustained because we do not find any language in the ordinance which purports to justify an absolute dismissal of a civil service employee until such individual has first been served with reasons in writing and has been given an opportunity to answer, and until a hearing has been had. True it is that the charter does not use the word "dismiss" and that the ordinance does, in some places use that word. However, taking the ordinance by its four corners, and reading the word "dismiss" together with the context, it is clear that the ordinance uses the word as synonymous with removal, temporary or permanent, in harmony with the context. It will be noted that the charter expressly confers the power to remove on the civil service board. It will also be noted that the charter expressly provides that the preliminary steps will be taken by the appointing power, but the function of actually removing is vested in the civil service board. It will also be noted that the charter expressly authorizes the appointing officer to suspend a subordinate pending the hearing before the civil service board. Again, a temporary removal is a suspension, and the charter impliedly recognizes a temporary removal because it is provided that, if the charges are not sustained, the employee "shall be restored to duty without prejudice." But, before one can be restored, he must have been displaced. Turning to rule XI, it will be observed that in subdivision (a) a permanent removal is provided for after hearing or opportunity for hearing; in subdivision (b) a suspension is provided for, provided the civil service board may investigate and approve or disapprove; in subdivision

(c) a suspension or dismissal is provided, for and the language used clearly indicates that the subordinate may, at the time the proceeding is initiated, be separated from his office, but that thereafter he is to be given a hearing if he demands it, and, if the charges are sustained, then he will be permanently removed—that is, dismissed. As against improper removals, the charter and the rules both enjoin on the civil service board the duty of protecting the subordinate. The charter enjoins on the superior office the duty of promoting "the efficiency of the public service." From all of these provisions it is clear that the charter and the rules enacted thereunder authorize (1) a permanent removal; (2) a suspension for disciplinary purposes; and (3) a suspension which will promote the efficiency of the service.

[4, 5] It is further contended that the writing dated November 9, 1925, is insufficient because it does not specifically designate acts of malfeasance or nonfeasance, but it will be noted from the charter provisions above quoted that the writing is sufficient if it states "the reasons" for the act of the superior officer. If we view the writing as made to "promote the efficiency of the service," it need not state acts of malfeasance or nonfeasance. It may state matters which tend to show a set of facts which may subsequently transpire as being without foundation, but, until met and explained, or avoided, would tend greatly to hamper "the efficiency of the service," and to greatly embarrass the subordinate official in the discharge of his duties. Certainly such a situation is of such importance that the civil service board should take jurisdiction, and, if a demand is made therefor, conduct a hearing and make and enter such a determination within the powers conferred on it as may be sustained by the facts, and which determination will result in wholly removing the embarrassment or perhaps in a permanent removal. Furthermore, a supposititious case can readily be conceived where the superior officer would not be justified in going any further than stating the rumor or information without alleging the facts therein to be true. However, the writing dated February 1st does designate specifically certain charges. Assuming that the attack on the writing dated November 9, 1925, is sufficient, no attack has been made on the sufficiency of the later writing. We know of none. A similar question was before the Supreme Court of Minnesota in the case entitled *In re Mason*, 147 Minn. 383, 181 N. W. 570. At page 572 (147 Minn. 386) the court said:

"It will be observed that the statute does not limit the time nor prescribe the manner in which charges shall be presented, but merely provides that the accused officer shall be furnished a copy of the charges and be afforded an opportunity to make his defense. This requires a hearing, the purpose of which is to determine whether the officer has been guilty

of the alleged misconduct. The Governor, upon whom the statute imposes the duty to determine this question, is not a court, and is not bound by the strict rules which govern trials in court. *State ex rel. v. Common Council*, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595; *State ex rel. v. Megaarden*, 85 Minn. 41, 88 N. W. 412, 89 Am. St. Rep. 534; *State ex rel. v. Eberhart*, 116 Minn. 313, 133 N. W. 857, 39 L. R. A. (N. S.) 788, Ann. Cas. 1913B, 785. The statute is remedial rather than penal in its nature; it provides for the removal of an unfaithful officer to protect the public, secure the faithful performance of official duties, and keep the public service above reproach, not to punish the officer for his derelictions. 22 R. C. L. 573, § 284; *Territory v. Sanches*, 14 N. M. 493, 94 P. 954, and note appended to report of case in 20 Ann. Cas. 109; also note found in 135 Am. St. Rep. 250. The restrictions which hedge about a trial in court on an indictment and limit the power to amend the indictment do not apply; and we find no warrant in the statute for saying that only one charge or set of charges may be considered, and see no reason why additional charges may not be presented, either independently of the original charges, or by way of amendment to them. The question to be determined is whether the accused officer has so misconducted himself in respect to the performance of his official duties that the good of the public service requires his removal from office. And the officer, or special tribunal, charged with the duty to determine this question, may, in our opinion, in the proper exercise of his discretion, permit the presentation of further and additional charges setting forth facts which, if true, have a direct and material bearing upon the question to be determined. Of course, the accused officer must be given a proper opportunity to meet the additional charges after they have been furnished to him. In the present case, the relator was given ample opportunity to present all his evidence and make a full defense."

A similar contention was made in *People v. Common Council*, 85 Hun, 601, 33 N. Y. S. 165. At page 168 (85 Hun, 606) the court said:

"The relator attacks the jurisdiction of the common council, in this, that he had not received the notice required by statute, of 14 days, of the charges against him. This contention is not well founded, as the proof shows that he had the 14-day notice of the substance of the charges upon which he was ultimately convicted. The amendments of one or two of the charges, which occurred during the progress of the investigation, were but an amplification of the original charges, and made in his presence, and an adjournment of several days was taken by the common council to give him an opportunity to meet the amended charges, and the relator had every reasonable opportunity to do so."

[6-12] It thus appears that the decisions dealing with the subject of the removal of officers concede the power to allow amendments. Such power is further evidenced by the charter provision that "the civil service board * * * shall not be bound by the tech-

nical rules of evidence and pleading." When the amendment amplifies but does not change the cause of action, the amended pleading relates back to the date when the original pleading was filed. 31 Cyc. 464; *Barber v. Reynolds*, 33 Cal. 497, 501; *Humphry v. Buena Vista Water Co.*, 2 Cal. App. 540, 542, 84 P. 296; *Claussen v. Chapin*, 69 Mont. 205, 221 P. 1073, 1075. If a new cause of action is introduced by the amendment, such new cause of action relates back to the date of filing the amendment. *Anderson v. Mayers*, 50 Cal. 525. From the record before us in this collateral attack we are not informed, and we may not assume that the new matter is otherwise than an amplification of the paper dated November 9, 1925. In this connection the petitioner contends that the writing of November 9, 1925, was so defective that there was nothing to amend and, that the right to amend implies that there is something to amend by. 31 Cyc. 362. In answer to that contention it must be said that a most casual reading of the writing referred to shows that it was an attempt by the writer to execute the initiatory paper mentioned in section 22 of article 3 of the Charter, which required that the superior officer should furnish to the person whose removal is sought "a copy of the reasons for his removal and of any charges preferred against him." The doctrine that there must be something to amend by has never obtained in an unlimited degree in this state. From an early date the power of the courts to allow amendments has existed, and the limit to such power was rested on the principle that the amendment should be allowed if it did not change the entire gravamen of the pleading. *Baker v. Bartol*, 6 Cal. 483; *Nevada County & Sacramento Canal Co. v. Kidd*, 28 Cal. 673. The statute does not contain any provisions to the effect that the powers of the civil service board are more restricted than the powers of the courts under similar circumstances.

[13] Except by his answer interposed, the petitioner did not question the sufficiency of the charges as stated in the paper dated November 9, 1925, or as stated in the paper dated February 1, 1926. The civil service board has never passed on either of those attacks. Unless the written charges are so defective as to be void, the attack may not be made in the courts for the first time. *People ex rel. Gibson v. French*, 49 Hun, 607, 1 N. Y. S. 638, 639; *People ex rel. Brady v. Brookfield*, 6 App. Div. 445, 39 N. Y. S. 677, 678; *Joyce v. City of Chicago*, 216 Ill. 466, 471, 75 N. E. 184; *Sullivan v. Lower*, 234 Ill. 21, 23, 84 N. E. 622; *Schlauf v. City of Chicago*, 170 Ill. App. 19, 23.

[14, 15] We are unable to hold that the papers purporting to state the reasons for removal, or charges, are void. It follows that the civil service board has not exceeded its jurisdiction. Having jurisdiction of the con-

trover, all questions of fact are for the determination of that board. The state of Wisconsin has a statute that is very similar to the provisions quoted from the charter of the city of Fresno. That statute was before the Supreme Court of Wisconsin in the cases entitled *State ex rel. Wagner v. Dahl*, 140 Wis. 301, 122 N. W. 748, and the companion cases *State ex rel. Hayden v. Arnold*, 151 Wis. 19, 138 N. W. 78, and *State ex rel. Bannen v. Arnold*, 151 Wis. 38, 138 N. W. 85. In the *Dahl* Case, at page 750 (140 Wis. 305) the court said:

"In *State ex rel. v. Houser*, supra [122 Wis. 534, 100 N. W. 964], the construction of section 35, St. 1898, was involved. In the event of two conventions of the same party being held, the secretary of state was required to give preference in designation on the official ballot to the nominees certified by the state central committee. The statute did not provide for any review of the action of such committee in making its certification. The right of the court to review the decision of the committee was combated, and it was held that, where a new right is created by statute and the statute provides a method by special tribunal for the enforcement or protection of such right, and makes no provision for a review of the decision of such tribunal, the remedy given is exclusive, provided the tribunal acts within its jurisdiction. *Op. Justice Marshall*, page 570 of 122 Wis. (100 N. W. 975), and of the present Chief Justice, page 595 of 122 Wis. (100 N. W. 984). Such is the law elsewhere generally. *Miller v. Clark*, 62 Kan. 278, 62 P. 664; *Chapman v. Miller*, 52 Ohio St. 166, 39 N. E. 24; *People v. Roosevelt*, 151 N. Y. 369, 45 N. E. 840; *People v. District Court*, 32 Colo. 15, 74 P. 896; *State v. Abbey*, 82 Miss. 559, 35 So. 153; *State v. Crittenden*, 164 Mo. 237, 64 S. W. 162. We have in this case a right created by statute by which certain state employes may not be discharged except for just cause, and the power of removal for such cause is vested in the appointing officer, with no provision in the law for reviewing his decision, so that the situation is similar to that before the court in *State ex rel. v. Houser*, supra."

And, in the case last cited the court said, commencing on page 85 (151 Wis. 39):

"This case, in the main, is ruled by the decision in *State ex rel. Hayden v. Arnold* [151 Wis. 19, 138 N. W. 78], mentioned in the statement. The only difference as to facts is that the cause assigned for removal did not exist. But we are constrained to hold that such circumstance cannot make any difference. Manifestly, the legislative purpose was that relief from any mistake of that sort should be sought by the specific means provided in the civil service law. The relator, in accepting office under it, submitted to its provisions, including those empowering the commissioner to remove him at pleasure, filing a statement of the reasons, to which, as indicated in the former case, the law gives opportunity to answer. * * * Applying the foregoing, in view of the fact, which satisfactorily appears, that the tax commissioner acted in the removal proceedings in the honest belief that the cause assigned for

displacing relator existed, the latter's remedy, if such cause did not exist, was under the civil service law, not by ignoring it and appealing to the courts in a mandamus or other proceeding. If such were not the case then, every time an appointing authority under the civil service law acts under the correlative power to discharge or remove, he would do so in peril of having to justify his action in judicial proceedings by showing satisfactorily to some court of general jurisdiction within his judicial district, that the cause assigned exists and is sufficient. Certainly the Legislature did not contemplate any such thing. Nothing of the sort is suggested, expressly, in the language of the law. Nothing of the sort is suggested by it inferentially. The legislative policy, evidenced by the enactment, is repellant to any such thing. To ingraft upon it any such an incident by construction, would undermine the law by taking from it one of the most essential elements of the legislative plan, i. e., to give the appointing authority the largest practicable measure of discretionary power to act summarily, in all cases, respecting the incumbency of subordinate positions, with reasonable opportunity to correct mistakes upon the same being brought to attention in the manner specified; such course being supposed to be promotive of, if not actually necessary, to, the best attainable performance of subordinate duties."

[16] Finally, the petitioner asserts that he has been suspended more than 30 days, and that a suspension for more than 30 days is prohibited by the provisions of Ordinance No. 972. This contention rests on a confusion or intermingling of two separate provisions of the ordinance. It is provided that a subordinate may be disciplined by suspension. It is also provided that the superior may initiate removal proceedings, and, pending the hearing thereof before the civil service board, that the subordinate officer may be suspended. As a disciplinary measure, the ordinance provides that a suspension may not be for a period exceeding 30 days. As an ancillary measure in removal proceedings no limit is placed on the period of suspension. Whether the suspension is of the first class or the second class, the ordinance provides that the subordinate may, on demand, be given a speedy hearing and that the period of 30 days will not necessarily be consumed in either case. Moreover, the facts above recited show that any delays which have occurred in the instant case were the delays caused or requested by the petitioner and not by his superior officers. Under very similar provisions contained in the New York charter the Supreme Court of that state made the same ruling. *Halpin v. City of New York*, 54 Misc. Rep. 128, 105 N. Y. S. 520.

[17] For the reasons which we have recited, we therefore hold that the writing signed by the respondent A. E. Sunderland November 9, 1925, was, under the attack as made in this case, sufficient to initiate proceedings looking toward a removal, and that all other questions are to be addressed, in the first

instance, to the civil service board. In view of what we have said, it is unnecessary to pass on the demurrers.

The respondents are entitled to judgment on the merits. It is so ordered.

We concur: LANGDON, P. J.; NOURSE, J.

77 Cal. App. 664

LANGENBERG v. GUY. (Civ. 4463.)

(District Court of Appeal, Second District, Division 2, California. April 29, 1926. Rehearing Denied May 29, 1926. Hearing Denied by Supreme Court. June 28, 1926.)

1. Master and servant ☞23—Party agreeing not to disable himself from continuing employment for stipulated time is liable for breach by sale of business.

Where party to contract of employment obligates himself either expressly or impliedly not to disable himself from continuing employment for stipulated time, he is liable for damages for breach if, by sale of business before expiration of stipulated period, he voluntarily put it out of his power to continue employment to end of its term in manner agreed by him.

2. Master and servant ☞23.

One binding himself to employ another for definite period is liable for breach if disposition of his affairs renders it impossible to receive services.

3. Master and servant ☞23.

Where contract of employment for specified time "as our business warrants" contained no express agreement that hirer would not sell business, any claim for damages for breach after sale must be grounded on theory of implied undertaking.

4. Master and servant ☞23.

Under contract of employment for specified time as business warranted, hirer is not liable for breach on sale of business before expiration of period.

5. Contracts ☞143.

In every judicial controversy under contract, it, as well as law, must be interpreted.

On Petition for Rehearing.

6. Master and servant ☞23.

Where contract of employment did not imply undertaking that hirer would not sell business during specified time of contract, mere fact that there was consideration for promise would not bind hirer not to sell.

Appeal from Superior Court, Los Angeles County; Thos. O. Toland, Judge.

Action by G. O. Langenberg against George F. Guy. Judgment for plaintiff, and defendant appeals. Reversed.

G. C. DeGarmo and H. B. Cornell, both of Los Angeles, for appellant.

Bordwell & Mathews and W. W. Hyams, all of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action to recover damages for the alleged breach of a contract. Judgment passed for plaintiff. Defendant, appealing from that judgment, claims among other things, that his conduct did not amount to a breach of his agreement. If this contention be well taken it is determinative of the case, and in that event it will not be necessary to consider any of the other points presented by the appeal.

Defendant offered in writing to employ plaintiff's truck and driver for the hauling of lumber for one year if plaintiff would purchase a certain Indiana truck outfit then owned by defendant's son-in-law, one Arthur L. Knudson. When he made the proposal, August 6, 1920, defendant was the sole owner of a lumber business carried on by him in the city of Los Angeles under the name of Pico Heights Lumber Company. The instrument which evidences the proposal, the italics being ours, is as follows:

"August 6, 1920. Mr. G. O. Langenberg, Los Angeles, Calif.—Dear Sir: In consideration of the purchase of the Indiana truck outfit from our Mr. Knudson, we will employ your truck and driver for lumber hauling for a period of one year from date of delivery of new truck, *as our business warrants.* This is based on city hauls, excluding the shoestring strip and San Fernando district, at \$2 per M. board feet and the prevailing rate to outside points, and on loads of from 3,000 to 6,000 feet. [Signed.] Pico Heights Lumber Company, by Geo. F. Guy."

Plaintiff claims that some time prior to September 25, 1920, he purchased the truck of Knudson in accordance with defendant's offer; that such purchase became and was a sufficient executed consideration for defendant's promise; and that thereupon defendant immediately became legally obligated to perform his promise to employ plaintiff's truck and driver in the hauling of lumber for the one-year period mentioned in the written offer. Plaintiff commenced hauling lumber for defendant on September 25, 1920, under the terms of the written offer and continued to do so until November 12, 1920, on which day defendant sold his business to a third party, and thereupon notified plaintiff that, as he did not have any more business, he would have no more hauling for him to do. There is no suggestion that the sale of the business was not bona fide in every particular.

Respondent claims that appellant, by selling his business, voluntarily put it out of his power to perform his part of the contract, thus preventing performance by respondent, and that such prevention of performance constituted a breach of the contract by appellant, entitling respondent immediately to sue for damages. Appellant, on the other hand, claims that his contract contains neither an express nor an implied undertaking on his part not to sell his business, that therefore he

could sell as he did without thereby violating his agreement, and that his sale of the business and his consequent inability to continue hiring respondent's truck and driver did not subject him to damages as for a breach of contract.

The case turns upon the proper interpretation to be put upon the contract as evidenced by appellant's written offer. As in most cases of the kind, but slight if any assistance can be derived from judicial decisions on other contracts, save in so far as the reasoning of the courts in other cases may prove helpful as guides to a correct interpretation of the particular contract under consideration. In the main each case must rest upon its own bottom.

The words of the contract which are of vital significance—the ones which we think are determinative of appellant's right to sell his business prior to the expiration of one year—are the words, "as our business warrants." With this language in the contract appellant's only undertaking was to employ the truck and its driver during the year as warranted by his business. Bearing in mind this provision, we now proceed to consider the nature of appellant's obligation in so far as his right to sell his business is concerned.

[1, 2] There is no basis for a contention that appellant has violated any express term of his contract. In no part of the instrument signed by him does he expressly covenant not to sell his business. Therefore, whether he could rightfully sell it during the year without breaching his contract with respondent depends entirely upon whether the contract imports an *implied* obligation on appellant's part not to sell the business prior to the year's expiration. That, in the last analysis, is the ultimate question presented for solution. If the contract does import such an implied undertaking on appellant's part, then upon selling the business before the end of the year he would become liable as for a breach of his agreement. For of course it must be conceded that where a party to a contract of employment obligates himself by either an express or an implied agreement not to disable himself from continuing the employment for a stipulated time, he will make himself liable in damages for breach of contract if, by a sale of his business before the expiration of the stipulated period, he voluntarily puts it out of his power to continue the employment to the end of its term in the manner agreed to by him. *White v. Lumiere North American Co.*, 79 Vt. 206, 64 A. 1121, and notes to that case in 6 L. R. A. (N. S.) 807 et seq. It may also be conceded that, in the absence of some provision in a contract of employment which tends to negative the implication that the employee will continue uninterruptedly during a specified term, one who has bound himself to employ another during a definite time for a compensation the amount whereof can be earned and

determined only by an actual performance of the services over the whole of the stipulated period, will render himself liable for damages for breach of contract if he makes a disposition of his affairs which renders it impossible for him to receive the services in the manner contemplated by the contract. Note to *Turner v. Sawdon & Co.*, 2 B. R. C. 774. In every such case the question in the last analysis is simply this: Do the terms of the contract—and, if the contract is ambiguous, do the circumstances under which it was made—necessitate the implication that the employer has undertaken not to dispose of his business during a fixed period of time?

[3] As we have pointed out, any claim that appellant breached his contract necessarily must be grounded upon the theory of an implied undertaking on his part not to sell his business before the expiration of the year, there being no express agreement on his part not to do so. The question then is this: Does an agreement to hire a truck and its driver to haul lumber for a year, *as the business of the hirer warrants*, carry an implied obligation on the hirer's part that he will not during the year put it out of his power to continue furnishing lumber for hauling? The words, "as our business warrants," give to the hirer of the truck a latitude and a freedom of action not often found in contracts of employment for a definite period. Their presence here makes this contract of employment somewhat analogous to those contracts of purchase and sale where the buyer agrees to take such an amount of goods as he may "require" in the course of his business. It seems to be generally held in actions to recover damages for the breach of such "requirement contracts," as they often are called, that if the buyer sells his business and thus reduces his requirements to the vanishing point, he does not thereby breach his contract. Thus in *Drake v. Vorse*, 52 Iowa, 417, 3 N. W. 465, the plaintiff, a manufacturer of castings, and the defendant, a manufacturer of school furniture, entered into a contract whereby the former was to furnish the latter with all the castings which the defendant "may want" during the year 1873. In May of that year the defendant formed a partnership with another, and thereafter the business was carried on by the firm, which refused to receive any castings from the plaintiff. It was held that the defendant had the right to discontinue his business at any time; that he did so when he formed the partnership; that the contract was not binding on the firm; and that the defendant was not liable for damages, though the plaintiff had incurred considerable expense in preparing for the manufacture of the castings and the defendant had made a general statement at the time of entering into the contract as to the amount he would probably want during the year. In that case the court says:

"But conceding that it [the contract] bound him [the defendant] to order and take of the plaintiff all the castings he should want, it could not, we think, have the effect to preclude him from entering into a partnership, nor would it become obligatory upon the firm. It was certainly the defendant's privilege to discontinue business at any time when it should appear to him that his interest demanded it, and that, too, without becoming liable to the plaintiff in damages. He did discontinue business upon his individual account. After that he did not individually want or need any castings, and as the firm was not bound to take any, we do not think that the defendant became liable."

The following cases are to the same effect: *McKeever v. Canonsburg Iron Co.*, 138 Pa. 184, 16 A. 97, 20 A. 938; *Kanaskat L. & S. Co. v. Cascade Timber Co.*, 80 Wash. 561, 142 P. 15; *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q. B. 488; *Pfann v. Turner, etc.*, L. Co., 194 F. 69, 114 C. C. A. 89. See, also, *Kenan, etc., v. Yorkville, etc.*, Co., 260 F. 28, 171 C. C. A. 64. In a note to *Diamond Alkali Co. v. Aetna Explosives Co.*, 7 A. L. R. at page 507, the annotator, speaking of these "requirement contracts," says:

"Where the buyer exercises good faith and is free from fraud in disposing of, or making a change in, his business, such change will have the effect of releasing him from the obligation of the contract to purchase his requirements of a certain commodity used in his certain business, to the extent that the change in the business does away with the necessity for the use of the commodity."

[4] But quite irrespective of whether this contract may or may not be regarded as akin to those contracts of sale where the buyer's agreement is to take such articles as the exigencies of his business may require during a fixed period of time, there are other considerations which point unerringly to the conclusion that appellant did not impliedly obligate himself not to sell his business during the one-year period. He did not bind himself to furnish respondent with any particular amount of lumber for hauling, nor did he agree to compensate respondent except for lumber hauled by the latter as and when warranted by the business. Respondent therefore assumed certain risks which were every whit as fatal to his right to haul lumber throughout the year as a sale of appellant's business would be. Those other risks were left altogether uncovered by the contract. They are risks against which it cannot be said that there was any protection by implication. For example, since appellant was obligated to employ the truck and its driver only so far as his "business warrants," it is clear that if, during any part of the year, the prices of lumber had declined to a point where the business could not be carried on with profit, he could have closed his establishment and could have held his lumber for better prices, even though respondent may have been left for the better part of the year without any lumber to haul.

Or appellant might have had labor troubles with his workers, such as strikes, which would have made it inexpedient for him to endeavor to move any lumber during the greater part of the year. Since risks of this character were indubitably assumed by respondent, the reasoning of the English court in *Rhodes v. Forwood*, 1 App. Cas. 256, 265, becomes pertinent. There Lord Cairns says:

"* * * There are really in this agreement several risks which are left altogether uncovered, and as to some of which it was very candidly admitted by the counsel for the respondents that no provision whatever was made, and that they could not say that there was even by implication any protection against those risks."

Then, after pointing out what these risks were, including, among others, the closing of the principal's colliery on account of low prices, strikes, etc., Lord Cairns proceeds:

"* * * If * * * it could not be contended that there is any provision in this contract against any of those risks, why is it to be assumed with regard to the other, the fourth risk, namely, the risk of the colliery owner, not selling his coal elsewhere piecemeal but selling the colliery itself to a purchaser, that there is an implied undertaking against that one risk, although it is admitted that there is no undertaking at all against any of the other risks? * * * The simple point here appears to me to be, as it is admitted that there is no express contract which has been violated, can your Lordships say that there is any implied contract which has been violated? I can find none. I cannot find any implied contract that the colliery owner would not sell his colliery entire."

This case was followed in *Morris v. Dinick*, 25 Ont. Rep. 291, where the court says:

"There is no undertaking [on the part of defendant] to manufacture any defined quantity of goods, or indeed to manufacture at all; and according to the class of cases applicable, no such term should be implied. * * * In brief, this plaintiff was to get commission on the sale of all goods manufactured by the defendants, but they did not say they would manufacture; and the continuance of the concern was, therefore, left at large to be determined by the interests of the principal."

Appellant, and not respondent, was the judge, and the sole judge, of how his lumber business should be conducted. As we have pointed out, there was no undertaking on appellant's part to furnish respondent with any definite quantity of lumber for hauling. Indeed, appellant was not bound to operate his business at all if it appeared that he could not do so except at a loss. And if he could altogether cease operating his business, he could sell it and get rid of it. Having the right to reduce his business to a minimum—and he unquestionably did have that right, since he was the sole judge of how the business should be managed to meet the varying exigencies arising from time to time—it follows that he had the right to reduce it to

nothing, so far as respondent was concerned. What was said in *Re English, etc., Ins. Co., L. R. 5 Chanc. 737*, is in point. There a person entered into an agreement with an insurance company to act as the company's agent for five years at a fixed annual salary and a commission of 10 per cent. on the net profits of each year. Less than two years after the agreement was entered into the company was wound up voluntarily. It was held that the agent was not entitled to damages by reason of the company having put it out of his power to make profits. "I am of the opinion," says James, L. J., "that this was a contract which did not give the servant the right to determine what the extent of the business was to be. He could not call upon the directors to issue new policies, to accept new premiums, or to take new risks, if they were not minded to do it. He could not say, 'Such a person has brought in a policy of insurance, and you must accept that.' Because, if he had a right to say, 'You must carry on the business,' he would also have a right to say, 'You must carry on the business in the usual and proper manner,' and that would be giving a servant the right of controlling the master in the mode in which he chose to carry on his business. Now, I am quite satisfied that the meaning of the contract was nothing of the kind. It was never intended to give the servant the right of dictating as to the extent of business, whether more or less, or nothing, but he simply took the chance of the company finding it a profitable business and carrying it on. *The company had a right to reduce the business to a minimum; and if they had a right to reduce it to a minimum, they had a right to reduce it to nothing—as far as he was concerned.* (Italics ours.) I was referred to a case at common law, *McIntyre v. Belcher*, 14 C. B. (N. S.) 654, where this illustration was given: 'If I sell a man all the apples from my apple tree, I have no right to cut down that tree.' But that is essentially different from a man saying, 'I am going to buy and sell apples, and I will give you 10 per cent. upon the profits of the sale of them.' That must, of course, depend upon the amount of apples which the man who enters into the speculation will buy, and what price he will be able to sell them at. In such a case the other party could not say, 'You are not making profits, because you go to a wrong market and buy upon bad terms; you have not got sufficient capital, and you are selling at a loss in order to get money. Therefore I am entitled to damages for the improper mode in which you carry on your business.'"

What was said by Lord Esher in *Hamlyn & Co. v. Wood & Co.*, supra, is pertinent here. There the defendants, who carried on business as brewers, entered into an agreement in writing by which they agreed to sell to the plaintiffs, and the plaintiffs agreed to buy, all the grain "made" by defendants from July 19, 1885, to September 30, 1895, at the average of

the rates charged each year by certain specified firms. It will be noticed that the agreement was, not that defendants would sell the plaintiffs grain for ten years, but that they would sell, and the plaintiffs would buy, all grain made by the defendants for ten years. In 1890 the defendants sold their business, and in consequence ceased to supply grains to the plaintiffs. It was held that the contract did not contain any implied obligation on defendants' part not to prevent themselves from continuing the sale of grains to the plaintiffs for the ten-year period. In the course of his opinion Lord Esher says:

"It is admitted in the present case that there has been no breach of any express stipulation of the agreement, and therefore we are asked to imply a stipulation of which there has been a breach. The stipulation we are asked to imply is, not that the defendants contracted to carry on their business for ten years, but that they contracted that they would not during that period willfully do anything to prevent their so doing. If you cannot imply the first of these stipulations as a matter of business, I should think it would be very difficult to imply the second."

So here, the terms of the contract before us do not include an implied undertaking on appellant's part to carry on his lumber business during all of the year regardless of prices, strikes, or other contingencies affecting profits. And if we cannot imply an obligation on the part of appellant to carry on his business during the year, then, as was said in substance by Lord Esher, it would be very difficult to imply that he contracted that he would not during that period voluntarily do anything to prevent his carrying on his business.

Our conclusion from the foregoing is that the sale of appellant's business, though it put it out of his power to furnish respondent with any more lumber for hauling, did not violate any express or implied term of the contract.

[5] None of the cases relied upon by respondent conflicts with our conclusion. In *Bagley v. Cohen*, 121 Cal. 604, 53 P. 1117, cited by respondent, the court applied to the facts the unquestionably correct doctrine that one who voluntarily puts it out of his power to do what he has agreed to do, breaks his contract and is immediately liable to be sued thereon for damages, even though the time specified for full performance has not arrived. There the obligor, Gould, had expressly agreed to pay out of the profits to be realized by him in his business a debt which he owed the plaintiff. The contract before the court in that case clearly showed that Gould had impliedly undertaken not voluntarily to disable himself from realizing profits in his business; for only out of such profits could the debt, a fixed and definite sum of money, be paid in the manner in which he had expressly agreed it should be paid. In every judicial controversy under a contract it, as well as

the law, must be interpreted. The interpreted contract is what the law enforces. Therefore, to ascertain whether there has been a breach, the agreement must first be interpreted. It of course is freely conceded by us that if appellant had expressly or impliedly obligated himself to carry on his business during all of the one-year period, in order that lumber might be furnished by him to be hauled by respondent's truck and driver, he would have been guilty of a breach of his contract. But, for the reasons which we have stated, no such obligation on appellant's part can be implied. What we have said of the Bagley Case applies with equal force and for substantially the same reason to *Wolf v. Marsh*, 54 Cal. 228, and *Carter v. Rhodes*, 135 Cal. 46, 66 P. 985. In the only other case cited by respondent—*Alderson v. Houston* 154 Cal. 1, 96 P. 884—the defendant had expressly agreed to do the very thing which he later put it out of his power to do. That is to say, in that case the defendant had expressly agreed to furnish certificates of title which, had they been furnished by him as he had agreed, would have shown the properties to be clear of the assessment liens which he later permitted to accrue. There was no question there as to whether the defendant had impliedly undertaken to do that which he subsequently put it out of his power to do. Whereas in the instant case the question is, should the court read into appellant's contract an implied undertaking to carry on his business in such a manner throughout the year that there would be deliveries of lumber to be hauled by respondent's truck and driver? We think the terms of this contract do not warrant any such implication.

The judgment is reversed.

We concur: WORKS, J.; CRAIG, J.

PER CURIAM. [6] The petition for rehearing is denied.

It is urged in the petition that in construing the contract we overlooked the fact that appellant received a consideration for his promise to hire respondent's truck and driver for one year. That consideration, as stated in the opinion, consisted of the purchase by respondent of the Indiana truck owned by appellant's son-in-law. This element was not overlooked by us when construing the contract in question. We thought then, as we do now, that the mere fact that appellant received a consideration for his promise is not necessarily determinative of the scope of his contractual obligations—that the receipt by him of the consideration agreed upon should not be given the force which appellant now claims for it. Obviously, in every binding contract the promise of the promisor must be supported by a legal consideration of some kind. In many of the contracts involved in actions such as this the consideration received by the defendant for his promise to employ

the plaintiff is the executory promise of the latter to perform his part of the mutual covenants. And while it is true that here respondent's promise to purchase the son-in-law's truck ceased to be executory and became an executed promise when he made the purchase, it does not therefore follow, as a necessary conclusion or as a matter of law, that appellant's agreement imports an implied obligation not to sell his business prior to the expiration of the year.

If the terms of appellant's express obligations are such that an undertaking on his part not to sell his business during the year cannot be implied, then the mere fact that he received a consideration for his promise would not bind him not to sell. The consideration received by him was given in return for his promise to do something. The question therefore is: What was it that he promised to do? The nature of that promise and of the implications incident to it are not necessarily controlled by the consideration which he received. Obviously, it could not be held that appellant breached his contract if he had neglected to do something which he had not obligated himself to do, merely because he received a consideration for doing what he did agree to do; and, conversely, it cannot be held that he breached his contract if he has done something which he has not obligated himself to refrain from doing, merely because he received a consideration for doing what he agreed to do. The sole question is: What is the scope and content of appellant's obligation? In seeking the answer to this question each and every part of the agreement, including the consideration agreed to be given to appellant, its nature and its value, should be taken into account. But the consideration for appellant's promise is only one of the elements to be considered. There may be, and, as we think, there is, another and a determining factor—one which warrants the inference that appellant did not obligate himself not to sell his business. That factor, as we pointed out in the opinion, is found in the provision that appellant agrees to hire respondent's truck and its driver only "as our business warrants."

While we agree with respondent that the fact that appellant has received his consideration is an element to be considered in arriving at the intention of the parties, we do not agree with his claim that the receipt of that consideration, regardless of its nature or of its value, conclusively evidences an intention that appellant was not to sell his business during the term of the employment or hiring. We think we should take counsel of the character of the consideration and of its value. It may be that if respondent had parted with a large pecuniary consideration for the privilege of hauling the lumber for one year, it should in that case be held that it was the intention of the parties that appellant was not

to discontinue his business within the year because of the great hardship which would befall respondent if he should lose the opportunity to haul the lumber for the full period agreed upon, after having paid dearly for the privilege. But here, in view of the nature of the consideration received by appellant, the hardship would fall upon the latter if an implied obligation not to sell the business were imported into the contract. It may be presumed that the truck which respondent purchased from appellant's son-in-law had some value, and that respondent, when he purchased it, received value for his money. Indeed, if we may assume that respondent exercised ordinary business prudence in the purchase of the truck it may be inferred that in the vehicle itself he received full value for the money paid by him for it. Unless, therefore, the other terms of the contract warrant the court in spelling out or implying a covenant on appellant's part not to sell his business, we would not be warranted in holding that an agreement not to sell should be imported into the contract merely because respondent bought a truck at appellant's request. In such a transaction appellant receives nothing of any substantial pecuniary value. "A right so important as that of one to sell his own property," says the court in *Pfann & Co. v. Turner Cypress L. Co.*, 194 F. 69, 114 C. C. A. 89 (cited in the opinion), "should not be denied him unless the language employed clearly conveys that intention."

What we have said is not without support in the decisions of other courts. Thus, in *Kanaskat Lumber, etc., Co. v. Cascade Timber Co.*, 80 Wash. 561, 142 P. 15 (cited in the opinion), defendant agreed to sell to plaintiff's assignor, whom for brevity we shall refer to as the plaintiff, all logs cut by it. At the same time plaintiff undertook, as a part of the consideration moving to the defendant, to erect and maintain a shingle mill adjacent to defendant's railroad tracks. This executory promise to erect a shingle mill must have become an executed promise long before the expiration of the ten-year period mentioned in the contract, for the opinion states that for six years there was a mutual performance of the contract by the parties thereto. The court held that the defendant was not liable in damages in consequence of its failure to continue to deliver logs, for the reason that its obligation under the contract was no more than a promise to deliver such logs as it might cut while in pursuit of its own logging operations. In the course of its opinion the court says:

"We need go no further than the contract. Its terms do not warrant us in holding that respondent is bound to deliver except as it conducts its own logging operations. A contract to so deliver on the one hand, and a contract to build a mill at a certain place and take the logs under such conditions as are stipulated in the

contract, is not in contravention of any public policy, nor can we say, as a matter of law, that it involves a hardship and would not have been entered into had appellant appreciated the force of the language employed. We would have the same right to imply into the contract an understanding that appellant was mindful of the fact that the business of logging is in a sense uncertain and subject to market fluctuations and that a logger would not bind himself to deliver excepting as he could operate at a profit, as we would have to imply that appellant would not have entered into the contract unless upon an understanding that respondent would keep it in material for the continuous operation of its mill. To so imply, would lead us into difficulties which could not be measured by any rule. * * * Counsel puts great reliance upon the words 'the party of the second part [plaintiff] agrees to erect and keep said mill adjacent to the track of the first party.' They ask, Why was appellant thus bound if respondent could log and deliver at will? Respondent meets this argument, saying that it is no more than a stipulation to protect it from a call to deliver at some point away from its own tracks. *Another answer might be that the words relied on are not to be singled out as the essence of the contract, but they are to be construed along with the agreement to deliver cedar logs 'as they are reached in logging operations of the party of the first part.'*" (Italics ours.)

It is further claimed in the petition for rehearing that respondent, as a reasonable man, could not have intended that appellant, in the short space of three months, should put it out of his power to furnish lumber for hauling. It is said that a construction of the contract which might lead to such a result would place respondent at the mercy of appellant. It may have been respondent's expectation that the business would be carried on by appellant throughout the year; but, even so, he cannot complain if he entered into a contract which did not obligate appellant to refrain from frustrating that expectation. What was said by the New York Court of Appeals in *Jugla v. Troutet*, 120 N. Y. 21, 23 N. E. 1066, is pertinent. There the plaintiffs, glove manufacturers in Paris, sold to defendant their New York business, at the same time agreeing to furnish him with gloves manufactured by them so long as he should continue the business so purchased. This provision of the contract was a part of the consideration moving to the defendant for the total sum which he agreed to pay to plaintiffs upon his purchase of their business. About a year after the contract was entered into plaintiffs discontinued the manufacture of gloves. Meanwhile they had been paid a considerable part of the purchase price. The action was brought by plaintiffs to recover the balance due them on the purchase price. Defendant claimed that plaintiffs had undertaken to continue to manufacture gloves and to furnish him with them for his trade, and that when they ceased to manufacture any more gloves they were chargeable with a breach of the contract. It was held that plaintiffs' undertaking to fur-

nish gloves to defendant was dependent upon their continuing to manufacture them. In the course of its opinion the court says:

"The terms of the agreement fairly import the intent of the parties, which is deemed within its covenants, that so long as the defendant should continue the business so purchased by him of the plaintiffs, the latter should sell to him and he should purchase of them gloves for his trade, provided the plaintiffs continued to manufacture gloves. This qualification quite clearly appears by the provisions of the contract, and there is no opportunity to spell out or imply a covenant on the part of the plaintiffs to continue in the business of manufacturing, or which denied to them the right at their pleasure to discontinue the production of gloves. It may have been assumed by the parties that the making of gloves and the sale to and purchase by the defendant, would be continued as long as the latter desired to carry on, in New York, the business so purchased by him; and that such expectation on his part was a leading inducement to him to make the purchase. It is in that view that the defendant's counsel urges that the intent to accomplish such purpose should be treated as within the covenants, and that any other view would render the contract unreasonable and place him at the mercy of the plaintiffs. * * * In the present case the contract appears to have been carefully prepared, its provisions are without doubtful import, and although the defendant took by his purchase the good will of the business, one essential element of which may have been the reputation of the 'D. Jugla' gloves, the undertaking of the plaintiffs to furnish them to the defendant was plainly made dependent upon their continuance to manufacture them, and such was manifestly the qualification of their covenant in that respect."

harmony. But whether the decisions which have construed such contracts are or are not in accord is immaterial here. For, as is said in the opinion, quite irrespective of whether this contract is or is not analogous to the so-called "requirement contracts," there are other reasons, detailed in the opinion, which lead to the conclusion that appellant's contract did not imply an obligation not to sell his business.

In his petition for a rehearing respondent calls attention to certain authorities which, like some of those cited in his brief, are cases where the defendant, being indebted to the plaintiff, promised to pay his debt out of profits to be realized by him in some business venture. In that class of cases the defendant owes a debt which he must pay. He makes a contract which accords him the privilege of paying his debt in a certain way, but pay the debt in some manner he must. If he pays it out of the profits as he agreed to, well and good; if he does not pay his debt in the manner agreed upon—if he sells the business so that he cannot pay the debt as contemplated by his contract—then he must be made to pay it out of any assets which can be reached on execution. The debt is his, and he cannot escape paying it in some manner. Obviously those cases have no application here.

Finally, our attention is called to certain cases which respondent claims give to the so-called "requirement contracts" a construction different from that which is given them in the cases cited by us in the opinion filed herein. It is possible that the decisions which deal with that class of contracts are not in entire

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PEOPLE v. WATTS. (Cr. 2845.)(Supreme Court of California. June 24, 1926.
Rehearing Denied July 22, 1926.)

1. **Homicide** ⇨268—Genuineness of defendant's reason for refusal to tell what he knew about deceased and inferences to be drawn therefrom held questions for jury.

Whether reason assigned by defendant for his refusal to tell what he knew about whereabouts of deceased was subterfuge or genuine and inferences to be drawn from such refusal held questions for jury.

2. **Homicide** ⇨229.

Evidence held to warrant finding as to identity of deceased.

3. **Homicide** ⇨332(2).

Jury's finding as to identity of deceased, supported by evidence, is conclusive on Supreme Court.

4. **Homicide** ⇨234(1).

Evidence held to justify finding that defendant slew deceased.

5. **Criminal law** ⇨564(1).

Evidence as to place where body was found, and nearby pools of blood, held sufficient proof of venue in homicide case.

6. **Homicide** ⇨253(1).

Evidence held to warrant finding that homicide was murder in first degree.

7. **Criminal law** ⇨698(1).

Testimony of deputy coroner that hair found near decomposed body of deceased was human hair held properly admitted, where only objection was to one of the preliminary questions, which was unanswered.

8. **Criminal law** ⇨437.

In homicide case, map of county, in a desert place of which deceased's body was found, held properly admitted in evidence, in view of Code Civ. Proc. § 1936.

9. **Criminal law** ⇨433—Telegrams sent by deceased held competent and relevant in prosecution for murder.

In prosecution for murder of person with whom defendant had driven in automobile from Detroit to California, two telegrams and copy of a third, sent by deceased to Detroit bank from places at which defendant and he had stopped, held competent and relevant.

10. **Criminal law** ⇨1043(2).

Where objection to evidence was general only, party making it cannot on appeal successfully urge a particular objection which could have been cured had it been specifically stated at trial.

11. **Criminal law** ⇨695(5).

General objection that testimony is irrelevant and incompetent is insufficient to raise objection of want of proper foundation.

12. **Criminal law** ⇨1186(4)—Curtalement of defendant's cross-examination of witness, though improper, held not reversible error (Const. art. 6, § 4½).

Curtalement of defendant's cross-examination of witness, affecting readiness with which he had identified defendant, though improper, held not reversible error, in view of Const. art. 6, § 4½.

13. **Criminal law** ⇨1163(1).

Since adoption of Const. art. 6, § 4½, injury is not presumed from error.

14. **Criminal law** ⇨823(17)—**Homicide** ⇨308(3)—Instruction that defendant was guilty of murder in first degree or of no offense whatever held not error, or, if error, not reversible error, in view of other instructions.

Instruction in effect that jury should either find defendant guilty of murder in first degree or acquit him held not error, in view of evidence, or at least not reversible error, in view of instruction as to ingredients of crime of murder in first degree and instruction to acquit unless defendant was guilty of that offense.

15. **Homicide** ⇨309(5)—Refusal of instructions affecting lesser offenses is proper where evidence shows defendant guilty of murder in first degree if guilty at all.

Refusal of instructions as to offenses less than murder in first degree is not error where evidence shows murder in first degree if defendant is guilty at all, nor does such rule violate constitutional inhibition against charging juries on matters of fact.

16. **Homicide** ⇨307(3)—Rule obviating necessity for instruction on lesser offenses than murder in first degree is not limited to specific homicidal acts conclusively showing deliberation and premeditation.

Rule that court need not charge with respect to lesser offenses where evidence shows murder in first degree, if defendant is guilty at all, is not limited to specific homicidal acts enumerated in statutory definition of murder in first degree which carry with them conclusive evidence of deliberation and premeditation.

17. **Homicide** ⇨307(3)—Rule obviating necessity for instructions on lesser offenses than murder in first degree is not limited to cases where evidence is direct and positive.

Rule permitting refusal of instructions on lesser offenses where evidence shows murder in first degree if defendant is guilty at all is not confined to those cases where evidence is direct and positive.

18. **Criminal law** ⇨762(3)—Instruction on circumstantial evidence held not objectionable as intimating that court considered evidence to satisfactorily establish issues in case.

Instruction that ultimate facts enumerated might be established "as satisfactorily and as conclusively by circumstantial as by direct evidence" held not objectionable, as carrying intimation that court deemed evidence to satisfactorily or conclusively establish any issues in case.

19. Criminal law ⚡784(8), 1172(2)—Instruction that nothing in nature of circumstantial evidence renders it less reliable than other evidence held error, but not prejudicial.

Instruction, "there is nothing in the nature of circumstantial evidence that renders it any less reliable than any other class of evidence," though in nature of argument and better omitted, held not prejudicially erroneous.

20. Criminal law ⚡1172(2).

Instruction on subject of flight, objectionable as containing no admonition that defendant must have known of crime and that he was accused thereof, held not prejudicially erroneous.

21. Criminal law ⚡761(2)—Instruction that ultimate facts could be established by specific circumstances mentioned held not erroneous as assuming existence of such circumstances.

Instruction that facts in issue might be established by circumstances specifically mentioned, if such circumstances were established to the satisfaction of the jury beyond reasonable doubt, and if the jury were satisfied from such circumstances of the existence of the ultimate facts, held not erroneous as assuming existence of circumstances mentioned.

22. Criminal law ⚡815(9)—Instruction held not erroneous as charge that jury could consider only probative facts established beyond a reasonable doubt.

Instruction that if specifically enumerated circumstances had been established beyond a reasonable doubt, jury could consider them "together with all other facts and circumstances, if any, shown by the evidence beyond a reasonable doubt," held not erroneous as charge that jury could consider only probative facts established beyond a reasonable doubt.

23. Homicide ⚡308(1).

Instruction that defendant could be found guilty of murder in the first degree only held not objectionable as omitting the essential elements of deliberation and premeditation.

24. Criminal law ⚡822(1)—Objection to isolated excerpts from instruction is obviated where instructions as a whole are fair, harmonious, and correct.

Objection that isolated excerpts from instructions omit essential conditions and limitations is obviated, where all instructions, read and considered together without straining, show a fair, harmonious, and correct statement of law, applicable to facts in case.

In Bank.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Joseph H. Watts was convicted of murder, and he appeals. Affirmed.

See, also, 241 P. 886.

El. W. Bartlett, of Colton, Perky, McConnell & Hill, of Long Beach, and Swing & Wilson, of San Bernardino, for appellant.

Frazier & Averitte, of Hillsboro, Tex., amici curiæ.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and George H. Johnson, Dist. Atty., of San Bernardino, for the People.

FINLAYSON, Justice pro tem. Defendant was charged with the murder of Wilfred Hey, alleged to have been committed in San Bernardino county on or about November 26, 1924. He was convicted of murder in the first degree, and was sentenced to suffer the extreme penalty. The appeal is from the judgment and from an order denying him a new trial.

In the latter part of December, 1924, a body, that of a man who had been dead for some time, was found at a lonely spot on the desert in San Bernardino county. By its verdict the jury impliedly found that the body was that of Wilfred Hey, that he had been murdered, that defendant was the slayer, and that the homicide was murder in the first degree. No eyewitness to the tragedy came forward, the evidence being entirely circumstantial. Defendant did not take the witness stand, nor did any witness testify in his behalf. In addition to claiming that the trial court erred in the admission and exclusion of certain evidence and in the giving of certain instructions, appellant contends that the evidence was insufficient to identify the dead body as that of Wilfred Hey, to identify defendant as the slayer, to prove the venue as laid—I. e., that the crime was committed in San Bernardino county—or to show that the homicide was murder in the first degree.

The uncontradicted evidence for the people tended to establish a circumstantial case against the accused, the outstanding features of which are substantially these: Wilfred Hey was a young man having the appearance and speech of an Englishman. He was about 28 years of age, was approximately 5 feet 4 inches tall, weighed about 125 pounds, and had brown or reddish brown hair. He had lived at the Kalamazoo Apartments in Detroit, Mich., from July, 1924, to the latter part of the month of October following, when he left that city in company with defendant in defendant's automobile—a secondhand Overland touring car. Defendant had lived with Hey in the latter's apartment for some three or four weeks previous to their departure from Detroit. Through this association it may be inferred that he had an opportunity to acquire some knowledge of Hey's financial affairs. About two months before the two men left Detroit, Hey called upon the assistant manager of the People's State Bank at that city, and asked that the bank write to England regarding the sale of some British war bonds which he owned and which he desired to sell. The bonds, which were then with the Union Bank of Manchester, England, were worth about \$1,500. In furtherance of Hey's wishes a letter, signed by him, was sent

by the People's State Bank to its foreign correspondents requesting them to sell the bonds and to transfer the proceeds to the bank at Detroit. Later, and while Hey still was in Detroit, the People's State Bank sold for him, through a New York institution, some shares of stock, upon which a small sum of money was realized. The proceeds of this sale were received by the Detroit bank on October 22, 1924. From the sum realized by the sale, the bank, after deducting a few dollars to liquidate a small loan which it previously had made to Hey, placed \$100 to his credit in a savings account and delivered the balance to him. Shortly thereafter defendant and Hey left Detroit to motor to Los Angeles. Up to that time the Detroit bank had not succeeded in selling the British war bonds.

Hey was not again heard of until November 7, 1924, when the Detroit bank received a telegram, purporting to have been sent by a bank at Rock Springs, Wyo., inquiring if a check drawn on Hey for \$10 was good. On November 10, 1924, the Detroit bank received another telegram, purporting to have been sent by Hey from Ogden, Utah, asking that the balance of his savings account be transmitted to the Security State Bank at Ogden. On the next day the Detroit bank transmitted the money to the Ogden bank by telegram. On the same day that the Detroit bank received Hey's telegram from Ogden, the president of the Security State Bank at the latter city prepared and delivered to Hey the form of a telegram to the Detroit bank. This document was admitted in evidence as People's Exhibit 2. There was written on it the following, in the handwriting of the president of the Ogden bank:

"People's State Bank, Detroit, Michigan. Telegraph Security State Bank, Ogden, Utah, balance of my savings account. Waive identification. Will write you regarding sale of British war bonds and transfer of money when I reach my destination."

This paper was found on the clothing of the body discovered on the desert in San Bernardino county. It is a fair inference from the evidence that Hey kept the document, though he doubtless used it as a model from which to compose the telegram which he sent to the Detroit bank, for on the day that he received this bit of writing from the president of the Ogden bank he and defendant called at the office of the Western Union Telegraph Company at Ogden and there caused to be sent to the Detroit bank a message which was almost identical with the form which had been prepared by the Ogden banker.

Defendant and Hey arrived in Ogden about November 8, 1924. There they remained for about one week. Their automobile was in need of some repair when they reached that

city, but neither had any money for that purpose. Indeed, they came to Ogden "stranded," and had not the wherewithal to buy their meals or to pay for lodgings. Defendant borrowed a small sum from a garage man at Ogden with whom he had left his car for needed repairs. The money which the Detroit bank remitted to the Ogden bank in response to Hey's telegram of November 10th was paid to Hey on November 15, 1924. Upon that occasion defendant accompanied Hey to the bank. Upon the payment of the money to Hey, defendant said, "Now that we can get out of town, we better go." At the same time defendant told the cashier that they had come from Detroit, that they were going to Los Angeles, and that they were traveling in an Overland automobile. On the preceding day defendant had called at the Security State Bank unaccompanied by Hey, and had then asked the cashier if the money had come from Detroit for Wilfred Hey, telling the bank officer that they had run out of money, that they were out of money when in Rock-Springs, Wyo., that they had to send for money while there, and that they had received \$10, which paid their expenses to Ogden; adding that "the damned fool (referring to Hey) didn't know anything; that he only drew \$10 when he ought to have drawn it all." Before the bank at Ogden paid Hey the money which the Detroit bank had remitted, the cashier asked him if he had anything that would indicate that he was Wilfred Hey. Whereupon the British war bonds were mentioned, defendant being present at the time. Hey, in defendant's presence, then produced a memorandum which had been given to him by the bank at Detroit and which referred to the authority that he had given that bank to sell the war bonds and to credit his account with the proceeds.

We next hear of defendant and Hey at Silver Lake, where the twain were seen together on the evening of November 25, 1924. Silver Lake is a small settlement in San Bernardino county, located many miles from any one of the county's exterior boundary lines. At that village, between 6 and 7 o'clock on the evening of November 25th, defendant procured some gasoline from B. Harrod, a mining man who was stopping at the village temporarily. Defendant and Harrod walked two blocks to the spot where defendant's car was parked, conversing as they walked. Defendant told Harrod that he was driving from Salt Lake City and was headed for Los Angeles. At the trial Harrod described the automobile as an Overland touring car. Sitting in the front seat of the car, when Harrod and defendant reached the vehicle, was a man whom Harrod, when testifying as a witness in the case, identified as Hey from some photographs which were shown him by the district attorney. Harrod described Hey as a "sandy-complected" man, who wore a dark

suit of clothes and who had a light cap on his head. This is the last time Hey was seen alive.

About a month later, at a spot about 29 miles south or southwesterly from Silver Lake and in the heart of San Bernardino county, the body referred to in the early part of this opinion was found. It was that of a man approximately 5 feet 4 inches tall, weighing from 125 to 130 pounds. It lay on the surface of the ground about 92 feet south of a county road, in a region where the road passes through a dry wash 300 feet wide. The place of the gruesome find is several miles from any human habitation, in wild, desert country. The corpse was covered with canvas, which had been weighted down with rocks. The body was fully dressed, save that there was no collar, tie, hat, or cap on it. The trousers and coat were of a dark blue texture, with fine white stripes. Between the body and the county road were two small bushes. The corpse lay just beyond these bushes and behind a small rise in the bank of the wash. When found, the body was in an advanced stage of decomposition. Wild animals had so stripped the skull of flesh that there were no recognizable features. The skull was as white as a sheet of paper. The vertebrae from the collarbone up were exposed. On the top of the skull was an irregular, depressed fracture, triangular in shape, about an inch and a half long and three-quarters of an inch across. There was another large opening in the skull back of the left ear, in the occipital bone. This latter opening was large enough to permit the tips of four fingers to be inserted an inch or two. It extended in an oblique direction from above downward and backward from the ear, and was about an inch wide in its widest part and approximately three inches in length. In both instances the fractured portions of the skull were caved in. The superintendent of the county hospital, a regularly licensed and practicing physician, after describing the nature of the wounds, testified that he did not think that either one could have been self-inflicted. Each wound had the appearance of having been caused by the crushing blow of a heavy, blunt instrument, an inch or so in diameter, and hard enough to break the skull.

Extending from the edge of the road to the spot where the body was found was a track or depression in the desert sand, about eighteen inches in width, which looked as though a human body had been dragged over it. In this track, five feet from the road, was a blood-soaked spot in the sand about six inches in diameter. The evidence discloses that the blood was that of a human being. Seventeen feet farther, in the direction toward which the body lay, was another spot where the sand was soaked with human blood. Scattered about the body were bunch-

es of hair of a reddish-brown color. The deputy coroner of San Bernardino county, who was present when the body was found, testified that in his opinion the hair was that of a human being.

On the clothing of the deceased, in the watch pocket, were found two ferry tickets, issued by the Detroit & Windsor Ferry Company, entitling the holder to passage by ferry between the city of Detroit and the nearby town of Windsor. There was also found in the same pocket three small slips of paper and the telegraphic form which the president of the Security State Bank at Ogden had delivered to Hey on the 10th of November, and which, as we have stated, was introduced in evidence as People's Exhibit No. 2.

[1] Coming now to defendant's actions subsequent to the time when he and Wilfred Hey were at Silver Lake on the evening of the 25th of November: Defendant arrived in Los Angeles in the latter part of that month. He told his brother, who resided in that city, that he had come from the east in his four-passenger touring car. On December 1, 1924, defendant, accompanied by his brother, visited the Bank of Italy in Los Angeles, and, representing himself to be Wilfred Hey, asked the person in charge of the telegraphic transfer department of that institution if there was any money there for him. It seems that prior to that date the Bank of Italy had received telegraph instructions from the People's State Bank at Detroit to pay to Wilfred Hey a certain sum of money—the proceeds of the sale of the British war bonds. This money had been received by the Detroit bank in the interim, and that institution had undertaken to remit it to the Bank of Italy at Los Angeles. The employee of the Bank of Italy with whom defendant had his dealings asked defendant to produce some evidence of his identity as Wilfred Hey. Thereupon defendant's brother, who was a customer of the bank, spoke up and told the banker that defendant was Wilfred Hey. The bank then issued to defendant, in the name of Wilfred Hey, a teller's exchange for the amount which it had been authorized to pay to Hey. Defendant, under the fictitious name of Wilfred Hey, then opened an account with the Bank of Italy. Later he drew out the money which he had deposited. We next hear of him in San Francisco, where he was taken into custody by the sheriff of San Bernardino county on February 7, 1925. The sheriff told defendant that he was charged with the murder of Wilfred Hey. Defendant admitted that he knew Hey, but upon being asked by the sheriff when it was that he last saw the man who had journeyed with him almost across the continent, he refused to tell, offering as an excuse for his reticence that he knew of a case where an accused had talked

when placed under arrest and was "jobbed and convicted." We pause here to say that it was for the jury to determine whether the reason assigned by defendant for declining to tell the sheriff what he knew of Hey's whereabouts was a subterfuge, or whether, if genuine, it justified him in withholding from the authorities such information as he possessed, also whether his conduct was contrary to the ordinary behavior of a person charged with crime, and whether it evinced guilt or innocence. *People v. Dole*, 122 Cal. 487, 55 P. 581, 68 Am. St. Rep. 50; *People v. Amaya*, 134 Cal. 531, 66 P. 794; *People v. Swaile*, 12 Cal. App. 192, 198, 107 P. 134; *People v. Graney*, 48 Cal. App. 773, 192 P. 460; *Jackson v. State*, 167 Ala. 77, 52 So. 730; *State v. Magoon*, 68 Vt. 289, 35 A. 310.

With this synoptical statement of the most important and controlling facts and circumstances shown by the people and upon which a conviction was sought, we proceed to a consideration of appellant's points in the order of their presentation.

[2, 3] The evidence was sufficient to warrant the jury in finding that the body was that of Wilfred Hey. The fact that the corpse was found at a spot not more than an hour's ride by automobile from the place where Hey was last seen alive, the fact that the body was that of a man of about the same size and weight as Hey, having the same colored hair and clothed with outer garments of substantially the same general color as those worn by Hey when he was seen at Silver Lake, and that there was found in one of the pockets a ferry ticket entitling the holder to passage between Windsor and Detroit—the city where Hey had lived for some three or four months before embarking upon his fateful adventure—are pregnant circumstances, to say the least. It may be that they alone would not suffice to justify the jury in finding that the body was that of Wilfred Hey. But when to these circumstances we add the further fact that there was found in the vest pocket of the deceased the form of telegram which the president of the Security State Bank at Ogden had made out and delivered to Hey but a few weeks previously, the conclusion that the body was that of Wilfred Hey becomes well-nigh irresistible. But this is not all. In addition to these damning circumstances we have appellant's incriminating conduct after the disappearance of his traveling companion. His brazen effrontery in boldly representing himself as Wilfred Hey when he secured from the Bank of Italy the proceeds of the British war bonds clearly indicates an utter absence of that fear of detection which he must have felt did he not know that the body of the man he was impersonating lay rotting on the desert sands. In the light of these circumstances the determination of the jury is conclusive upon this court. *People v. Peete*, 54 Cal. App. 333, 347,

202 P. 51; *State v. Barnes*, 47 Or. 592, 85 P. 998, 7 L. R. A. (N. S.) 181; *State v. Sprouse* (Mo.) 177 S. W. 338; *State v. Barrington*, 198 Mo. 23, 95 S. W. 235; *Ausmus v. People*, 47 Colo. 167, 107 P. 204, 19 Ann. Cas. 491.

[4] There was sufficient evidence to justify the jury in finding that appellant was the slayer of Hey. He had been the dead man's traveling companion while the two were making their way across the continent with Los Angeles as their goal. He was the one who last was seen with the slain man at a small settlement not many miles from the spot on the vast stretch of uninhabited desert where the body was found. He had a mercenary and sordid motive for the commission of the crime, i. e., a desire to possess himself of the money to which his murdered companion was entitled. This motive was later exhibited by his false representation to the employees of the bank at Los Angeles that he was Wilfred Hey and that as such he was entitled to the proceeds from the sale of Hey's British war bonds. The confident assurance with which appellant enacted the imposter's rôle when posing as Wilfred Hey is explicable upon the theory that he was fully aware that the man whose name and character he was assuming could not rise up in any human tribunal and there call him to account for the money gained through his treachery and deceit. And then there is appellant's flat refusal to tell the sheriff when it was that he last saw the deceased. If appellant did not slay Hey he must have known who it was that did the deed, for it is a fair inference from all the circumstances in the case that he was with his companion when the latter was felled by the death-dealing blows. It does not seem reasonable, therefore, that appellant, if he were innocent, would have refused to tell what he knew of the whereabouts of his slain companion. The withholding of information, directly invited, upon a subject of such grave import and which so vitally concerned the welfare of the person with whom he had been so closely associated is a circumstance which betokens that fear of self-betrayal which grips the heart of one who knows himself as a blood-stained murderer. Who, if not appellant, was the person who so carefully covered the body with canvas and secreted it behind the bushes 92 feet from the highway? He was the person who last was seen with the unfortunate victim of the murderous assault, and he must have had some knowledge of what had befallen the man who for so long a time had been his boon companion.

The circumstances which we have recited point so directly to appellant as the guilty agent who was responsible for Hey's untimely taking off that we do not hesitate to hold the evidence sufficient to justify the verdict. It of course is possible that appellant did not

murder Hey. But, as was said in *Ausmus v. People*, supra:

"* * * Until the faculties of man are unfolded and expanded so that all things are known, we must act on circumstances as they appear, logical deductions made and presumptive proof, or leave the worst crimes unpunished."

[5, 6] The venue was proved as laid. The remains were found at a place which is many miles from any one of the exterior boundaries of San Bernardino county. The pools of blood in the immediate vicinity of the body show that the slaying occurred not far from the spot where the corpse was discovered. The evidence was sufficient to warrant the jury in finding the homicide to be murder in the first degree. The circumstances all indicate that the deceased was willfully and brutally slain for his money. There was no evidence of a combat or of a struggle. No circumstances of mitigation, justification, or excuse were shown. Two crushing blows on the head with a deadly weapon—some blunt instrument sufficiently hard and heavy to produce such lethal wounds—had evidently ended the life of Wilfred Hey. From the character of the weapon used, the nature of the wounds inflicted, and the acts and conduct of appellant subsequent to the slaying, the jury had the right to infer that it was willful murder, done with the fell purpose of acquiring the proceeds of the dead man's British war bonds by subsequently resorting to that form of deception which appellant later did practice upon the bank in Los Angeles. So inferring, the jury was warranted in returning a verdict of murder in the first degree. *People v. Mahatch*, 148 Cal. 200, 203, 82 P. 779; *People v. Machuca*, 158 Cal. 62, 109 P. 886; *People v. Bellon*, 180 Cal. 706, 182 P. 420; *People v. Erno*, 195 Cal. 272, 232 P. 710; *People v. Peete*, supra; *Killer v. Commonwealth*, 124 Pa. 92, 16 A. 495; *Commonwealth v. Drum*, 58 Pa. 9; *State v. Welch*, 36 W. Va. 690, 15 S. E. 419.

[7] No error was committed in permitting the deputy coroner, who was present when the strands of hair were found near the body of the deceased, to testify that, in his opinion, the hair was that of a human being. The district attorney asked the witness this question: "Could you tell whether or not it was human hair you saw there?" Defendant's counsel objected to the question upon the ground that it called for the opinion of one not shown to be an expert. The question was not answered. It seems that the district attorney, when arguing against the validity of the objection, stated to the court, in substance and effect, that his question did not call for the opinion of the witness, but that it merely asked him whether he was able to say that the hair was or was not from the head of a human being; and then, without waiting for the witness to give an answer,

the prosecutor propounded another question as follows: "Do you know whether that was human hair?" To this question no objection was interposed. The witness answered by saying, in substance and effect, that he did know whether it was human hair. Then, in response to another question put to him by the district attorney, he testified that the hair which he saw was human hair. The two questions which preceded the one last mentioned had been propounded for the purpose of ascertaining whether the witness possessed that knowledge which would qualify him to testify as an expert to the character of the hair. The objection that he was not shown to be qualified should have been interposed to the last question—the one which asked him whether it was human hair. The preceding questions were of a preliminary character, and the only one to which objection was made went unanswered.

[8] There was no error in admitting in evidence a map of San Bernardino county. It was used in connection with the testimony of certain witnesses for the purpose of representing the relative location of the places testified to by them. It is proper for courts to admit in evidence illustrative charts and maps. *Foley v. Northern California, etc., Co.*, 165 Cal. 107, 130 P. 1183; 22 C. J. 910. The map was a public document. It was a part of the files in the office of the county surveyor. A published map, made by persons indifferent between the parties, is *prima facie* evidence of facts of general notoriety and interest. Section 1936, Code Civ. Proc.

[9-11] No error was committed in admitting Exhibits 17, 18, and 20 in evidence. Exhibit 17 was the telegram from the Rock Springs bank to the Detroit bank, sent from Rock Springs, Wyo., on November 7, 1924. It reads: "Is check on Wilfred Hey for ten dollars good." Exhibit 18 is a copy of the telegram which the Detroit bank sent in reply to the telegraphic inquiry of the Rock Springs bank. The original of this reply was not in California at the time of the trial. Exhibit 20 was the telegram sent by Hey to the Detroit bank from Ogden on November 10, 1924. It reads: "Telegraph Security State Bank Ogden Utah balance in my account. Waive identification. Wilfred Hey." The only grounds of objection made in the lower court were these: Exhibit 17 was objected to on the ground that it was incompetent and irrelevant, Exhibit 18 on the ground that it was incompetent, and in presenting his objection to Exhibit 20 defendant's counsel merely said: "Same objection, your honor, as to the other telegram." None of these documents was objectionable upon the ground of irrelevancy. Any competent evidence which tended to show that Hey was journeying westward from Detroit toward the place where he was last seen alive was relevant and material. These telegrams, showing as they do that Hey was in Rock Springs on November 7th and

that three days later he was in Ogden, tended to substantiate the theory that at the times when they were sent he was on his way from Detroit to the western side of the continent—that he was journeying in a direction which would bring him to the place where the dead body was found. Nor was the other ground of objection, incompetency, sufficient reason for the exclusion of these exhibits. In support of this objection it is claimed here that no foundation was laid for the introduction of the telegrams. It is well established that where the trial court has overruled a general objection to the admission of evidence, i. e., an objection that it is incompetent, irrelevant, and immaterial, the party against whom the ruling was made will not be permitted to urge in the appellate court a particular objection which could have been readily cured had it been openly urged in the trial court. *People v. Louie Foo*, 112 Cal. 17, 22, 44 P. 453; *People v. Baird*, 105 Cal. 126, 38 P. 633. In *People v. Frank*, 28 Cal. 507, this court held that a general objection to offered testimony that it is irrelevant and incompetent is not sufficient if the real ground of the objection is that no proper foundation has been laid for its introduction.

[12] The curtailment of defendant's cross-examination of the witness Harrod is not reversible error. It will be recalled that this witness testified that he saw defendant at Silver Lake on the evening of November 25, 1924. This was on his direct examination. On cross-examination Harrod testified that he did not see defendant again until March or April of 1925, when he saw him in a cell in the county jail at San Bernardino, that when he saw defendant in his cell he recognized him, and that no one pointed him out. The witness was then asked this question by defendant's counsel:

"Will you state that you did not testify at the preliminary hearing that you went up in the cell, and a man said, 'There he is,' and you turned around at this preliminary hearing and pointed out Fred Weaver as the man that pointed out Watts to you?"

[13] The court sustained an objection to the question upon the ground that it was not the proper way to impeach the witness. Impeachment was not necessarily the purpose of the question. Only as the witness answered might questions by way of direct impeachment have followed. The ruling was an improper restriction upon the right of cross-examination. *People v. Jones*, 160 Cal. 358, 365, 117 P. 176; *People v. Hart*, 153 Cal. 261, 266, 94 P. 1042. However, a survey of the entire record compels the conclusion that the error has not resulted in a miscarriage of justice, and that it is a case for the application of section 4½ of article 6 of the Constitution. Even if the question had been permitted and the witness had given it an affirmative answer, it is inconceivable that the jury could have rejected

as incredible Harrod's positive testimony that he saw the defendant and Hey at Silver Lake. Harrod's testimony, like that of all the other witnesses for the prosecution, was not contradicted in any particular whatever. If, after having had his memory refreshed by the question asked of him on cross-examination, Harrod had admitted that at the preliminary examination he did testify that defendant was pointed out to him when he saw the latter in his cell, that fact would not necessarily have been inconsistent with the witness' testimony that he recognized defendant when he saw him in the cell. Had witnesses on behalf of the defendant been produced, and had they given testimony contradicting Harrod's testimony that he saw defendant with Hey at Silver Lake, an affirmative answer by Harrod to the question ruled out by the trial court might possibly have had sufficient weight to tip the scales in favor of the testimony of such opposing witnesses. But in the absence of any such contradictory testimony we do not perceive how appellant could possibly have been prejudiced by the court's ruling. Since the adoption of section 4½ it no longer is the rule in this state that injury is presumed from error. Before the reversal of a judgment of conviction may be had it must affirmatively appear to the satisfaction of this court, after an examination of the entire cause, including the evidence, that the accused may well have been substantially injured by the error of which he complains. *People v. Lapara*, 181 Cal. 66, 72, 183 P. 545; *People v. Mazzurco*, 49 Cal. App. 275, 280, 193 P. 164. No such injury appears here.

[14] The court did not err in giving an instruction which, in effect, told the jurors that they should either find defendant guilty of murder in the first degree or acquit him of any offense whatever. After having carefully defined the crime of murder and each of the two degrees thereof, as well as manslaughter, and after having fully instructed the jury as to the essential elements of each of those offenses, the learned trial judge gave an instruction to the effect that the only degree of murder for the jurors to consider was murder in the first degree, and that they were not to consider any other degree of murder or manslaughter in their deliberations. In consonance with this instruction but three forms of verdict were handed to the jury, viz., murder in the first degree, murder in the first degree with the penalty of life imprisonment, and not guilty. Under the circumstances disclosed by all the evidence, the giving of the instruction was not error.

[15] In a criminal case instructions are always to be given with reference to the facts proved before the jury. Accordingly, it is the established rule that on the trial of a person charged with murder it is proper to refuse to give an instruction as to a lesser degree than that of murder in the first degree, or as to a lesser offense included within the crime

charged, if the evidence is of such a nature as to warrant only a verdict of first degree murder, in the event that the accused is guilty at all. *People v. Rogers*, 163 Cal. 476, 482, 483, 126 P. 143; *People v. Lapara*, supra; *People v. Byrnes*, 30 Cal. 206; note to *Bandy v. State*, 21 A. L. R. 603 et seq. This rule does no violence to the constitutional inhibition against charging juries with respect to matters of fact. *People v. Welch*, 49 Cal. 174, 181. See, also, *State v. Hopper*, 71 Mo. 431.

In the cases cited by appellant (*People v. Valencia*, 43 Cal. 552; *People v. Ah Lee*, 60 Cal. 85, and *People v. Chew Sing Wing*, 88 Cal. 268, 25 P. 1099); the jury in effect was instructed that from the mere *killing* of the deceased the law presumes murder in the first degree. See *People v. Bawden*, 90 Cal. 197, 27 P. 204. Such an instruction obviously is erroneous, since it omits from the definition of murder in the first degree the essential elements of deliberation and premeditation. It is, of course, the peculiar province of the jury to say in each and every case whether the killing was perpetrated with that deliberation and premeditation which are necessary to constitute it murder of the first degree. There was no interference with that prerogative in the present case. Here the jurors were carefully and correctly advised by the court's instructions as to what constitutes murder in the first degree, and were told, in substance and effect, that, to justify a verdict of guilty, every essential element of the crime must be established beyond a reasonable doubt.

[16] The rule that the court need not charge with respect to a lower degree of murder or an included offense, where there is no evidence tending to show the commission of a lesser crime than murder in the first degree, is not confined to those specific homicidal acts particularly enumerated by the Legislature in its code definition of murder in the first degree, and which carry with them conclusive evidence of deliberation and premeditation. That is to say, the rule is not limited to cases where the killing was perpetrated by means of poison, lying in wait, etc., or where the slaying was committed in the perpetration or attempt to perpetrate some one of the felonies enumerated in the statute, such as robbery, arson, etc. On the contrary, it extends to all cases where there is no evidence tending to show the commission of a lesser offense than murder in the first degree. In *People v. Lapara*, supra, this court sanctioned the application of the rule to a case, where the deceased was shot while driving a truck, and enmity was the apparent motive for the slaying. It may be, as is stated in substance by the Ohio court in *Bandy v. State*, supra (102 Ohio St. 384, 131 N. E. 499, 21 A. L. R. 594), that a refusal to charge upon the lesser degree should be the exception in those cases where the killing is not of the kind which the Legislature has taken upon itself the respon-

sibility of saying shall be murder in the first degree, and that, conversely, the giving of a charge upon the lesser degree ordinarily would be the exception in those cases where the killing is of the kind which the Legislature has declared shall conclusively evidence deliberation and premeditation. But however this may be, we are satisfied that the rule is applicable to every case where there is no evidence tending to show the commission of a lesser offense than that of murder in the first degree.

[17] Nor is the rule confined to those cases where the evidence of the slaying is direct and positive. The mere fact that the evidence is circumstantial would not of itself require the trial court to charge on murder in the second degree. There are many cases which hold that, though there be no eyewitness to the killing and the evidence is entirely circumstantial, no instruction upon a lesser offense than that of murder in the first degree need be given where the circumstances disclosed by the evidence will not permit a reasonable inference that the defendant was guilty of a lesser grade of homicide. *Monmouth v. State*, 54 Tex. Cr. R. 407, 114 S. W. 114; *Pearl v. State*, 43 Tex. Cr. R. 189, 63 S. W. 1013; *State v. Grba*, 196 Iowa, 241, 194 N. W. 250; *Higgins v. Commonwealth*, 142 Ky. 647, 134 S. W. 1135.

The instruction which was given in this case, limiting the jury to a verdict finding the accused guilty of the highest offense or not guilty of any crime whatever, was fully warranted by the facts disclosed by the evidence. The blows which caused the death were inflicted with a heavy, blunt instrument which, under the circumstances of its use, may well have been found to be a deadly weapon. There was, as we have said, nothing to show a struggle or a combat. On the contrary, the evidence shows that if the killing was done by defendant the deceased was put to death in furtherance of a base, mercenary motive. Under these circumstances we have no hesitancy in saying that if defendant was guilty of anything he was guilty of brutal and ruthless murder, done willfully, deliberately, and with premeditation. If there was a failure of proof as to any element necessary to the establishment of murder in the first degree, there was a like failure of proof as to any lesser grade of homicide. Either appellant is guilty of murder in the first degree or he is entirely innocent.

Moreover, even if the giving of the instruction were error, it could not have harmed appellant. As we have stated, the jurors, who were fully instructed as to the ingredients of the crime of murder in the first degree, were told in effect that if they were not satisfied that defendant was guilty of that offense they must acquit him altogether. It will be presumed that they heeded this instruction and performed their whole duty in accordance with it. If they were not satisfied

beyond a reasonable doubt that appellant was guilty of first degree murder, under the instructions they would have acquitted him. The instruction therefore would not have justified a reversal even if it had been error to give it. *People v. Lopez*, 135 Cal. 25, 66 P. 965.

[18] There is no merit in the claim that the trial court erroneously instructed upon the weight of circumstantial evidence. The trial judge gave several long instructions dealing with the subject of circumstantial evidence. In one of them the jury was advised that no conviction could be had unless the people established beyond a reasonable doubt that the death of Hey was caused by homicidal means; by another the jury was told that a conviction could not be had unless the prosecution established beyond a reasonable doubt that the injuries causing the death were inflicted in San Bernardino county; and in still another instruction the court charged the jury that a verdict of guilty could not be returned unless the people had established beyond a reasonable doubt that the defendant is the person who committed the murder, if murder there was. In the course of these instructions the trial court told the jury, in substance and in effect, that though these ultimate facts—death by homicidal means, the infliction of the lethal injuries in San Bernardino county, and the identity of the defendant as the slayer—must be proved beyond a reasonable doubt, still they need not be shown by direct evidence but “may be established as satisfactorily and as conclusively by circumstantial as by direct evidence.” This language did not carry an intimation to the jury that the court deemed that the evidence satisfactorily or conclusively established or tended to establish any of the issues in the case. The court’s statement that the facts referred to in the instructions might be established “as satisfactorily and as conclusively by circumstantial as by direct evidence,” when read in connection with the whole charge, amounted to no more than a statement that circumstantial evidence is legal and competent, and that if the jurors found it to be sufficient to prove defendant’s guilt beyond a reasonable doubt they might accept it and act upon it just as if it were direct evidence. So construed, the instructions state the law correctly. *People v. Tom Woo*, 181 Cal. 331, 184 P. 389.

[19] No prejudicial error was committed in giving the instruction upon circumstantial evidence which substantially conforms with the one that was approved in *People v. Morrow*, 60 Cal. 142, and *People v. Urquidas*, 96 Cal. 239, 31 P. 52. The only portion of the instruction of which there can be any just criticism is the following: “There is nothing in the nature of circumstantial evidence that renders it any less reliable than any other class of evidence.” This language is more in the nature of an argument than a declaration

of law, and it were better had it been omitted; but it is not prejudicially erroneous. *People v. Wilder*, 134 Cal. 182, 66 P. 228; *People v. Howard*, 135 Cal. 266, 67 P. 148; *People v. Ung Sing*, 171 Cal. 83, 151 P. 1145.

[20] The instruction upon the subject of “flight” was not harmful error. In substance it is such an instruction as was criticized in *People v. Jones*, supra. It failed to admonish the jury that the defendant must know that a crime has been perpetrated and that he is accused of its commission. This instruction, though frequently frowned upon by this court, never has been held to be ground for reversal, save in those cases where it appears that the defendant has been prejudiced by it. *People v. Sainz*, 162 Cal. 242, 121 P. 922; *People v. Lee Nam Chin*, 166 Cal. 570, 137 P. 917; *People v. Erno*, supra. No substantial injury appears here. In finding appellant guilty the jury necessarily must have found that the crime had been committed. And no other inference can reasonably be drawn from the evidence than that appellant knew that the crime had been perpetrated and that he would be charged with its commission. This being the case, we hold, for the reasons given in *People v. Erno*, supra, that the instruction was not prejudicially erroneous, although we again take occasion to say that it should never be given.

[21] There is no merit in the claim that the instructions assume the existence of certain incriminating circumstances. To support their contention in this regard, counsel have selected from the instructions on circumstantial evidence four or five detached passages. In the course of the instructions which charged the jury that it was incumbent upon the prosecution to establish beyond a reasonable doubt that the body was that of Wilfred Hey, that the death was caused by homicidal means, that the injuries causing the death were inflicted in San Bernardino county, and that defendant is the person who murdered Hey, the trial court, after saying that each of these facts could be established by circumstantial evidence, told the jury, in substance and effect, that these major facts might be established by certain circumstances which the instructions specifically mentioned, if the circumstances so referred to by the court were established to the satisfaction of the jury beyond a reasonable doubt, and if the jurors were satisfied from such circumstances, to a moral certainty and beyond a reasonable doubt, of the existence of such ultimate facts of identity, death by homicidal means, etc. This, in substance, is the purport of the instructions when the charge is considered as a whole. It is clear, therefore, that the instructions, when so considered, do not assume the existence of any of the circumstances mentioned in them.

[22] The court did not charge the jurors that they could take into consideration only such probative facts as were established be-

yond a reasonable doubt. In the course of the instructions to the effect that the identity of the dead body, death by homicidal means, etc., could be established by circumstantial evidence, the court advised the jurors that if they believed the specifically enumerated circumstances had been established beyond a reasonable doubt they could consider them, "together with *all other facts and circumstances, if any, shown by the evidence beyond a reasonable doubt.*" In criticism of the italicized part of this instruction, appellant says that, while it is necessary that the essential elements of the crime shall be established beyond a reasonable doubt, "it has never been the rule that only probative facts which are so established shall be considered by the jury." We find no merit in the point. The instructions, when considered in the light of the charge as a whole, could not have left the jury with the impression that in determining defendant's guilt or innocence they could take into consideration only such probative facts as were established to their satisfaction beyond a reasonable doubt. In its instruction upon reasonable doubt the court was at pains to tell the jury that such a doubt "is that state of the case which, after an entire comparison and consideration of *all* the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." In the instructions which are made the object of appellant's present attack, the trial judge was dealing with the subject of circumstantial evidence, which he correctly defined as "proof by testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant to warrant a conviction." In substance and effect, the instructions under attack simply told the jurors that it was for them to decide whether any particular circumstance, concerning which testimony had been given, was necessary to complete a chain of circumstances establishing to their satisfaction, beyond all reasonable doubt, the facts essential to guilt, and that, if they decided that such circumstance was a necessary link in such a chain, it must be proven beyond all reasonable doubt before they could act upon it. This is a correct declaration of the law. We know of no California case which states a different rule. It certainly is in accord with what is said in *People v. Phipps*, 39 Cal. 326, 333, *People v. Ah Chung*, 54 Cal. 398, *People v. Ah Jake*, 91 Cal. 98, 27 P. 595, and *People v. Smith*, 106 Cal. 73, 39 P. 40.

There is no merit in the claim that the court charged the jury that a particular fact or group of facts afforded sufficient proof of identity of the deceased, cause of death, etc. The learned trial judge was careful to advise the jury that, though the circumstances referred to in the instructions, if shown by the

evidence beyond a reasonable doubt, might be taken into consideration, identification could be established only "if such evidence (i. e., the circumstances adverted to) is sufficient to convince the jury to a moral certainty as to the identity of the dead body." Nowhere in his charge did the trial judge undertake to tell the jury what should be the effect of any of the circumstances or chains of circumstance referred to hypothetically in the instructions. On the contrary, the jurors were specifically told, in each instance, that it was for them to determine, from all the circumstances established beyond a reasonable doubt, whether the identity of the body, cause of death by homicidal means, venue, etc., were or were not established beyond a reasonable doubt.

[23] There is no basis for the claim that the trial court charged that defendant could be found guilty of murder in the first degree without including in the charge the essential elements of deliberation and premeditation. From the body of those instructions which advised the jury that the identity of the deceased and death by homicidal means could be established by circumstantial evidence, appellant has wrenched the following detached passages: "* * * If you believe beyond a reasonable doubt that Wilfred Hey was unlawfully killed *as alleged in the information*, and * * * that defendant killed and murdered the said Wilfred Hey, *as alleged in the information*, then you will find the defendant guilty"; and, "If the jury further believe * * * beyond a reasonable doubt that the defendant inflicted the wound or wounds, and thereby caused the death of Wilfred Hey, *as alleged in the information*, then you will find the defendant guilty"; also, "* * * If you believe * * * beyond a reasonable doubt that the dead body found was the body of Wilfred Hey, and that the defendant, at about the time and place alleged in the information, killed and *murdered* the said Hey, then you will find the defendant guilty as charged." It is claimed that, because the jury was instructed that the defendant, if guilty at all, could only be found guilty of murder in the first degree, these instructions are erroneous for the reason that they fail to state that the killing must be preceded by and be the result of the concurrence of deliberation and premeditation. In the two excerpts first above quoted the jurors were advised that they should return a verdict of guilty if they believed that the defendant murdered Hey and caused his death "as alleged in the information." The information charges that defendant murdered Hey "willfully * * * and with malice aforethought." The words "malice aforethought" are equivalent to an averment that the killing was committed with deliberation and premeditation. *People v. Fowler*, 178 Cal. 661, 174 P. 892; *Jolly v. Commonwealth*, 110 Ky.

190, 61 S. W. 49, 96 Am. St. Rep. 429. When, therefore, the court told the jurors that they should find appellant guilty—which, under the charge, meant guilty of murder in the first degree—if they believed that he murdered Hey and caused his death *as alleged in the information*, it in effect told them that they should find him guilty if they believed, beyond a reasonable doubt, that he murdered Hey willfully and with deliberation and premeditation. If appellant desired an instruction defining the words of the information, "malice aforethought," he should have asked for it.

[24] From what we have said, It is clear that appellant was not prejudiced by either of the first two above-quoted excerpts from the court's instructions. Nor was he prejudiced by the third passage above quoted, even though it does omit the qualifying words "as alleged in the information." Before the court gave the instruction from which this excerpt is taken, it had carefully charged the jurors that to constitute murder in the first degree the killing must be preceded by and be the result of a concurrence of will, deliberation, and premeditation on the part of the slayer. They also were told that, to justify a conviction, every element of the crime must be established by the prosecution beyond a reasonable doubt. When, therefore, the jurors were told that they should return a verdict of guilty—i. e., guilty of murder in the first degree—if they believed beyond a reasonable doubt that defendant "murdered" Hey, they necessarily must have understood, as men of common understanding, that the court was referring to murder in the first degree, and that they could not return a verdict of guilty of that crime unless they believed beyond a reasonable doubt that defendant murdered the slain man willfully, deliberately, and with premeditation. All the instructions, read and considered together as one charge, without straining the language, show a fair, harmonious, and correct statement of the law applicable to the facts of the case, and contain all the conditions and limitations which are omitted from the isolated excerpts selected by appellant for criticism. This has been held repeatedly to obviate such objections as are now made. *People v. Doyell*, 48 Cal. 92; *People v. Dennis*, 39 Cal. 636; *People v. Nelson*, 56 Cal. 81; *People v. Gray*, 61 Cal. 182, 44 Am. Rep. 549; *People v. Hurtado*, 63 Cal. 288; *People v. Tomlinson*, 66 Cal. 346, 5 P. 509; *People v. Clark*, 84 Cal. 583, 24 P. 313.

We have examined the record with care, and we find no error which would justify a reversal.

The judgment and the order denying a new trial are affirmed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; CURTIS, J.; SEAWELL, J.

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RAY WONG v. EARLE C. ANTHONY, Inc.
(Sac. 3715.)

(Supreme Court of California. June 29, 1926.)

1. Corporations ⇨503(2)—Constitutional provision that corporation may be sued in county where obligation or liability arises applies to torts (Const. art. 12, § 16).

Const. art. 12, § 16, providing that corporation may be sued in county where contract is made or is to be performed, or where obligation or liability arises or breach occurs, applies to torts, as well as to matters of contract.

2. Corporations ⇨503(2)—Constitutional provision that corporation may be sued in county where obligation or liability arises applies to place of trial (Const. art. 12, § 16).

Const. art. 12, § 16, providing that corporation may be sued in county where contract is made or is to be performed, or liability arises, or breach occurs, applies to the place of trial, and not merely to the place where action may be commenced.

3. Malicious prosecution ⇨34.

Term "prosecution" includes every step in action, from its commencement to its final determination.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Prosecution.]

4. Malicious prosecution ⇨67—Damages for malicious prosecution include loss of time and liberty, injury to reputation, mental suffering, and losses to business.

In action for malicious prosecution, damages may be recovered for loss of time, deprivation of liberty, injury to reputation, mental suffering, general impairment of social and mercantile standing, injury to credit, and all losses to business directly and naturally resulting.

5. Damages ⇨19—Doer of illegal or wrongful act is liable for consequences ensuing in ordinary and natural course of events, though immediately caused by intervening agents, if set in motion by wrongdoer, or acts were necessary or legal or natural consequences.

Doer of illegal or wrongful act is liable for all consequences ensuing in the ordinary and natural course of events, though immediately caused by intervening agents, if such agents were set in motion by primary wrongdoer, or if acts were necessary or legal and natural consequences of wrongful act.

6. Corporations ⇨503(2)—Corporation may be sued for malicious prosecution in county in which plaintiff resided and was arrested and imprisoned, though proceedings instituted in another county (Const. art. 12, § 16).

Under Const. art. 12, § 16, providing that corporation may be sued in county where liability arises, corporation may be sued for malicious prosecution in county wherein plaintiff resided, and was arrested and imprisoned, though proceedings were instituted in another county.

7. Corporations —503(2)—Injury need not occur wholly within county in which suit against corporation is brought (Const. art. 12, § 16).

Under Const. art. 12, § 16, providing that corporation may be sued in county where contract is made or is to be performed, or where obligation or liability arises or breach occurs, injury need not occur wholly within county in which suit is brought.

8. Corporations —503(2).

Const. art. 12, § 16, providing that corporation may be sued in county where liability arises, does not mean where liability first arises only.

In Bank.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by Ray Wong against Earle C. Anthony, Inc., for damages for malicious prosecution. From an order denying change of place of trial, defendant appeals. Affirmed.

Samuel M. Samter, of San Francisco, for appellant.

Geo. F. McNoble, Stanley M. Arndt, and Herbert C. Coblenz, all of Stockton, for respondent.

FINCH, Justice pro tem. Plaintiff brought this action in San Joaquin county to recover damages for alleged malicious prosecution. The plaintiff alleges that the defendant caused a complaint to be filed in the police court of Sacramento, charging him with the crime of embezzlement; that a warrant of arrest was issued out of said court, and in obedience thereto the plaintiff was arrested in Stockton, and there placed in the county jail of San Joaquin county; that he was thereafter taken to Sacramento, and there imprisoned in the county jail of Sacramento county; that he was tried for the alleged crime in Sacramento county, and acquitted. The complaint alleges in appropriate language that the prosecution by defendant was malicious and without probable cause.

The defendant duly moved the court for a change of the place of trial to Los Angeles county, on the ground that its principal place of business is in that county, and not in San Joaquin county, and on the further ground that the alleged obligation or liability of the defendant did not arise in the latter county. The motion was supported by an affidavit to the effect that the defendant's principal place of business is, and at the time of the commencement of this action was, in Los Angeles county. The plaintiff introduced affidavits to the effect that, long prior to his arrest and at all times since, he has been a resident of Stockton, San Joaquin county. The court denied the motion, and the defendant has appealed.

[1, 2] Article 12, § 16, of the Constitution provides:

"A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

"This provision applies to torts as well as to matters of contract." *Tingley v. Times-Mirror Co.*, 144 Cal. 205, 115 P. 318. It applies to the place of trial, and not merely to the place where an action may be commenced. *Cook v. Ray Manufacturing Co.*, 159 Cal. 694, 696; *Raphael v. People's Bank of Benicia*, 45 Cal. App. 115, 116, 187 P. 53. Appellant does not contest the foregoing statements of the law applicable to the case, but contends that "it is the instituting of the criminal proceedings which lays the foundation for the subsequent action in malicious prosecution," and that therefore the suit was improperly brought in San Joaquin county, citing *Hubbard v. Lord*, 59 Tex. 384. That was a suit for malicious prosecution of a criminal action. The decision is based upon statutory provisions essentially different from ours. The court said:

"It is urged that the case comes within the eighth exception to article 1198 of the Revised Statutes. That exception provides that, when the foundation of the suit is some crime or offense or trespass, for which a civil action in damages may lie, suit may be brought in the county where such crime, offense or trespass was committed. By article 273 of our Criminal Code [Pen. Code 1879], it is made an offense to institute a criminal prosecution against any person for the purpose of vexing, harassing, or injuring him. The offense consists in instituting the prosecution, or causing it to be instituted. In this case, the criminal prosecution was commenced or instituted * * * in De Witt county. The arrest in Wilson county was not the institution of the prosecution, and hence the offense was not committed by making it, but was complete when the preliminary steps, including the issuance of the warrant, had been taken."

[3-8] The term "prosecution" is sufficiently comprehensive to include every step in an action from its commencement to its final determination. 32 Cyc. 727. "The reason for the action for malicious prosecution does not lie solely in the danger of punishment but in the disgraceful imputation, the injury caused by the arrest, and the inconvenience and expense incident to defending the proceedings." 16 Cal. Jur. 732; *Harrington v. Tippet*, 143 Cal. 78, 80, 76 P. 816; *Cochran v. Bones*, 1 Cal. App. 729, 732, 82 P. 970. In such an action, damages may be recovered for "loss of time, deprivation of liberty, * * * injury to fame, reputation, character, * * * mental suffering, general impairment of social and mercantile standing, injury to credit, * * * and all losses sustained to plain-

tiff's business as the direct and natural result of the proceedings complained of." 33 C. J. 446. "The general rule of law is that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately brought about by intervening agents, provided such agents were set in motion by the primary wrongdoer, or provided those acts causing the damage were the necessary or legal and natural consequence of the wrongful act." *Filer v. Smith*, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603; *Burke v. Watts*, 188 Cal. 118, 128, 204 P. 578.

Since the defendant is liable, if at all, for the damage caused by every step regularly taken in the prosecution of the plaintiff, it is liable for the injury naturally resulting from the arrest and imprisonment of plaintiff in San Joaquin county. That liability, which is a part of the cause of action, arose in San Joaquin county. "Provision is sometimes made by statute that a suit shall be brought in the county wherein the cause of action arose. Under such a statute, it is not necessary that an injury for which suit is brought should have wholly occurred within the county in which suit is brought." 27 R. C. L. 805; *Southern Ry. Co. v. Harrington*, 166 Ala. 630, 52 So. 57, 139 Am. St. Rep. 59; *Atlantic Coast Line R. Co. v. Powell*, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A. (N. S.) 769, 9 Ann. Cas. 553. In *Evans v. Maysville & B. S. R. Co.*, 77 S. W. 708, 25 Ky. Law Rep. 1258, the plaintiff sued the defendant corporation in Greenup county for malicious prosecution and false imprisonment. The complaint alleged that the plaintiff was arrested in Mason county, and carried under arrest through Greenup county and into Bath county. Section 72 of the Civil Code of Practice of Kentucky provided that an action against a corporation for a tort might be brought in the county where the tort was committed. Other sections provided that actions for injury to the person of the plaintiff or his character might be brought in the county in which the injury was done. The court said:

"It matters not which of these sections of the Code is applicable to the case at bar. * * * Appellant's cause of action was for damages for the injuries alleged to have been done or inflicted upon him by appellees. The county in which the injury was inflicted did not affect his cause of action, but only affected the venue thereof. * * * It was one continued transaction. For this injury, if any, appellant has a cause of action, and he had the right to elect in which county he would institute it."

See, also, *Santoro v. Trimble*, 63 App. Div. 413, 71 N. Y. S. 785; *Ellis v. Baker*, 62 App. Div. 542, 71 N. Y. S. 88; *Osborn v. Stephens*,

74 Hun, 91, 26 N. Y. S. 160; *Vennum v. Huston*, 38 Neb. 293, 56 N. W. 970.

Generally the principal injury resulting from the malicious prosecution of a criminal action is to the feelings and reputation of the defendant therein, caused by the accusation and his arrest and imprisonment thereunder. In this respect the grounds for recovery are the same as for libel. Such injury is naturally greatest in the county wherein the defendant resides and is engaged in business. In *Tingley v. Times-Mirror Co.*, 144 Cal. 205, 206, 77 P. 918, 919, the plaintiff, who resided in San Diego county, brought an action for libel in that county against the defendant, a corporation having its principal place of business in Los Angeles county. It was contended that "the wrong complained of consisted in printing, publishing and distributing the alleged libelous articles, which * * * was done in Los Angeles." The court said:

"The liability arises where the injury occurs, and the injury in the case of libel is peculiarly at the county in which the plaintiff resides, if, as is alleged, the plaintiff has published and circulated the libelous article there, and there it is that plaintiff is most injured by the publication. * * * In our opinion, libel may be maintained in the county in which the plaintiff resides, when the newspaper is circulated in that county, though published in another county, which latter is the principal place where defendant's business is located."

The principle announced in that case is equally applicable in this. Undoubtedly liability in that case arose first in Los Angeles county, where the newspaper containing the libelous article was printed and published, if the plaintiff was injured by its publication therein, but she was most injured by its publication in the county of her residence. The constitutional provision is that a corporation may be sued in the county "where the * * * liability arises," not necessarily where liability first arises. For the purposes of this discussion it may be conceded that liability in this case, if any, arose first in Sacramento county, just as in the *Tingley Case* it arose first in Los Angeles county; but the injury "is peculiarly at the county in which the plaintiff resides" and in which he was arrested and imprisoned. The fact that the defendant did not directly do anything in San Joaquin county of which complaint is made is wholly immaterial. The arrest and imprisonment in that county were the natural consequences of the accusation, ensuing in the regular course of the proceeding which the defendant set in motion.

The order denying a change of the place of trial is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; RICHARDS, J.

198 Cal. 753

(247 P.)

LOS ANGELES COUNTY v. HUNT, Los Angeles County Treasurer. (L. A. 9063.)

(Supreme Court of California. June 23, 1926, as Modified July 9, 1926.)

1. Constitutional law ⚡290(3)—Counties ⚡22—Acquisition and Improvement Act held to provide for sufficient notice to affected property owners, though indefinite as to period of publication of notice of intention (Acquisition and Improvement Act 1925 [St. 1925, p. 849] Const. U. S. Amend. 14).

Acquisition and Improvement Act of 1925 held to provide for sufficient notice to affected property owners to satisfy due process requirement, though the act was indefinite in relation to period of time required for publication of resolution of intention prior to date for first hearing at which property owners might appear.

2. Constitutional law ⚡60.

Acquisition and Improvement Act (St. 1925, p. 849), held not invalid because it delegated to subordinate legislative body function of fixing limits of assessment district and amount of assessments.

3. Constitutional law ⚡290(3)—Acquisition and Improvement Act held not violative of due process clause by reason of time provided for hearing of protesting property owners (St. 1925, p. 849).

Acquisition and Improvement Act is not violative of due process clause, though hearing for protesting property owners therein provided for is to take place in advance of doing of any work or awarding of any contract, in view of provisions and estimates before such meeting, of cost of work and proportionate share of burden to be imposed on particular zones.

4. Eminent domain ⚡71—Provisions of Acquisition and Improvement Act for raising of money to be deposited to obtain immediate possession of lands, subject of condemnation proceedings, held not contrary to intent or spirit of Constitution (Acquisition and Improvement Act, §§ 28-37 [St. 1925, pp. 876-886; Const. art. 1, § 14, as amended in 1918]).

Acquisition and Improvement Act, particularly sections 28-37, providing for issuance and sale of bonds against lands of district for purpose of raising money required to be deposited in order to obtain immediate possession of other lands, subject of pending condemnation proceedings, and providing further for notice and hearing of question of issuance of such bonds, held not contrary to spirit and intention of Const. art. 1, § 14, as amended in 1918.

5. Counties ⚡20.

Acquisition and Improvement Act (St. 1925, p. 849) must be interpreted liberally to effect beneficent public purpose contemplated.

6. Counties ⚡20—Statutes ⚡76(2).

Acquisition and Improvement Act (St. 1925, p. 855), § 5, authorizing exemption from assessment of lands belonging to certain public bodies, held not violative of Const. art. 1, § 2, or article 4, § 25, subd. 33.

7. Taxation ⚡25.

Legislature for public improvement may impose such burdens on property of public agencies as to it may seem just, and such agencies have no private or proprietary interest therein as against state.

8. Constitutional law ⚡48.

Every intendment is in favor of validity of legislative classification, and its classification will not be disturbed, unless it is palpably arbitrary.

9. Counties ⚡20½.

Acquisition and Improvement Act (St. 1925, p. 849), though it authorizes the county of Los Angeles to conduct work within city of Los Angeles, is not violative of Const. art. 11, §§ 6, 8, or of provisions of charter of city of Los Angeles.

In Bank.

Application by the County of Los Angeles for writ of mandamus to be directed against John N. Hunt, County Treasurer of the County of Los Angeles, to compel him to sign and issue certain improvement bonds. Writ granted.

Edward T. Bishop, County Counsel, and Everett W. Mattoon, Chief Deputy County Counsel, both of Los Angeles, for petitioner and plaintiff.

H. W. O'Melveny, of Los Angeles, amicus curiæ.

Arthur M. Ellis, of Los Angeles, for defendant.

RICHARDS, J. The application herein is for a writ of mandate whereby the petitioner seeks to compel the respondent, as treasurer of the county of Los Angeles, to sign and issue certain bonds which had been ordered to be issued by the board of supervisors of said county under the provisions of an act of the Legislature known as the "Acquisition and Improvement Act of 1925" (Stats. 1925, p. 849), and under section 28 of said act. The questions presented upon said application and upon the demurrer of the respondent to the sufficiency thereof involve primarily the constitutionality of said act, and, secondarily, certain alleged irregularities of procedure thereunder appearing upon the face of said application, but which do not affect the validity of the act itself. An examination of the aforesaid act of 1925 discloses that the controlling purpose of those who framed it and of the Legislature in its adoption was to provide a simplified plan, and at the same time a comprehensive procedure for the acquisition and improvement of public ways, parks, and pleasure grounds, whether lying entirely within unincorporated territory of a county or within the territory of a municipality, or lying partly within such unincorporated territory and partly within one or more municipalities, or lying within two or more municipalities, or forming the exterior bound-

ary of any municipality where the same joins unincorporated territory of a county or the territory of another municipality whether partly within or without such boundary, and for the payment of the costs and expenses of such acquisition and work of improvement and the issuance and payment of bonds therefor, and for such other purposes as may be necessary to carry into effect the main purposes and provisions of said act. It is asserted by the petitioner, and is not denied or questioned by the respondent, that the object of this act is to embrace and combine within its provisions and procedure the accomplishment of all of the various things relating to the acquisition and improvement of public ways, parks, and pleasure grounds, the accomplishment of which has heretofore been committed to a number of earlier statutory enactments, such as the Vrooman Act (Stats. 1885, p. 147) and its several amendments, the Improvement Act of 1911 (Stats. 1911, p. 730), the Municipal District Improvement Act (Stats. 1915, p. 99), the City Boundary Street Act (Stats. 1911, p. 1018), the Road District Improvement Act (Stats. 1907, p. 806), the Drainage District Improvement Act (Stats. 1919, p. 731), the Street Opening Act of 1889 (Stats. 1889, p. 70), the Opening and Widening Act of 1903 (Stats. 1903, p. 376), the County Street Opening Act of 1923 (Stats. 1923, p. 308), and possibly certain other and earlier enactments. The provisions of the act, in so far as they come under review in this proceeding, may be briefly summarized as follows: Section 1 thereof purports to confer jurisdiction upon the several legislative bodies of those political subdivisions wherein public improvements of the kind above indicated are contemplated, with power to proceed according to the method provided in subsequent provisions of the act. Section 2 thereof provides that, whenever public convenience may require the acquisition or improvement, or both the acquisition and improvement, of the aforesaid public ways or properties, the legislative body of the political subdivision wherein the same are situate may order the said acquisition or improvement thereof, or, if both the acquisition and improvement are desired, may provide by such order that both may be included and consummated in a single proceeding, and that public ways already acquired, as well as the whole or any portion of such as are to be acquired under such proceeding, may be improved under such single proceeding, and that, in the course of such acquisition or improvement or both, authority, power, and jurisdiction are given to the legislative body or bodies thus proceeding to make the same to issue, sell, and dispose of bonds representing the costs and expenses of such acquisition and improvement, and to provide the funds for the payment of such bonds through the levy and collection of assessment taxes upon such districts and the property therein as may be established or in said act subsequently pro-

vided for as being affected by such improvement. The section proceeds at some length and with much detail to provide that the legislative body of a county shall have jurisdiction to acquire and improve public ways within the boundaries of such county, and in cases where such acquisition or improvement as thus contemplated includes or extends over, or connects with, or renders of greater use to the public, any public way or ways lying partly within such unincorporated territory of the county, and partly within one or more municipalities, the consent of the municipal bodies of such municipality or municipalities shall first be obtained thereto, and to the assessment of the property therein to be benefited thereby, the intent and meaning of this provision in said act being that the necessary jurisdiction and power for the consummation of such acquisitions and improvements shall be vested in, and that the proceedings therefor as provided in said act may be had and taken by, the legislative body either of the county or of any of such municipalities, the public interest and convenience of which is affected thereby, and that each of such legislative bodies shall have concurrent jurisdiction to initiate such proceedings, provided that the legislative body initiating the proceedings and adopting the resolution of intention therefor as in said act provided shall thereafter have exclusive jurisdiction of such proceeding or proceedings and of the acquisitions and improvements comprehended therein and to be consummated thereby. Section 3 of said act proceeds to define in detail the power and authority of the legislative body thus initiating and conducting such proceedings, which include the appointment of engineers and superintendents of work and of competent persons for the preparing and furnishing of such specifications, as is later in detail provided for in said act, and of attorneys and of such other persons as may be required during the progress of such work, and to provide for the compensation of such officers and employés. Section 4 of said act provides for the designation of a county or municipal officer or some other competent person to prepare and furnish specifications for the proposed acquisition or improvement or both of such properties as the legislative body initiating such proceeding or proceedings may desire to acquire or improve, and provides what such specifications shall include. The order, therefore, is to precede the resolution of intention to make such acquisitions and improvements, which said resolution is included in the terms of the succeeding section of said act. Section five of said act provides that, before ordering any such acquisitions or improvements or both, authorized by the terms of the act, the legislative body which initiates and is to conduct the proceedings shall adopt a resolution of intention so to do, which resolution shall refer to the public way acquired or improved or both, by its lawful or official name, or by

the name by which it is commonly known, or, if the same is yet to be acquired, by a name by which the same is to be called upon its acquisition, which name is thereby fixed and established, and shall also briefly describe such public way or right of way, and, in case of acquisition, such resolution shall describe the property necessary or convenient to be taken therefor. It shall be determined in said resolution that the public interest and necessity require the acquisition of such public way or right of way and of the property necessary to be taken therefor; and in case of its improvement said resolution shall also determine that the public interest and necessity require such improvement as is set forth in the resolution, and shall briefly describe such improvement so as to state in general terms the class or kind of work contemplated, such as grading, paving, sewerage, or other work of improvement, and give in general the location of the proposed improvement, and refer to the plans and specifications therefor for a full and detailed description and location of such improvement and the grades to which said improvement is to be constructed. Said resolution shall specifically direct the notice of all persons affected by such improvement or improvements to the same and to the provisions of said act relating to grades, and shall also, in cases where the construction of the proposed improvement will result in a substantial change, considering existing physical conditions, with respect to the elevation of any abutting property to any public way as it will exist when thus improved to grade, particularly direct the attention of such owners of abutting properties to the fact of such substantial change in the elevation of their such properties in relation to such public way as it will exist when thus improved. If both acquisition and improvement are contemplated in the same proceeding, one resolution of intention shall be sufficient for both purposes.

The resolution of intention shall also contain a description of the district of the lands to be benefited by such proposed acquisition or improvement or both, which shall be known thereafter and be referred to in said act as "the assessment district." The description of the assessment district may be in general terms, referring to a plat or map approved by the legislative body conducting the proceeding, which shall be on file in the office of the clerk of such legislative body at the time of the adoption of such resolution of intention, and which shall indicate by a boundary line the extent of the territory to be included in the proposed assessment district, which said plat shall govern for all details as to the extent thereof. Said resolution shall also contain a statement that, for the expenses of the things therein proposed to be done, bonds will be issued for the full amount of the same, excepting the amount, if any, to be contributed thereto by the county or municipality in money or by the furnishing of materials there-

for, said bonds to be specifically described therein as to the interest thereon and time of payment thereof, and as to the aggregate principal of said bonds and the time or times within which such bonds are to be redeemed, and the annual payments thereon to be made in the course of such redemption, and that a special fund shall be constituted for the payment of said bonds by the levy of special assessment taxes upon the lands within the assessment district, in accordance with the provisions of said act. Said section further provides for the exemption from such special assessment taxes of certain lands such as those belonging to the United States or the state of California or its political subdivisions or educational, penal, or other public institutions as are particularly set forth in the resolution of intention as thus to be exempted from such special assessment tax. It is further provided in said section of the act that, if, in the judgment of the legislative body conducting such proceeding varying benefits are to be derived from the different parcels of land lying within such assessment district, it may provide that the said district be divided into zones, according to benefits, such zones to be as many in number as may be deemed necessary so as to include in each zone lands within the district which will be benefited in like measure. Such legislative body shall also determine the percentage of the sum to be raised each year from such special assessment taxes which will be raised from the lands in each zone. These zones shall be designated by letters or numbers to be plainly shown upon the map or plat of the assessment district, and shall be referred to in the resolution of intention either by separate boundaries or by coloring or other convenient and graphic method, so that all persons interested may with accuracy ascertain within which zone any parcel of land is located.

It shall be sufficient in the resolution of intention in case of the division of the assessment district into such zones to refer to said plat or map for the boundaries and all details concerning the same. Said section further provides that said resolution of intention shall contain a notice of a day, hour, and place to be fixed therein when and where any and all persons having any objections to the proposed acquisition or improvement, or both, to the proposed grades to which such improvement is to be constructed, to the extent of the assessment district, to the zones, if any, into which the same is to be divided, to the percentages of assessment taxes to be raised from each of said zones, or to any or all of the matters to be contained in said resolution of intention, shall appear and be heard before the legislative body conducting such proceeding. Said time shall be not less than 15, nor more than 60, days from the date of the adoption of such resolution, and shall be caused by the clerk of said legislative body to

be published by at least two insertions. Section 6 of said act provides that the legislative body, having power by its resolution of intention to establish the grades to which any improvements provided for therein shall conform, shall also have power to modify or change such adopted grades at the hearing provided for in such resolution of intention either with or without the objections of property owners included within said assessment district, and the failure to make such objections shall be deemed to be a waiver on the part of such property owners of all objections to such grades as originally established, or as thus modified or changed, and a bar to all claims for damages therefor or to any action looking to the prevention of such work or improvement or to the recovery of damages on account thereof. Section 7 of said act provides for the determination by the legislative body conducting such proceedings as to what, if any, part of the expenses of the acquisition or improvement, or both, of the properties required for such public purpose shall be paid out of the treasury of the county or municipality, as the case may be, and that such payment may be made out of the general fund of such county or municipality or from any other fund available for such purpose. In the event that the proposed acquisition or improvement or both under such proceeding includes any acquisition or improvement or both within the territory of a county or of any municipality or municipalities for which the legislative body conducting such proceeding does not function, the legislative body of such county or municipality may determine that any part of the expense of such acquisition or improvement, or both, provided for in such proceeding, shall be paid out of its treasury, or that any materials purchased therefor shall be paid therefrom or from any of its funds available therefor, which determination shall be expressed by the resolution of such legislative body, and shall be transmitted to the legislative body conducting such proceeding, and shall thereby create a liability on the part of the county or municipality so resolving to furnish such proportion of such expenses or materials as are provided for therein. The resolution of intention of the legislative body conducting such proceeding shall set forth the fact that such expenses or materials or both are to be thus furnished and paid for. Section 8 of said act provides that, after the adoption of the resolution of intention, the superintendent of work shall cause to be posted along the line of the contemplated acquisition or improvement notices of adoption of said resolution, at specified distances, and which shall be conspicuously entitled "Notice of Improvement," and which shall contain certain specified facts relating to the adoption and contents of said resolution of intention. Said notices shall also contain a statement of the hour, day, and place

when and where any and all persons having any objections to the proposed acquisition or improvement, or both, or to any of the matters contained in said resolution of intention, may appear before said legislative body and be heard. Said legislative body may also, if it deems advisable, direct the clerk thereof to mail copies of such notices to the owners or reputed owners of property within such assessment district, but the failure to do so shall not in any way affect the validity of such proceedings. Section 9 of said act provides for the procedure before such legislative body at the time set for hearing such objections as are provided for in the preceding section and for such hearing thereon. Section 10 of said act provides that at the conclusion of such hearing such legislative body, as a determination of all questions arising thereat, shall by resolution declare its finding thereon, embodying such changes or modifications as may be made as a result of such hearing as to the extent and boundaries of the assessment district or as to the zones, if any, in which the same is divided, or as to the percentage of the amount to be paid by each zone of the special assessment taxes for such work and in the grades therein provided for. If any such modifications or changes are thus made, the plat or map of the assessment district shall be so amended as to show such modifications and changes in the boundaries of said district or the zones thereof or of the percentages of cost to be raised from each zone or in the grades provided for in the resolution of intention; and the boundaries, zones, percentages, and grades as thus finally determined shall be established and prevail throughout all the later stages of such proceeding, including the issuance and final payment of the bonds therefor, and such finding and determination of such legislative body thereon shall be final and conclusive.

Sections 11, 12, 13, 14, and 15 of said act provide for proceeding with such work or acquisition or improvement, or both, for the issuance of notice and the receipt of bids therefor, for the conditions of such bidding and of the award or awards of contracts therefor, and for the publication of notice of such award or awards by the clerk of the legislative body making the same. Section 16 provides that at any time within 10 days from the date of the first publication of such notice any property owner or any other person interested in any parcel of land within the boundaries of the assessment district who claims that any of the previous acts or proceedings relating to such acquisition or improvement are irregular, defective, erroneous, faulty, or invalid for any reason, may file with the clerk a written notice specifying in what respects such proceedings are thus erroneous, irregular, or invalid; the intent of the section being that any person failing to file such notice shall be deemed to have

waived such objections, and shall be estopped from thereafter raising the same. Sections 17, 18, 19, 20, and 21 of said act provide for the execution by the superintendent of work of the contract or contracts to the awardee or awardees of the same, for the contents of such contract or contracts, and for the bond or bonds to be given by the latter for the faithful performance of the same, and for the time and manner of the progress and completion of the work to be done under such contract or contracts, and for the procedure in event of the filing and enforcement of liens of mechanics, materialmen, or laborers on account of such work, and for the duties of the officers of the said legislative body in respect to the same and the satisfaction thereof. Section 22 of said act provides that, as soon as the work so provided for to be done has been done in good faith, and there shall have been filed with the clerk of the legislative body conducting such proceeding a declaration signed and verified by the superintendent of work, that such work has been completed, such legislative body shall thereupon fix a day and hour and place for and direct notice to be given of a hearing for the purpose of determining whether or not such work or improvement shall be accepted as having been completed according to such contract or contracts, and of furnishing an opportunity for all persons interested in, or affected by, such work or improvement, or feeling aggrieved by any act or determination done or made in the course of such proceeding, or claiming any irregularities therein or in the progress thereof, which such persons may still be entitled to urge, to appear and set forth their said claims. Such hearing shall be known as the final hearing upon the improvement, and the notice thereof shall be phrased and published as set forth in detail in said section. Section 23 of said act provides for the procedure upon such hearing, and upon any objections which may be presented and urged thereat. Section 24 provides that, when such hearing shall have been concluded said legislative body shall then determine whether such work has been substantially completed and performed, and whether the same shall be accepted and paid for as provided in said contract or contracts therefor, and in the manner provided by the previous resolutions and orders of such body. The section further provides that such legislative body may thereupon remedy and correct any error or informality in the proceedings, and revise and correct any act or determination relative thereto or to the work or improvement performed thereunder, and that all decisions and determinations of such legislative body had upon notice and hearing as aforesaid shall be final and conclusive upon all persons entitled to be heard during the progress of the proceedings as to any errors, informalities, irregularities, omissions, and

defects therein, and that no assessment taxes levied or bonds issued or to be issued for such work or improvement shall be held invalid by any court for any such errors or irregularities or other defects where the resolution of intention has been actually published as in this act provided before such legislative body shall have ordered such work or improvement performed. The remaining sections of said act up to section 47 thereof relate to the issue and reissue of bonds on account of such work and improvement and the collection by suit or otherwise of the payment due thereon, and to the condemnation of such properties as may be required for the acquisition or improvement provided for in said act, and for the issuance of bonds to provide for the payment therefor in the course of such condemnation proceedings. Sections 47, 48, and 49 of said act refer to the procedure of such legislative body, and to the method and detail for the making of such publications of the orders, notices, and other proceedings thereof as have theretofore been provided for in said act. Section 50 of said act refers to the definition of the words, terms, and phrases used therein, while sections 51 and 52 have reference to the effect and interpretation to be given to the provisions of the act as a whole. Section 53 gives the title by which the act shall be known and designated as "Acquisition and Improvement Act of 1925."

[1] We have thus summarized at considerable length the provisions of this act in order to aid in clarifying the discussion of the objections which are urged to its validity. It is conceded by the respondent herein that the various steps and proceedings required by the terms of the act to be taken in the course of the proceedings providing for such acquisition and improvement and of the condemnation proceedings preliminary thereto, in the course of which the bond issue involved in this proceeding has been ordered, were regularly taken in conformity with the requirements of said act. His main objection goes to the procedure provided for in said act for imposing the burden of paying for the acquisitions or improvements or both, for which provision is attempted to be made therein, upon the property owners within the district to be affected by the acquisition or improvement. His first objection to that procedure seems to be that the act is indefinite in relation to the period of time required for the publication of the resolution of intention prior to the date fixed for the first hearing thereon at which property owners may appear and be heard as to their objections to the making or cost or details of the proposed acquisition or improvement or both. The respondent cites no authority in support of this particular objection, nor are we referred to any cases holding that in the statute itself the precise length of time required

for notice to those interested in the particular proceeding must be specified. All that is apparently required is that such persons shall be given such reasonable notice in the manner provided by the statute as to enable them to appear at the designated place and time of the hearing to make their objections, if any, to the acquisition or improvement contemplated in the resolution of intention, or to the form or substance of the resolution. Section 5 of the act in question provides that the time of such hearing shall be not less than 15, nor more than 60, days from the date of the adoption of such resolution, and that notice thereof shall be given by publication. Section 8 of the act provides also for posting notices of the adoption of the resolution, which may consist of printed copies thereof stating the day, hour, and place when and where such hearing is to be had and such objections, if any, considered. The statute evidently contemplates that these notices by both publication and posting shall be given by the clerk immediately upon the adoption of the resolution. In the instant case it is conceded that such notices were given on the day following the adoption of the resolution, viz, on November 9, 1925, and that the date of hearing was therein noticed for November 23, 1925. We are of the opinion that the statutory provisions for notice are adequate to satisfy the requirements of due process of law, and that the legislative body in question acquired by the notices actually given jurisdiction to proceed. *Tarpey v. McClure*, 190 Cal. 593, 213 P. 983; *Huntley v. Board of Trustees*, 165 Cal. 298, 131 P. 859.

[2] The next contention of the respondent is as to the mode of fixing the amount of assessments provided for in section 10 of the act. The gravamen of the respondent's contention seems to be that, while the Legislature itself might in the body of its act have laid down the rule for fixing the limits of the assessment district and the mode of arriving at the amount of the assessment, it could not delegate these functions to a subordinate legislative body as it has undertaken to do in this act. While it may be true that in the Road District Act of 1907 the former method was pursued, we are not pointed to any authority which holds that the latter method may not be availed of, provided the principles governing due process of law are adhered to. In the case of *Thomas v. Pridham*, 171 Cal. 98, 153 P. 933, wherein the provisions and validity of the Road District Improvement Act of 1907 were the subject of review, it being contended in that case that the said act was unconstitutional in permitting assessments of property within the districts to be formed under it to be made ad valorem instead of as to benefits, this court, however, basing its decision upon the very early case of *Emery v. San Francisco Gas Co.*, 28 Cal. 372, as approved in the case of *In re Madera*

Irr. Dist., 92 Cal. 325, 28 P. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106, and also upon the reasoning of the Supreme Court of the United States in *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 176, 17 S. Ct. 56, 41 L. Ed. 369, held that the Legislature was authorized to apportion the amount of money to be raised in order to meet the expenses of the improvement according to either the ad valorem or assessment according to benefits plan, or to adopt any principle of apportionment which might be devised under the sovereign power of taxation. In *Fallbrook Irr. Dist. v. Bradley*, supra, it was said, as quoted in *Thomas v. Pridham*, supra:

"Assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received, and that no land ought in justice to be assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry. Some means of arriving at this amount must be used, and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made, and where the fact of some benefit accruing to all the lands has been legally found, can it be that the adoption of an ad valorem method of assessing the lands is to be held a violation of the federal Constitution? It seems to us clearly not. It is one of these matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, which is open to the discretion of the state legislature, and with which this court ought to have nothing to do. The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem and far from a case of taking property without due process of law."

If, as above stated, the matter of arriving at the proper basis of assessment is a mere matter of detail open to the discretion of the state Legislature itself, we can perceive no reason why it might not commit such discretion to local legislative bodies possessed with knowledge of the identical local situation and invested with power to proceed with the needed improvement.

[3] The chief objection which the respondent appears to make to the procedure provided in section 10 of this act, wherein the local legislative body is invested with power upon the hearing provided for in the preceding sections thereof, to determine the extent and boundaries of the assessment district, and to finally fix the zones into which such district is to be divided for purposes of assessment and the percentages to be raised therefrom, and establish the grades for the contemplated improvement, is that upon such hearing in advance of the doing of any actual work of improvement or of the awarding of any contract or contracts therefor it would

be impossible for either the legislative body or the protesting property owner to know what burden each particular piece of property was to bear, and that, by the time the facts were ascertained by the actual completion of the work under contemplation, the time of the property owner to make an intelligent objection thereto would have long since expired. It is argued, therefore, that the requirements of due process of law are not complied with by such preliminary hearing and by the merely speculative determinations of the legislative body thereat. It is to be remembered, however, that the provisions of the act in its earlier sections contemplate the careful preparation of plans and specifications of the improvement to be entered upon, embracing and delineating the boundaries of the assessment district and the various zones thereof, and the grades upon the basis of which the work is to be done, the estimated cost of such work, the approximate portion of the burden of expense which shall be laid upon each particular zone, and the basis of the assessment taxes to be imposed for the purpose of meeting such burden. In its foregoing provisions the act in question follows generally, though more liberally, the similar plan provided for in the Road District Improvement Act of 1907, which was expressly upheld by this court in the case of *Thomas v. Pridham*, supra, and in which the Supreme Court of this state, both upon the main hearing and upon the rehearing, determined amounted to due process of law. The decision in that case has been followed in *Dillingham v. Welch*, 179 Cal. 656, 178 P. 512, and *Swall v. Los Angeles County*, 42 Cal. App. 758, 184 P. 406. That the plan of subdividing assessment districts into subdistricts or zones for the purpose of equitably distributing the burdens of the assessment has also been adopted and approved in other jurisdictions. See *Embree v. Kansas City Road District*, 240 U. S. 242, 36 S. Ct. 317, 60 L. Ed. 624; *City of Denver v. Kennedy*, 33 Colo. 80, 80 P. 122, 467. We are therefore of the opinion that section 10 of said act, providing for the determination of the matters to be inquired into at the hearing held in accordance therewith and with the notices of such hearing provided for in the preceding sections of the act, is not subject to the objections urged by the respondent, and that as to the matters thus determined its provisions sufficiently meet the legal requirements of due process of law.

[4, 5] The next contention of the respondent is that the provisions of the act with relation to the issuance and sale of bonds against lands of a district adjacent to the property to be condemned for the purpose of obtaining the money necessary to make the required deposit in court in order to obtain immediate possession of the lands to be condemned are contrary to the spirit and intent

of the state Constitution. The sections of the act thus assailed are sections 28 to 37 thereof, which, in substance, provided that in cases where the condemnation of any property needed in the course of the contemplated acquisition or improvement or both has been determined upon and appropriate proceedings to accomplish such condemnation have been initiated and prosecuted to the point of an order for possession as is provided for in the Constitution and statutes relating to the exercise of eminent domain, upon the entry of such order for possession, providing, as it may, for the taking of immediate possession of the property sought to be condemned, upon the payment into court of the amount or amounts required by the terms of the Constitution and statutes to the owner and persons interested in the property thus to be taken, the legislative body conducting the proceeding shall fix a day, hour, and place for a hearing upon the matter of the issuance of bonds against the assessment district for the purpose of obtaining the amount or amounts set forth in said order for possession as thus required to be so deposited, of which hearing all persons owning property within the assessment district shall be given notice as provided in said sections of the act, and at which these may appear to urge whatever reasons they may have why such bonds should not be issued. The sufficiency of the notice thus required and given in the instant proceeding is not called in question by the respondent herein, but he argues that the provisions of article 1, § 14, of the state Constitution, as amended in the year 1918, which relate to the payment into court in condemnation proceedings of such amounts as the court may determine to be reasonably adequate to secure to the owners of the property sought to be condemned immediate payment of just compensation for such taking, including damages and costs, have been in some manner violated. We look vainly through that article and section of the Constitution, however, for any limitation upon the ways or means to be adopted by the public or quasi public institution seeking such condemnation in providing the funds wherewith to make such payment, nor do we perceive any sufficient reason lying in any constitutional limitation why the legislative body, which is invested with power to proceed to make the acquisition or improvement in question, and to issue bonds for the expenses thereof, may not adopt any practical method open to it for obtaining the needed means to enable it to proceed with such acquisition or improvement required in advance thereof in order to obtain possession of the property to be taken in the course thereof. In point of fact, the provisions of said article and section of the Constitution, by its amendment in said year, providing for such immediate possession, implies that the municipality or other

public body thus permitted to take such possession of property sought to be condemned must obtain from some source the means for making the required payments into court. Whether such means are to be drawn from the general or some specific fund of the public body seeking such condemnation, or from money to be borrowed by it in accordance with those methods which are provided by law for the creation of an indebtedness, is quite immaterial, since the property owners of the district to be benefited by such acquisition or improvement must eventually, in one form or other, bear the burden of the cost of such acquisition or improvement. The argument of the respondent seems to be that the spirit and intent of the constitutional provision is violated by virtue of the long delay which must occur in the course of carrying into effect the resolution of the legislative body condemning the property in question with relation to the issuance and sale of bonds until the consummation of which the payment into court of the sums provided for in the interlocutory decree cannot be made; but this does not appear to us to be vital, since until such payment into court has been made the owner thereof cannot be required to yield up its possession. It may be that some added burdens in the way of interest upon the adjudged amounts may by the act be laid upon the property owners of the district, but this consequence would seem to be inevitable, in view of the fact that the district has at the outset no money or the practical means of getting any with which to proceed with the work of acquisition or improvement except by the process of issuing bonds. Read by and large, and interpreted liberally, as we are required to do in respect to acts of this character, with a view to making effective the beneficent public purpose contemplated by their terms, we do not find that the provisions of this act thus brought into question are violative of the spirit and intent of the Constitution as to the plan provided therein for the condemnation of properties required in the course of the acquisition or improvement contemplated or for the payment and provision of means for payment of compensation for the properties thus to be taken. We find no merit, therefore, in the respondent's aforesaid contention.

[6] The next contention of the respondent is that the provisions of section 5 of said act, permitting the legislative body in charge of the acquisitions or improvements, or both, contemplated by said act, to assess or to exempt from assessment lands belonging to certain public bodies, are violative of the provisions of article 1, § 11, and article 4, § 25, subd. 33, of the state Constitution. These two provisions of the Constitution, however, only embody the requirements of the organic law that "all laws of a general nature shall have a uniform operation," and that special laws

shall not be enacted "where a general law can be made applicable." In the case of *City Street Improvement Co. v. Regents, etc.*, 153 Cal. 776, 96 P. 801, 18 L. R. A. (N. S.) 451, it was held that the general rule exempting the lands of public agencies from taxation applied only to general state, county, and municipal taxes, and did not extend to the exemption of such agencies from local assessment for street improvements. In the very recent case of the *City of Fresno v. Fresno Irr. Dist.* (Cal. App.) 237 P. 772, it was held that lands of a municipality lying within an irrigation district might be assessed for the special purpose for which the district was formed, in the absence of an express or implied exemption of such lands in the statute creating such district, and in that case it was held that there was such implied exemption. But section 5 of the act in question, instead of expressly or impliedly exempting the properties of public bodies or agencies designated therein from assessment for the purposes provided for in the act, expressly provides that such properties may, if in use in the performance of a public function, be omitted from such assessment, but that, in order that they may be so omitted, the resolution of intention of such legislative body shall so determine and declare. There is ample authority in other jurisdictions for the proposition that such provisions in statutes providing for special assessments for local improvements are valid. *Adams County v. Quincy*, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155; *McLean County v. Bloomington*, 106 Ill. 209; *Edwards, etc., v. Jasper County*, 117 Iowa, 365, 90 N. W. 1006, 94 Am. St. Rep. 301; *Board of Comm'rs, etc., v. Ottawa*, 49 Kan. 747, 31 P. 788, 33 Am. St. Rep. 396; *City of Kalispell v. School Dist.*, 45 Mont. 221, 122 P. 742, Ann. Cas. 1913D, 1101; *Seattle School Dist. v. City of Seattle*, 44 Wash. 62, 86 P. 1117, 12 Ann. Cas. 417.

[7, 8] In the case of *Reclamation District No. 1500 v. Superior Court*, 171 Cal. 672, 154 P. 845, the general subject of the power of the Legislature over the properties of public agencies was exhaustively considered, and the principle was therein deduced that the Legislature, for purposes of public improvement, may impose such burdens upon such properties as to it may seem just, and that such public agencies have no private or proprietary interest in such properties as against the state. The respondent, while apparently conceding the soundness of this principle, makes the contention that the inclusion of certain properties belonging to the school department in the assessment in question in the instant case was in the nature of special legislation on the part of the legislative body having the proceedings in question in charge. The answer made to this contention is that the legislative body having the particular acquisition and improvement in charge had

power to classify the public properties within said assessment district according to their location and use, and also according to the benefits to be derived from such public improvement, and that the power to thus classify necessarily carried with it a wide discretion as to its exercise. Such was the ruling of this court in the case of *Martin v. Superior Court*, 194 Cal. 93, 101, 227 P. 762, wherein it was held that, where the authority and duty to ascertain the facts which will justify a particular classification is vested in a legislative body, every intendment is in favor of the validity of its action, and the legislative classification will not therefore be disturbed, unless it is palpably arbitrary in its nature, and neither founded upon, nor supported by, reason. We are unable to say in the instant case that the inclusion of the school properties in question in the assessable property of the district was not properly responsive to its location, uses, or to the benefits to be derived by it from the making of the acquisition and improvement in question. It may be noted that under other provisions of the act this method of payment of the burdens laid upon such classes of public property as are to be subjected to this assessment is fully provided for, and that the same involves no loss of such properties to the public service or use to which they are devoted.

[9] The next contention on the part of the respondent is that the county of Los Angeles, through its legislative body in charge of said work, involving, as it does, the condemning of property, establishing street grades, making street improvements, and assessing property therefor within the city of Los Angeles, is violative of the provisions of article 11, §§ 6 and 8, of the Constitution, and also the provisions of the charter of the city of Los Angeles. This contention is predicated upon the proposition that the condemnation of property for street purposes and its improvement is a municipal affair, and that, when such property lies within the limits of the city of Los Angeles, its condemnation and improvement cannot be subjected to the control of general laws. This contention would seem to be quite fully answered in principle by the decision in the case of *Gadd v. McGuire*, recently decided by the District Court of Appeal, 69 Cal. App. 347, 231 P. 754, for, while it is true that in the instant case the city of Los Angeles was not, as in that case, an immediate actor in making the improvements in question, it is also true that the provisions of the Constitution and of the charter of Los Angeles, upon which the respondent relies herein, were fully considered therein. In so considering these, and applying them to the facts of that case, the court very aptly and correctly held that—

"It is true that the charter of the city of Los Angeles contains an express grant of power to make street improvements and to provide that

the costs and expenses thereof shall be a lien upon the abutting property or on property in districts benefited thereby. But it also is expressly declared in that instrument that these powers shall be 'supplemental, additional and alternative powers to those conferred upon municipalities by the general laws of the state of California.' Subdivisions 13 and 19 of section 2, art. 1, of the charter; Stats. 1919, pp. 1432, 1433; St. 1921, pp. 1802-1804. By thus declaring that the powers granted by the charter with respect to street improvements are 'supplemental, additional and alternative' to such powers as may likewise be conferred upon municipalities by general laws, there is evidenced an unmistakable intention on the part of the charter-makers to confer upon the city authorities the right to elect either to exercise the powers which are expressly granted to the city by its organic law, and to proceed as therein provided, or to exercise those powers which are granted to all municipalities of the state by general laws, and to proceed as in those laws prescribed."

We can perceive no real distinction between the application of the foregoing reasoning to that case and to the case at bar, and we are further of the opinion, as was held in the foregoing case, that, when a general law of the state provides, as the act in question does, for a scheme of public improvement, the scope of which both intrudes upon and transcends the boundary of one or several municipalities, such contemplated improvement ceases to be a municipal affair, and comes within the proper domain and regulation of the general laws of the state.

The remaining contentions of the respondent, involving, as they do, objections to alleged defects in the particular proceeding under review, and not to the validity of the act itself, are, we think, sufficiently answered by the briefs of the petitioner, and do not require separate or further prolonged consideration.

Let the writ issue as prayed for.

We concur: WASTE, C. J.; CASHIN, Justice pro tem.; CURTIS, J.; SEAWELL, J.

SHENK, J. I concur. Something further, however, should, in my opinion, be said concerning the practical operation of certain features of the act. First, as to the notice of presenting and hearing objections: Under section 5 the resolution of intention must contain a notice of the time and place when objections may be presented and heard. The time must not be less than 15, nor more than 60, days from the date of the adoption of the resolution—not from the publication of the notice. The resolution must be published by at least two insertions, and the publication may be made in a daily newspaper. It is thus made possible for the entire publication to be commenced and completed within 2 days before the time appointed for hearing objections. Obviously, a 2 days' notice would not constitute such a reasonable notice as

would satisfy the requirements of due process. Again, at the time set for the hearing, the property owner must present his objections to the proposed acquisition or improvement, to the proposed grades to which the improvement is to be constructed, to the extent of the assessment district, to the zones into which the assessment district is to be divided, and to the percentages to be raised from each of said zones. If the property owner does not object at the time appointed, he is cut off from objecting to any of the proceedings taken under the act, including the right to object to the construction of the improvement to the official grade fixed by the legislative body. The construction of the improvement to the official grade may cause vast damage to him by reason of cuts or fills, or both, and there is no provision in the act for compensating him on account of thus taking or damaging his property for public use. The provisions of the statute in this respect would seem to be incomplete and inadequate. And, again, the legislative body may issue and sell bonds sufficient to make a required deposit in court in the event lands are to be condemned in the course of the proceeding. These bonds become an immediate charge on the property in the district, and the property owner is barred by the terms of the act from contesting any tax levy to pay for the same. Yet the property sought to be condemned may never be acquired by reason of the abandonment of the proceedings as authorized by the act. The property owner is then in the position, so far as the statute is concerned, of being required to pay off a bond issue for which no property has been acquired and no improvement constructed, since there is no provision in the act for retiring the bond issue in the event of the abandonment of proceedings. But, quite apart from the foregoing considerations, the 14 days' notice of the time and place to present objections, given in the present case, would seem to be sufficient, and the proceedings involved herein are not affected by the other provisions of the act to which I have referred.

198 Cal. 746

WALLACE et al. v. PRIVETT. (L. A. 7541.)

(Supreme Court of California. June 22, 1926.)

Executors and administrators §156—Though contract of guaranty inured only to benefit of deceased, her "heirs," and "administrators," and the deceased bequeathed property to persons not heirs at law, held "executors" might enforce guaranty.

Though contract of guaranty against loss on purchase of stock inured only to the benefit of deceased, her heirs, and administrators, and deceased bequeathed stock to persons not her heirs at law, held executors might enforce guar-

anty, especially as "executors" and "administrators" are used indiscriminately by laymen, and "heirs" is frequently used to designate successors to property either by will or by law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Administrator; Executor; Heirs.]

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action to recover upon a contract of guaranty by William H. Wallace and another, as executors of the estate of Justina P. Arnold, deceased, against W. E. Privett. From a judgment for defendant, plaintiffs appeal. Reversed.

Eugene C. Campbell, of Long Beach, for appellants.

Meserve & Meserve, of Los Angeles, for respondent.

CURTIS, J. This action comes before this court after decision by the District Court of Appeal, First district, Division 2, Presiding Justice Langdon having written the opinion. We are in accord with said opinion in many respects, and we adopt and approve the following portion thereof:

"Plaintiffs have appealed from a judgment against them in an action to recover upon a contract of guaranty. The findings present the following facts: The defendant was one of the promoters and principal stockholders of a corporation known as Oceanic Engineering Corporation. During the months of April, May, and June, 1916, he solicited a subscription to the capital stock of said corporation from plaintiffs' testatrix, and induced her to subscribe for 5,700 shares at \$1 a share. As a consideration for said purchase, defendant guaranteed Justina P. Arnold against any loss on account of the purchase of said stock, and further guaranteed that it would pay her an income of not less than 8 per cent. per annum. This stock was owned by Justina P. Arnold at the time of her death. At the time she subscribed for the stock, defendant agreed to deliver to Mrs. Arnold a written memorandum of his agreement of guaranty, and on June 3, 1916, in fulfillment of said promise, he delivered to her a written agreement, which he reaffirmed and renewed in writing on May 29, 1920, in words and figures as follows:

"Whereas, Mrs. J. P. Arnold, of 229 West Anaheim street, Long Beach, Cal., has purchased five thousand seven hundred (5,700) shares of the capital stock of the Oceanic Engineering Corporation, at the price of one dollar per share:

"Now therefore, W. E. Privett, subject to the conditions hereinafter stated, guarantees to said Mrs. J. P. Arnold that said stock will pay her annually an income not less than 8 per cent. per annum; provided, however, that should W. E. Privett procure within one year a purchaser ready, able, and willing to buy said stock at a price of not less than \$2 per share, and who tenders her said sum for said stock, the liability of said W. E. Privett upon said guaranty afore-

said shall thereupon immediately cease and terminate, whether or not said Mrs. J. P. Arnold sells said stock to said purchaser.

"It is further agreed that said W. E. Privett guarantees Mrs. J. P. Arnold against any loss whatsoever on account of this investment, and that this guaranty shall inure only to the benefit of Mrs. J. P. Arnold, her heirs, and administrators.

"Witness our hands and seals this 3d day of June, 1916. W. E. Privett. [Seal.]

"Mrs. J. P. Arnold. [Seal.]

"The above contract of guaranty is hereby reaffirmed and renewed this 29th day of May, 1920. W. E. Privett."

"It was further found that at the time of the filing of this action said shares of stock were worthless and valueless by reason of the dissolution of the corporation; that Justina P. Arnold left a will which did not specifically bequeath the stock involved in this action, but contained a residuary clause, bequeathing all property not otherwise disposed of to certain named persons who were not her heirs at law; that her heir at law was a grandson, who was not a party to this action and not entitled, under the will, to the stock in question.

"The decision in favor of the defendant was based upon the technical ground that the action was not prosecuted for the benefit of the heir or heirs at law of Justina P. Arnold, and that the contract of guaranty did not inure to the benefit of legatees of deceased. It is purely a question of the construction of the foregoing instrument and it seems to us to present little difficulty. It is to 'inure to the benefit of Mrs. J. P. Arnold, her heirs and administrators.' This would indicate that, while the guaranty was not available to a transferee of Mrs. Arnold during her lifetime it was available to one who took either by descent or purchase upon her death."

If the stock were her property at the time of her death and she had died intestate, then upon her death the title thereto passed unto her heirs subject to administration. During administration the administrator of the estate would be entitled to the possession of said stock, and, as he was included in the express language of the contract of guaranty, he would be authorized, and it would be his duty, to institute and prosecute an action upon said contract for any breach thereof by the guarantor. The fact that Mrs. Arnold left a will, and therefore the stock went to her devisees instead of her legal heirs, we think, is immaterial. In this case her executors during administration are entitled to the possession of said stock, and their rights and duties as such executors with reference to said stock and the contract of guaranty are the same as those of an administrator had she left no will. It is true that her executors are not mentioned in said guaranty, but it was not necessary, for either the administrator or executor to be mentioned in said contract of guaranty, in order to enable either to protect the rights of her estate under said contract. The guaranty by express terms in-

ured to the benefit of Mrs. Arnold. Upon her death her personal representative, be he either the executor of her will or the administrator of her estate, whichever may be acting in the premises, and without any mention of him being made in said contract of guaranty, would be entitled to enforce the same for the benefit of her estate. Besides, as was further said by the District Court of Appeal in the opinion above referred to:

"The two words (executor and administrator) are used indiscriminately by laymen. As was said in *Re Murphy*, 144 N. Y. 557, 39 N. E. 691: 'Although in name there is a difference between "executor" and "administrator," yet in fact and in law they are really the same, for each has control over the personal estate, and the distribution thereof.' In the case of *Sheldon v. Smith*, 97 Mass. 34, 35, it was said: 'An executor is, in one sense, an administrator, and in the only sense material to the prosecution of this suit.' So in the instant case, the executor is an administrator in the sense that he takes the place of the deceased with respect to her rights in personal property. As to the indiscriminate use of these two terms, see, also, *Robins v. McClure*, 100 N. Y. 328, 348, 3 N. E. 663, 53 Am. Rep. 184, and *Finney v. Barnes*, 97 Mass. 401.

"It is also true that the word 'heirs' is frequently used as a designation for those who succeed to property upon the death of the owner, whether the succession is by operation of law or by virtue of a will. *Hascall v. Cox*, 49 Mich. 435, 13 N. W. 807; *Hoyt v. Hoyt*, 85 N. Y. 142, 151; *Swan v. Warren*, 138 Mass. 11."

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; LENNON, J.; FINLAYSON, Justice pro tem.

198 Cal. 728

PEOPLE v. TRINIDAD. (Cr. 2848.)

(Supreme Court of California. June 21, 1926.)

1. Criminal law §706.

Persistence of district attorney in propounding questions and in making offers of certain testimony, and fact that he differed with court as to admissibility of testimony, held not conduct constituting error, where he acted in good faith.

2. Criminal law §730(5)—District attorney's comment to jury on law under which people could not call defendant's wife as witness held not error, in view of court's suggestion that he accept law without comment.

District attorney's comment, in argument to jury in prosecution for murder, on law under which people could not call defendant's wife as witness, held not error, where episode was closed by court's suggestion that he accept law without comment, notwithstanding defendant's wife had testified for defense.

3. Criminal law ☞729.

District attorney's comment on prevalence of crime and laxity of punishment *held* not error, where he withdrew it at suggestion of court.

4. Criminal law ☞808½—Instruction containing all of statute relative to impeachment of witnesses held not to imply that defendant had previously been convicted of felony (Code Civ. Proc. § 2051).

Instruction containing all of Code Civ. Proc. § 2051, relative to impeachment of witnesses, *held* not error on objection that it implied that defendant had previously been convicted of felony, though it was unnecessary to read that portion of section providing that it may be shown that a witness has been convicted of felony.

5. Criminal law ☞1172(2).

Instruction that evidence should be weighed with distrust if stronger evidence could have been given *held* not prejudicial, though defendant had not testified, where there was no doubt as to his guilt, but such instruction found in Code Civ. Proc. § 2061, subds. 6, 7, should rarely be given in criminal cases.

In Bank.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Mauricio Trinidad was convicted of murder in the first degree, and he appeals. Affirmed.

Reese & Bagg, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., Erwin W. Widney, Deputy Atty. Gen., and George H. Johnson, Dist. Atty., of San Bernardino, for the People.

WASTE, O. J. The defendant was convicted of murder in the first degree and sentenced to pay the extreme penalty. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

It is not denied that appellant shot Hernandez, the decedent. The defense in the court below was based upon the contention that the domestic happiness of the appellant and his wife was interfered with by Hernandez, and that an altercation arose between the two men, during which Hernandez attempted to assault Trinidad with a shoe knife, and that Trinidad, in self-defense, fired the shots which killed the decedent. The defendant did not take the stand, and the alleged facts on which his defense was based were related by other witnesses. Police officers and a newspaper reporter testified that after the shooting the appellant surrendered himself to the officers, and, on being interrogated, confessed that he went to the place of the shooting to kill the decedent, because he thought he was trying to make a "bad woman" out of his wife; that the decedent had no weapon; and that he (the defendant) killed him. Other testimony tended to further destroy the defense erected by the appellant. There was therefore sufficient

evidence to support the conclusion of the jury that the defendant was guilty of murder as charged in the information. It is not contended here that the evidence was not sufficient to sustain the conviction. The appeal is based upon alleged misconduct of the jury and errors of the trial court in giving certain instructions.

[1] It is first contended that the district attorney was guilty of misconduct in the examination of witnesses, and in the insistent repetition of questions and interrogatories to which objections had been sustained by the court, after the district attorney had overstepped the bounds of propriety in comment as to the admissibility of testimony offered. Appellant contends that the conduct of the district attorney throughout the trial was calculated to and aroused the passion and prejudice of the jurors, and was such that the defendant did not have a fair and impartial trial. It cannot be denied that the district attorney showed considerable zeal in the presentation of the case for the people. Counsel for the defendant was equally zealous in the defense of his client, and overlooked no opportunity to save every point he felt would inure to the benefit of the appellant. Progress of the trial was tedious, and the defendant's counsel complained of the length of time the case was continued. The district attorney was, it is also to be admitted, persistent in the propounding of questions and in his offers of certain testimony. Objections interposed by appellant's counsel led to frequent and sometimes prolonged discussion between the court and counsel as to the admissibility of the evidence under consideration. The court and the district attorney frequently differed, but from our careful examination of all that occurred during the trial we have been unable to discover anything more than an earnest endeavor on the part of the prosecuting officer to present the case of the people in its best light. In none of the instances we are here called upon to review can we say with any assurance that the district attorney knew the questions to be improper or the evidence he sought to introduce to be inadmissible, or that any questions were asked by him without the expectation of answers directed to the point of his inquiry.

Judges and counsel will differ in opinion in such matters, and from time to time indulge in discussions which lead to a final disposition of the matter by the court. In this case the trial court promptly checked any undue examination by the district attorney and properly kept that official's zeal within due bounds. From time to time during the progress of the trial the jury was admonished that it would "be governed only by the testimony introduced," and the same point was fully covered in the final charge. We therefore find no error in the conduct of the prosecuting officer in the examination of witnesses.

[2, 3] It is next contended that the district attorney was guilty of misconduct during the argument to the jury, in that he made statements of facts to support which no evidence was offered, and that other statements made by him were direct appeals to the passion and prejudice of the jury. As in the case of the other assignments of misconduct on the part of the prosecution, we have carefully read the argument made by the district attorney and are not convinced that the appellant's contentions are correct. The wife of the appellant was not called by the prosecution, but testified for the defendant. During his argument the district attorney commented upon the law which places it without the power of the people under the rules of evidence to call a wife as a witness against her husband in such a case. On objection of appellant's counsel, the court suggested that the prosecuting officer accept the law without criticizing or without commenting upon it, and the episode appears to have been closed. At another time the district attorney commented upon the prevalence of crime and the apparent laxity of punishment in criminal cases. On objection of counsel and at the suggestion of the court, the district attorney withdrew that portion of his argument. We deem it unnecessary to notice other and similar assignments of misconduct.

[4] In the course of giving its instructions to the jury the court read section 2051 of the Code of Civil Procedure, providing how a witness may be impeached by the party against whom he was called. Appellant contends that from the fact that the trial court read the section in its entirety, including the portion which provides that it may be shown by the examination of the witness or by the record of a judgment that he has been convicted of a felony, the instruction was accepted by the jury as a statement, or implication, that the defendant Trinidad had, as a matter of fact, been previously convicted of a felony. While it is apparent from the record that there was no occasion to read that portion of the section, the instruction considered as a whole was a correct statement of law, and in its greater portion a material and proper instruction to be given. We cannot see how it can be contended that it was or could have been given the construction which the appellant now says the jurors placed upon it. Consequently, no error resulted from the reading of the entire section.

[5] A more serious situation is presented in the last contention made by appellant. By another instruction the jurors were told:

"That evidence is to be estimated not only by its intrinsic weight, but also according to the evidence which it is in the power of one side to produce and the other to contradict; and therefore, if the weaker or less satisfactory

evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be weighed with distrust."

Appellant contends that by the giving of this instruction the court told the jury that he (the appellant) had it within his power to explain the facts and circumstances surrounding the offense with which he was charged and to produce stronger evidence than that produced in his favor of the trial; that such a statement, coming with the force that such statements have when made by a court during a trial, carried with it a weight and influence that worked prejudicially in the minds of the jury, and necessitates the reversal of the verdict of conviction. It was held in *People v. Cuff*, 122 Cal. 589, 55 P. 407, that this instruction, which is found in subdivisions 6 and 7 of section 2061 of the Code of Civil Procedure, may be given by the court to the jury on all proper occasions, but that in criminal cases the proper occasions are so few and the improper occasions are so many that it were best it should be given rarely, if at all.

The conviction in the case just cited was reversed upon other grounds in addition to the giving of the instruction, and there is nothing in the case to show that the jury were elsewhere instructed upon the right of the defendant to remain silent. In the case now here the jury was fully instructed on the presumption of innocence attaching to the defendant "until [his] guilt [was] proven beyond a reasonable doubt," and of the duty of "the people by evidence to prove to [their] minds beyond a reasonable doubt and to a moral certainty" the truth of the charge. The jury was also instructed that the defendant had a right to testify, or not to testify, in the case as he elected, and that it must not consider the fact that he did not testify in his own behalf as evidence or as a circumstance against him. We find nothing in the record which makes this case a proper occasion for the giving of the instruction. The trial court should have obeyed the admonition given in *People v. Cuff*, supra. Were this a "close case," or one in which the minds of men might reasonably differ as to the guilt or innocence of the defendant, it might be well argued that the giving of the instruction perhaps influenced the verdict. The facts in the case are few and simple, and there can be no doubt as to the guilt of the defendant. We cannot say, therefore, that the rights of the appellant were prejudiced by the giving of the instruction.

The judgment and the order of the trial court denying a motion for a new trial are, and each is, affirmed.

We concur: LAWLOR, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.

198 Cal. 750

SOULES v. GLAFKIDAS. (S. F. 11538.)

(Supreme Court of California. June 22, 1926.)

1. Appeal and error —110—Order denying motion for new trial is not appealable (Code Civ. Proc. § 956).

Order denying motion for new trial is not appealable, in view of 1915 amendment relating to appeals (Code Civ. Proc. § 956), which provides such order may be reviewed on appeal from judgment.

2. Appeal and error —345(1)—Judgment is appealable until 30 days after entry of order determining pending proceedings on motion for new trial, or termination of proceedings (Code Civ. Proc. § 939).

If proceedings on motion for new trial are pending, time for appeal from judgment does not expire until 30 days after entry of order determining the motion, or termination in trial court of proceedings thereon, under Code Civ. Proc. § 939.

3. Appeal and error —110—Order refusing permission to amend notice of intention to move for new trial held not appealable, since reviewable on appeal from judgment (Code Civ. Proc. §§ 939, 956, 963, subd. 2).

Order refusing permission to amend notice of intention to move for new trial, made in proceedings on motion for new trial, held not appealable, after appeal from judgment has been dismissed, notwithstanding Code Civ. Proc. § 963, subd. 2, providing special order made after final judgment is appealable, since order was reviewable, under §§ 939, 956, on appeal from judgment.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action for damages for personal injuries by Minnie Soules against M. Glafkidas. On motion to dismiss defendant's appeal from an order denying leave to amend notice of intention to move for new trial. Motion granted.

Sloss & Ackerman, of San Francisco, for appellant.

Edwin V. McKenzie, of San Francisco, for respondent.

WASTE, C. J. The respondent makes a motion to dismiss an appeal from an order of the trial court denying leave to amend a notice of intention to move for a new trial. The jury returned a verdict in favor of the plaintiff for damages for personal injuries in the sum of \$10,000, and judgment was duly entered. Defendant thereupon gave notice of intention to move for a new trial, to be made on the minutes of the court, upon specified statutory grounds. Newly discovered evidence was not one of these, but subsequently, and after the expiration of more than 10 days after the entry of judgment, the defend-

ant gave notice of a motion for leave to amend his notice of intention to move for a new trial theretofore made, and to be relieved of default. In the proposed amended notice of intention, a copy of which was attached and served with the notice of motion to amend, it was specified that a further ground of the motion for a new trial would be newly discovered evidence, material to the defendant, which he could not with reasonable diligence have discovered and produced at the trial. It was further stated that, as to the additional ground, the motion for a new trial would be made upon affidavits to be filed.

The court denied the motion to amend on the sole ground that it was without jurisdiction, for the reason that the motion was made after the expiration of 10 days from the notice of entry of judgment. At the same time, and, we may assume, as part of the same proceeding, it denied the motion for a new trial. The defendant appealed from the judgment, and, by a separate appeal, from the order denying his motion for leave to amend. The appeal from the judgment was dismissed on the uncontested motion of respondent who now moves to dismiss the appeal from the order, on the ground that, since certain amendments were made to the Code sections relating to appeals, in 1915, no appeal lies from an order of a trial court refusing permission to amend a notice of intention to move for a new trial.

[1, 2] Appellant, in support of his appeal, and in opposition to the motion to dismiss, contends that the order is appealable under section 963, subd. 2, of the Code of Civil Procedure, which provides that an appeal may be taken from a special order made after final judgment. He contends that such an order was appealable prior to 1915, and that its status as an appealable order was not changed by the amendments. We have followed with much interest appellant's argument, beginning with the assumption that such an order was appealable prior to the changes made in the law of 1915, but fail in our appreciation of the contention made by him. By the amendments in question, the Legislature abolished the right of appeal from orders denying motions for a new trial, and provided that such orders may be reviewed on appeals from the judgment. The court may now, on an appeal from the judgment, "review any order on motion for a new trial." Code Civ. Proc. § 956. If proceedings on motion for a new trial are pending, the time for appeal from the judgment does not expire until 30 days after entry of the order determining the motion, or the termination in the trial court of the proceedings thereon. Code Civ. Proc. § 939. The clear intention of the Legislature in making these amendments was to provide for a review, on appeal from the judgment, of matters that might theretofore be considered on a direct appeal

from orders on motion for new trial. The plain purpose of the amendments was to give an opportunity for a review in any and every case, in lieu of the review which was previously afforded. *Wilcox v. Hardisty*, 177 Cal. 752, 753, 171 P. 947; *Boole v. Union Marine Ins. Co.*, 52 Cal. App. 207, 208, 198 P. 416.

[3] This case seems to fall squarely within the provision made by the amendments. The motion for leave to amend the notice of intention to move for a new trial was heard and denied as part of the proceedings on motion for a new trial. Appellant had ample opportunity to have the action of the trial court, in refusing leave to amend, reviewed on the appeal from the judgment. That appeal having been dismissed, to permit another effort of review would be to do violence to the plain intention of the Legislature in making the vital amendments to the procedure relating to appeal to which we have referred.

The motion to dismiss is granted.

We concur: RICHARDS, J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; FINLAYSON, Justice pro tem.

198 Cal. 733

MAPPIN v. ATCHISON, T. & S. F. RY. CO.
(S. F. 11470.)

(Supreme Court of California. June 21, 1926.
Rehearing Denied and Opinion Modified
July 21, 1926.)

1. Master and servant §267(1)—Evidence of loading cars with interstate freight on day after injury held admissible on issue of employment in interstate commerce at time of injury (federal Employers' Liability Act [U. S. Comp. St. §§ 8657-8665]).

In death action under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), evidence of loading cars with interstate freight on day after decedent fell under empty car held admissible on issue whether they were definitely committed to interstate commerce and engaged in such use at time of injury.

2. Commerce §27(3).

If single car in train through movement of which employee receives fatal injuries, is devoted to interstate commerce, it gives its quality to entire train.

3. Commerce §27(3).

Empty foreign freight car is engaged in interstate commerce, even before being reloaded, when it begins movement back to point at which received by carrier, or is definitely designated and started on way to receive interstate freight.

4. Master and servant §284(1)—Whether empty foreign car, in terminal carrier's yards, has taken on quality of car engaged in interstate commerce is question for jury.

Whether foreign freight car, though still in terminal carrier's yards after unloading, has again taken on quality of car engaged in inter-

state commerce by beginning movement back to point where received, or being definitely designated to receive interstate freight, and immediately on way to loading place within such yards, is fact question for jury.

5. Master and servant §276(1).

Evidence held to sustain finding that at least one car in train was committed to interstate use, within federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), at time of injuries.

6. Commerce §27(3).

That destination of empty car was designated in switching foreman's list as way station near state line held not conclusive that it was not engaged in interstate commerce during movement, where name of such station was used merely for convenience to indicate route of travel along carrier's interstate lines.

7. Appeal and error §1001(1).

Jury's finding, implied from verdict for plaintiff, on sufficient evidence that defendant was engaged in interstate commerce at time of deceased's injury will not be disturbed on appeal.

8. Master and servant §265(13).

Burden of proving assumed risk is on employer.

9. Master and servant §288(1).

Assumption of risk is fact question for jury, unless evidence is clear, direct, and undisputed.

10. Master and servant §265(15).

It will not be presumed that deceased employee was negligent, or knowingly incurred risk of injury causing death.

11. Master and servant §288(5)—Switch foreman's assumption of risk in using place with knowledge of danger held for jury (federal Employers' Liability Act [U. S. Comp. St. §§ 8657-8665]).

In death action under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), evidence held not to show switch foreman's actual or imputed knowledge of defective, dangerous switch and switching place so as to require finding as matter of law that he assumed risk.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Gertrude Mappin, administratrix of the estate of Walter W. Mappin, deceased, against the Atchison, Topeka & Santa Fe Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

E. W. Camp and E. T. Lucey, both of Los Angeles, and Platt Kent, of San Francisco, for appellant.

J. H. Sapiro and Edwin V. McKenzie, both of San Francisco, for respondent.

RICHARDS, J. This appeal is from a judgment of the superior court in and for the city and county of San Francisco in favor of the plaintiff as administratrix of the estate

of Walter W. Mappin, deceased, against the defendant for the sum of \$25,000 damages arising out of injuries sustained by, and the death therefrom of, said W. W. Mappin, her husband, while an employee of said defendant and through its alleged negligence. The action was commenced and prosecuted in said court under the provisions of the so-called "federal Employers' Liability Act" (U. S. Comp. St. §§ 8657-8665), which act provides for the enforcement in the state courts of the liabilities of common carriers for injuries suffered by their employees while employed by such carriers in interstate commerce. The primary question presented upon this appeal is as to whether the evidence adduced at the trial of the cause was sufficient to uphold the implied finding of the jury that the deceased was employed by the defendant in interstate commerce at the time he received the injuries which resulted in his death. The secondary question, assuming the first above inquiry to be answered affirmatively, is as to whether the plaintiff had succeeded in showing a case of actionable negligence on the part of the defendant proximately causing the death of the deceased. There are certain undisputed facts presented by the pleadings and evidence in the case which have reference to the primary inquiry above referred to. These are as follows: The defendant Atchison, Topeka & Santa Fé Railway Company is a corporation and a common carrier engaged in both interstate and intrastate commerce within the state of California, and as to the former beyond the boundaries of said state. The decedent, Walter W. Mappin, was, on November 1, 1923, and at the time of his aforesaid injuries, employed by the said defendant in its railroad freightyards in the city of San Francisco in the capacity of an engine foreman in charge of a switch crew in the main switchyard of the defendant, which is fully equipped with roundhouse, track scales, storage facilities, etc., and which adjoins its freighthouse, where all freight shipped from and consigned to San Francisco through its facilities is handled. There are shifts of working crews in this yard, each under its own foreman, each working eight hours a day, and handling in all an average of 100 cars daily. The hours of work of the particular crew of which the deceased was foreman were from 11 o'clock at night until 7 o'clock the next morning. It was the duty of this crew to take up the work of the crew which had preceded it with respect to the receipt and disposal of cars, and upon this particular occasion it became the duty of Mappin's crew to deal with an assemblage of 13 empty cars which the former switching crew had placed upon "track 9," and which were to be placed in their designated position for loading according to the requirements of the following day. These cars had already been selected by the yardmaster from the repair track and various other tracks in the yard with reference to their

adaptability for such requirements. Some of these empty cars were to be weighed, and the first duty, apparently, of this switching crew was to have this line of cars pulled over No. 9 track and past No. 9 switch for the purpose of backing them down to the scale track, where those of them requiring weighing were to be weighed, upon the conclusion of which the several cars were to be switched to their respective places as indicated upon said list. There were in this aggregation of 13 cars which were thus to be handled that night 10 cars which at some time prior thereto had arrived in San Francisco upon the defendant's railway lines carrying merchandise originating as to its transportation in states other than California, while the remainder of said list of cars had come in with loads originating within the state of California. Of the former 10 cars 3 were cars belonging to railroad companies which had no tracks in California. These were a Chicago, Burlington & Quincy car, No. 130238, which had been received by the defendant at Denver, Colo., loaded with interstate freight destined for California points; New York Central car No. 336914, which had been received by the defendant at Streator, Ill., similarly loaded; R. I. car No. 42217, which had been received by the defendant at Amarillo, Tex., also similarly loaded. Each of these cars had been unloaded prior to November 1, 1923, and had been inspected, cleaned, and repaired so that they were ready for use. These three last-named cars had been selected for specific switching destination, viz. Chicago, Burlington & Quincy car No. 130238 was designated "to load lumber, berth 2"; New York Central car No. 336914 was to be spotted for derrick. This designation was explained by the testimony of the yard foreman immediately preceding Mappin on that evening to the effect that this car was to go to the "derrick" in connection with another car "Santa Fé No. 62219" which was to receive there a specific load, and there was some further evidence that New York Central car No. 336914 thus ordered spotted at the derrick left San Francisco on November 3, 1923, loaded with wrought iron pipe consigned to Las Vegas, N. M. Rock Island car No. 42217 was designated to be spotted at "block No. 6." The term "block" indicated the place in the freighthouse from which shipments of freight were to be loaded upon the cars for specific destinations, and "block 6" was the place where freight consigned to Arizona was to be loaded on the cars which had been "spotted" at that point. There is evidence that Rock Island car No. 42217, placed at that point immediately after the accident to Mappin, was, on the following day, loaded at "block 6" with freight destined for Arizona.

[1] There was also offered, and received in evidence, the rules of the defendant company in conformity with the like rules of the Interstate Commerce Commission to the effect

that it was the duty of a railroad carrier receiving foreign cars from a forwarding railroad to return such cars when unloaded at their point of destination to the forwarding railroad at the point where the former received them. This point was designated by a card affixed to the side of the car. There was also evidence of a custom among carriers to place in such cars when thus turned homeward freight consigned to points inside or outside the state of California, provided these shipments of freight were to points of destination along the homeward route of the foreign car. With respect to the foregoing evidence, showing what was done in the way of loading these three cars with freight for interstate shipments on the day following the injuries to Mappin, and which evidence was offered and admitted over the defendant's objection, it is urged by the appellant that the trial court was in error in the admission of such evidence. We cannot agree with this contention. In the absence of any showing of a change of purpose as to the immediate destination of these cars within the defendant's freightyard or of any change of design that they, or some of them at least, should be presently loaded with freight destined for foreign points along the homeward route of the cars so to be loaded, we are of the opinion that evidence that certain of said cars were so presently loaded with such freight and at such predesignated spotting points was admissible as having an important bearing upon the question as to whether the cars had thus been definitely destined for use in interstate commerce and started on their homeward way in the course of such use prior to Mappin's injuries; and that they were engaged in such use at the time the latter received such injuries. *Breske v. Minneapolis, etc., Railway Co.*, 115 Minn. 386, 132 N. W. 337.

[2, 3] The case of *Chicago Junction Ry. Co. v. Industrial Board, etc.*, 277 Ill. 512, 115 N. E. 647, cited by the appellant upon this point, is distinguishable as to its facts both from the last above cited decision and from the case at bar in the respect that prior to, and up to and including, the time of the injury to the decedent in that case there was no showing of a predestination of the empty cars, which were being switched by his crew, to interstate uses. The appellant, however, contends that, even conceding the proper admission of the foregoing evidence as to the uses to which certain of said cars were put upon the day following the decedent's fatal injuries, the evidence as a whole was insufficient to justify the conclusion arrived at by the jury that the cars or any of them in the train which the deceased was occupied in switching were at the very time of his injuries engaged in interstate commerce so as to give the court jurisdiction of the case under the provisions of the Interstate Commerce Commission Act

(U. S. Comp. St. § 8563 et seq.). In support of this contention the appellant urges that the fact that certain, or even all, of the cars in question were the cars of foreign carriers having no railroad lines in California, or even that such cars had come into California loaded with interstate freight, is entirely immaterial to the present inquiry, since it is a well-established rule of railroad law that a car, whatever its ownership, or with whatever sort of freight it is loaded at the time of its entry into California, when once unloaded, and either standing empty, or being shifted about local freight yards, loses during such time its character as a car engaged in interstate commerce, and that such car does not again regain that character until it has again been definitely put to interstate uses. It may be conceded, for the purposes of this case only, that the authorities cited by the appellant upon this proposition sustain it, but it does not follow that this rule has application to the facts of the case at bar. It is conceded as being fully established by the authorities that, if a single car in the train of cars through the movement of which the deceased employee receives his injuries is devoted to interstate commerce it gives its quality to the entire train of cars of which it is an integral part. There are at least two ways, by either or both of which an empty car, especially if it is of foreign ownership, when it has lost its quality as engaged in interstate commerce by being emptied and remaining in carriers' freightyards, can regain that quality even before the time when it is actually loaded with interstate freightage. One of these ways is when such car, though empty, has actually begun its homeward movement in conformity with the rules and customs of carriers above referred to. The other is where such car has been definitely designated to receive interstate freight, and is immediately on its way to the place within the freight yards of the carrier where it is to be loaded with such freight.

[4-6] That the question as to whether by one or both of these ways a foreign car, though still in the carrier's freightyards, has again taken on the quality of a car engaged in interstate commerce is a question of fact for the jury is established by the authorities hereinafter to be referred to. We are satisfied that the evidence in this case was sufficient to sustain the implied finding of the jury that at least one of the units in the aggregation of empty cars during the course of the movement of which the deceased employee received his fatal injuries was as to both of the particular ways above referred to committed to interstate uses so as to give to the entire train the quality of being engaged in interstate commerce at the moment of the receipt by the decedent of his injuries. We refer to Rock Island car No. 42217. This was a foreign car both as to its ownership and as to the place at Amarillo, Tex., at which it

had been received, loaded with interstate freight by the defendant herein, and to which, in accordance with both rule and custom, it was to be returned by it. It had been designated as such by a tag on the side of the car. It had been emptied of its original interstate load, and was in the freightyards of the defendant subject to reloading and return to the foreign point at which it had been received. It had been inspected, cleaned, repaired, and otherwise prepared for its return to said point. It was not one of the cars which required weighing before being "spotted" for the load which it was to receive upon the following day. It had been selected by the yardmaster for such loading, and had been designated for that purpose. Its designation was to "block 6" in the freighthouse of the defendant, which was the place from which freight destined to Arizona points was to be loaded upon cars. The instructions given to Mappin by his preceding yard foreman a few minutes before his injuries indicated that this particular car was to be spotted at or opposite "block 6"; and that it was so designated and destined for loading on the following morning with that particular kind of freight is sufficiently shown by the corroborating circumstance that it was so identically loaded on the morning of the following day. It was in course of movement to its thus designated place for its thus pre-designed purpose when the injuries to Mappin occurred. It is true that there were some cars in the aggregation of empty cars which were to be weighed before being placed at the designated spot for loading, but this was not one of such cars, and it cannot therefore be said that it had any such intermediate destination. In other words, so far as Rock Island car No. 42217 was concerned, it was a foreign car, which had been definitely started on its homeward interstate journey, and was in an immediate movement to the point in the defendant's freightyard, where it was presently to be loaded with its predestined cargo of interstate freight consigned to Arizona points. Some emphasis is laid by the appellant upon the fact that, while Rock Island car No. 42217 was designated to be "spotted" at "Block 6," its destination was Cadiz, Cal.; but this fact loses its significance when it appears from the evidence that "Cadiz" is merely a small way station on the border between California and Arizona, to which practically no freight is consigned, but the name of which is used for convenience as the last California station to indicate the route along which particular cars or trains are to travel on their journey eastward along the defendant's several interstate lines. While there has not heretofore been presented to the courts of California a case involving the foregoing identical facts, such cases have arisen in other jurisdictions, and the decisions there handed down are, we think, controlling in the case at bar. The most per-

suasive of these cases, because based upon practically identical facts, are the following: *Christy v. Wabash R. Co.*, 195 Mo. App. 232, 191 S. W. 243; *Breske v. Minneapolis, etc., Ry.*, 115 Minn. 386, 132 N. W. 337; *Fayssoux v. Seaboard etc. Ry. Co.*, 109 S. C. 352, 96 S. E. 151; *Hester v. East Tenn. etc. Co.*, 254 F. 787, 166 C. C. A. 233; *Kinsella v. N. Y. C. R. Co.*, 186 App. Div. 856, 175 N. Y. S. 363; *Geer v. St. Louis S. F. etc. Ry. Co.*, 109 Tex. 36, 194 S. W. 939; *Aldread v. N. P. C. Ry. Co.*, 93 Wash. 209, 160 P. 429; *Trobridge v. Ry. Co.*, 192 Mo. App. 52, 179 S. W. 777. This list of cases might be indefinitely extended were it necessary so to do in order to support and illustrate what we deem to be the well-established rule that the question is, under circumstances similar to those presented by the evidence in the instant case, a question of fact for the jury. The cases cited by the appellant herein touching this subject are, when their facts are considered, easily differentiated from those of the foregoing cases and of the case at bar. This distinction is well illustrated by the case of *Chicago Junction Ry. Co. v. Industrial Board*, 277 Ill. 512, 115 N. E. 647, which is one of the cases upon which the appellant herein most strongly relies. In that case the deceased employee was one of a switching crew moving 15 empty cars from the car shops to the storage tracks in the carrier's freightyards, and was injured in the course of such removal. Eleven of these cars, after the accident, were taken to the storage tracks, re-iced, and on the same day moved by another crew to the loading tracks where they were filled with interstate freight. The opinion of the court expressly recites that up to the time of the accident there had been no specific designation given as to where any particular car would ultimately go, and the court for that reason held that the cars were not at the time of the decedent's injury engaged in interstate commerce. In so holding the court said:

"It has been held that, if the object of a switching movement is the placing of an empty car in a position to receive a load to be carried out of the state, the car is engaged in moving interstate commerce from the moment the switching movement begins," citing *Breske v. Minneapolis, etc., Ry. Co.*, supra.

[7-11] This may be said to be a typical case. The jury in the instant case, however, by its finding, implied from its verdict in the plaintiff's favor, has determined, from what we deem sufficient evidence, that the defendant was, at the time of the injuries received by its employee Mappin, and which caused his death, engaged in interstate commerce so as to give the trial court jurisdiction over the case before it. We do not feel justified in disturbing the finding of the jury in that regard. With respect to the immediate cause of the decedent Mappin's injuries which resulted in his death, the facts appear to be that, while

acting in the capacity of a switching foreman, and engaged in disposing of the string of empty cars in the manner heretofore indicated in this opinion, the deceased, while attempting to board such train of cars, stumbled over a tie supporting a switch which, according to the plaintiff's claim, had been negligently maintained. We are not presented upon this appeal with any contention on behalf of the appellant that it was not negligent in the foregoing regard; the appellant's contention being merely that the decedent must be held to have assumed, as a matter of law, the risks of his employment, of which the defective condition of the switching place in question was one, under the undisputed facts of this case. It may be stated in limine that it is conceded that the defense of assumption of risk is one of the defenses which may be taken advantage of by a defendant carrier, where the action is brought under the provisions of the federal Employers' Liability Act; but it should also be said that upon the issue of assumption of risk the burden of proof is upon the employer (*Kanawha R. Co. v. Kerse*, 239 U. S. 576, 36 S. Ct. 174, 60 L. Ed. 448; 18 R. C. L. § 126, p. 631; 16 Cal. Juris. p. 1079, and cases cited); and that as a general rule the question of assumption of risk is a question of fact for the jury (16 Cal. Juris. p. 1080, and cases cited). The only exception to this rule is that, when the evidence in the case is clear, direct, and undisputed, the question of assumption of risk becomes a question of law for the court. The appellant herein contends that this case comes clearly within this exception, and recites at length the evidence in the case upon which it relies in support of its said contention, from which recital it appears that the particular defect in the switch and immediate switching place upon which the decedent stumbled when about to board one of the moving cars after throwing the switch was that the ties upon which the switch stand was bolted were sticking above the ground about three inches, and that there were rocks and oil about this spot on the ground; that the decedent had been employed in the defendant's freightyard as a member of its switching crew for a period of about two years prior to the accident which caused his death; that his duties were night duties of the kind he was performing at the time of his injuries; that in the course of these duties it was occasionally his function to throw this particular switch; and that he was thereby given a full opportunity to know the condition of this switch and switching place, and to be fully informed as to its defective and dangerous state; and that, these facts having been shown by undisputed evidence, the deceased must be held as a matter of law to have assumed the risk of his employment arising from the known defects and dangers of this particular appliance and place. This might be taken to be true if the foregoing were all of the facts which were by

the court or jury to be taken into consideration upon this subject of assumption of risk. What the deceased actually knew as to these defects cannot be known. From the evidence in the case, however, it appears that, while the defective condition of this particular switch and switching place was one which had been in existence for a considerable period of time, it was one which was repairable and which it was the continuing duty incumbent upon the defendant to repair. It further appeared from the evidence that it was the general custom in freightyards to have the tracks ballasted and leveled off even with the tops of the ties, and especially the switch ties, and that it was true that this custom had been generally complied with in relation to the numerous switches and switching places in this particular yard, and even with relation to this particular switching place as to all of the ties on either side of the switch stand which, with the exception of the two ties to which the said switch stand was bolted, were ballasted up even with the top thereof. The reason for this required care in maintaining the ballasting of the ties in the freightyard even with the top of the ends thereof consisted in the fact that switchmen, especially those working at night, were required by the nature of their service to run along the track over these tie ends in boarding the moving cars during a switching movement, during which the eyes and attention of the switchman must be fixed upon the moving train and the particular car and its appliances which he is to lay hold of in the act of boarding it after throwing the switch. The evidence further shows that the members of a switching crew working thus at night were not assigned to particular switches, but that it was that one of them nearest to any particular switch at the moment whose duty it was to throw it in the course of the train movement. From these added facts, and from the further fact that in determining the question of assumption of risk the injured employee will not be presumed to be negligent or to knowingly incur risk or danger of injury, we arrive at the conclusion that the evidence in this case does not so indisputably and clearly show such actual or imputed knowledge on the part of this deceased employee as to the defective and dangerous state of this particular switch and switching place at the time of his injuries as to have required the trial court to determine as a matter of law that he had assumed this particular risk of his employment. We are aided in reaching this conclusion by a consideration of the following cases from our own court touching the application of the doctrine of assumption of risk to situations similar to that presented by the facts of the case at bar: *Kreitzer v. S. P. Co.*, 38 Cal. App. 654, 177 P. 477; *Crabbe v. Mammoth Channel G. M. Co.*, 168 Cal. 500; 143 P. 714; *Hennesey v. Bingham*, 125 Cal. 628, 58 P. 200; *Smith v. Occidental, etc., Co.*,

99 Cal. 462, 34 P. 84. We are also especially aided in reaching the foregoing conclusion by the case of *Chicago, etc., Ry. Co. v. Hines*, 132 Ill. 161, 169, 23 N. E. 1021, 1023, 22 Am. St. Rep. 515, which presents a state of facts practically identical with those of the instant case, and wherein in the course of its opinion the Supreme Court of Illinois makes use of this significant language:

"And, necessarily, much more is the servant entitled to assume that his master has furnished him with suitable and safe materials, machinery, and surroundings, and relieved him of investigation and inquiry in that regard, where, as in the present instance, the performance of his duties requires constancy of attention to other matters. A man whose attention is constantly directed to moving cars, and their coupling and uncoupling, cannot possibly give much attention to the ties, switchbars, etc., over which he may from time to time have to pass."

The case of *Chicago etc. Co. v. Dinius*, 180 Ind. 612, 103 N. E. 658, is another case wherein the facts are much similar to those of the case at bar, and in discussing which the Supreme Court of Indiana says:

"The theory of the complaint seems to be that, in a measure, appellee was lulled into a sense of safety of footing by the fact that the tracks, generally, about which he was working were properly ballasted: that the discovery of a defect on the coupling apparatus of the standing car raised an emergency which required him to cross the track in advance of the slowly moving car and so to effect the coupling of that car to the standing one; that, to meet this emergency and make the coupling in the performance of his duty, appellee stepped into a hole in the track where it was unballasted. The facts averred sustain this theory, and under them it was a question of fact and not of law whether appellee knew of the defects in the track and the danger which might exist in attempting to cross. Manifestly there was little time for deliberation, and with due care to protect himself from being caught by the advancing car, appellee could not slowly and deliberately inspect the placing of every foot step and give no attention to the car. A due regard at once for his safety and the performance of his duty under these circumstances might well divide the exercise of his faculties, and it cannot be said as a matter of law that he must have seen the defective condition of the track before or when he entered upon it, and that he voluntarily encountered the risk."

The trial court in the instant case, in accord with the conclusions arrived at in the foregoing cases, committed the question of the assumption of risk by the decedent by its instructions to the jury, and, we think, did so properly, and for that reason we shall not disturb the finding of the jury favorable to the plaintiff thereon.

The appellant has also urged certain other defects in the instructions of the trial court, but as to these they consist in the main in alleged errors in respect to the matters which have heretofore been considered in this opin-

ion. The instructions of the trial court were, taken as a whole, full and fair, and as to the questions of law involved require no further consideration than that which has already been given to these in this opinion.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; FINLAYSON, Justice pro tem.

78 Cal. App. 62

PEOPLE v. FOLCEY. (Cr. 1332.)

(District Court of Appeal, Second District, Division 1, California. May 17, 1926. Hearing Denied by Supreme Court July 15, 1926.)

False pretenses §11 — Statute provides no punishment for obtaining real property by false pretenses (Pen. Code, §§ 484-488, 502½, 532, 538; Deering's Gen. Laws 1923, Acts 4194, 4195, and 5233, § 64, subd. 29).

No punishment is provided for obtaining real property by false pretenses, under Pen. Code, § 532, notwithstanding statute purports to impose punishment for so obtaining property, whether real or personal, as for larceny; larceny being inapplicable to real property, in view of Pen. Code, §§ 484-488, 502½, 538, and Deering's Gen. Laws 1923, Acts 4194, 4195, and 5233, § 64, subd. 29.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

M. L. Folcey was convicted of obtaining real property by false pretenses, and he appeals. Reversed.

John A. Deweese and L. E. Dadmun, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

YORK, J. Appellant was tried by a jury and found guilty on both counts of an indictment charging the alleged crime of obtaining real property by false pretenses, and appeals from the judgment of the court and from its order denying his motion for a new trial.

The first point raised by the appellant is that section 532 of the Penal Code fails to provide that it is a crime to obtain real property by fraudulent representation or pretense, in that the only portion of said section which provides for any punishment for violation thereof is in the following words:

" * * * Is punishable in the same manner and to the same extent as for larceny of the money or property so obtained."

The only definition of larceny contained in our Codes is that contained in Penal Code, §§ 484-488, 502½, 538, and in General Laws (Deering's 1923 Ed.) Acts 4194, 4195, and 5233, § 64, subd. 29, all of which are limited to personal property. Therefore we are

forced to hold that the insertion in section 532 of the Penal Code of the words "whether real or personal" means nothing whatsoever, in so far as real property is concerned. The Legislature, after the decision in the case of *People v. Cummings*, 114 Cal. 437, 46 P. 284, amended section 532 by inserting the words "whether real or personal," and neglected entirely in said section to make any other amendment whatsoever. In *People v. Cummings*, supra, the Supreme Court stated directly that, since real estate is not the subject of larceny, the words "punishable in the same manner and to the same extent as for larceny of the money or property so obtained" are meaningless in relation to real property.

This decision makes unnecessary any discussion of the other points raised.

Judgment reversed.

We concur: CONREY, P. J.; HOUSER, J.

78 Cal. App. 11

PEOPLE v. FLOYD. (Cr. 1273.)

(District Court of Appeal, Second District, Division 1, California. May 11, 1926.)

1. Criminal law § 1159(2).

As concerns facts presented on trial of criminal case, appellate court can only determine whether they sustain conviction.

2. Fines § 19—Recorder of sixth class city held to have duty to receive and to pay over fines, in absence of statutory provision for collection (Pen. Code, §§ 1457, 1570; Vehicle Act, § 160 [St. 1923, p. 570]; Municipal Corporation Act, §§ 882, 883, 885 [Deering's Gen. Laws 1923, Act 5233]; Code Civ. Proc. § 187).

Recorder of city of sixth class, whose duties are prescribed by Municipal Corporation Act, §§ 882, 883, 885, and who had duty to assess fines for violations of the Vehicle Act, held to have duty to receive payment of fines and to pay same over to city treasury in absence of statutory provision for their collection, in view of Pen. Code, §§ 1457, 1570, Vehicle Act, § 160, and in view of Code Civ. Proc. § 187, providing that when jurisdiction was conferred on a judicial officer means to carry it into effect were given.

3. Criminal law § 429(1)—In prosecution for embezzlement, mutilation of and falsifying public records, falsified dockets kept by defendant held admissible, where substantially such as required by law.

In prosecution for embezzlement, mutilation of and falsifying public records, dockets held admissible where dockets were substantially such as required by law, and were falsified and were kept by defendant personally or under his direction, especially where defendant admitted necessary foundational facts.

4. Criminal law § 429(1).

In prosecution for embezzlement, mutilation of and falsifying public records, cash books kept by defendant held admissible, though not kept in pursuance of statutory requirement.

5. Criminal law § 406(2).

In prosecution for embezzlement, mutilation of and falsifying public records, private memoranda in official cash books and dockets kept by defendant containing statements or figures in nature of admissions against interest held admissible.

6. Criminal law § 400(3).

In prosecution for embezzlement, mutilation of and falsifying public records, oral statements in contradiction of statements and figures in official dockets kept by defendant and accuracy of which were involved, held admissible.

7. Criminal law § 93—Court held to have jurisdiction in prosecution against officer appropriating fines to own use, under statute making fraudulent and felonious appropriation of property not in execution of trust embezzlement, despite statute making refusal or neglect to pay over collected fine a misdemeanor (Pen. Code, §§ 427, 503, 504).

Court held to have jurisdiction over prosecution against officer appropriating funds to own use, under Pen. Code, § 504, making fraudulent appropriation of property not in execution of trust or secretion of property with fraudulent intent embezzlement, despite section 427, making refusal or neglect to pay over collected fine a misdemeanor, in view of section 503, since felonious intent and fraudulent appropriation were necessary only in former.

8. Embezzlement § 11(2).

Prosecution against officer collecting and appropriating fines and failing to pay them over to city treasurer held properly brought under Pen. Code, § 504, making officer's fraudulent appropriation of property embezzlement, rather than under section 424, subd. 7, making willful omission or refusal to pay over money received embezzlement.

9. Criminal law § 1168(2).

Failure to introduce in evidence mutilated docket, to admission of which no objection could have been raised and which was treated by all parties as properly introduced, held not reversible error.

10. Witnesses § 255(9).

Refreshing witness' memory by showing transcript of his testimony before grand jury held not error, where either no objection was made or witness' memory was not refreshed and no former testimony before grand jury read, or both, in absence of suggestion that prosecution was not misled.

11. Witnesses § 414(2).

Where witness because of defective memory fails to testify as expected, but gives no positive testimony against party calling him, his former statements which would tend to establish case of party calling him are inadmissible.

12. Criminal law — §1170½(1).

Refreshing witness' memory by reading and showing to each transcript of his testimony before grand jury held harmless error, where witness failed to remember facts and there was no substantial change in testimony, in view of Code Civ. Proc. § 2049.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Alva H. Floyd was convicted of embezzlement, destruction and mutilation of public records, and falsifying a public record, and he appeals. Affirmed.

R. C. Hunting, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

HOUSER, J. Defendant was convicted on each of seven counts contained in two indictments which charged him with the crime of embezzlement of public funds while acting as recorder of Culver City. Under additional counts of one of such indictments he was also convicted on each of two counts which charged him with the destruction and mutilation of public records; also on each of four counts therein which charged him with the crime of falsifying a public record. Defendant appeals from the judgment rendered by the trial court on a verdict of conviction as to each of such counts, as well as from the order of the trial court denying his motion for a new trial thereon.

[1] The first point made by appellant for reversal of the judgment as to each count of the indictments on which he was convicted is that the verdict was "contrary to and against the weight of the evidence." For this court to attempt to weigh the evidence adduced on the trial of the action and to determine therefrom whether it preponderated in favor of the prosecution or of the defendant would be a clear usurpation of the functions of the jury, which body is exclusively charged with the performance of a duty which, were the suggestion of appellant to be adopted, would thrust it upon a tribunal wholly unacquainted with the facts except as they may appear in cold type, utterly divested of the illuminating circumstances and conditions surrounding the receipt of the evidence by the trial court. The only power possessed and properly assumed by an appellate court in connection with the facts presented on the trial of an action is that of determining whether such facts are sufficient to justify the conclusion reached by the jury, and while such particular question is only inferentially suggested by the point presented herein by appellant, in passing it may be said that as to each count on which defendant was convicted this court has examined not only the admitted statements of respective counsel with reference

thereto, but, wherever necessary or advisable, has also inspected the reporter's transcript of the evidence, and after a consideration thereof is convinced that the jury was fully warranted in its several conclusions as expressed in its verdict.

[2] With reference to the crime of embezzlement of which defendant was convicted, it is urged by appellant that, considering the fact that the offense was committed by defendant while acting in the capacity of recorder of a city of the sixth class of this state, there is no rule of law which makes it the official duty of such officer to collect or handle moneys belonging to a city of such class. It appears that the moneys alleged to have been embezzled by defendant came into his possession as recorder of Culver City, and were derived from fines imposed by defendant in his judicial capacity of recorder for violations of different provisions of the California Vehicle Act (St. 1923, p. 517). General powers and duties of a recorder are prescribed by sections 882, 883, and 885 of the Municipal Corporation Act (St. 1883, p. 93, as variously amended; Deering's Gen. Laws, 1923 Ed., Act 5233), which include the provisions that the recorder shall be judge of the recorder's court and shall have the powers and perform the duties of a magistrate, and that "every officer collecting or receiving any moneys belonging to or for the use of such city or town, shall settle for the same on the first Monday in the month and immediately pay the same into the treasury," etc.

Sections 1457 and 1570 of the Penal Code provide in substance that all forfeitures and fines collected in any court for the violation of any city or town ordinance shall be paid into the city treasury. In addition thereto, and as possibly applying to the facts of the instant case, section 160 of the California Vehicle Act, *supra*, provides that:

"All fines or forfeitures collected upon conviction or upon the forfeiture of bail of any person charged with a violation of any of the provisions of this act constituting a misdemeanor following an arrest of such person by any officer employed by a city, shall be paid into the city treasury. * * * All fines or forfeitures collected upon conviction for violation of any of the provisions of this act following arrest by any officer employed by the state or by a county or city and county and whether collected by a justice of the peace, police court, city recorder's court, city justice of the peace or otherwise shall be paid to the treasurer of the county or incorporated city and county in which the court is held and said moneys shall belong to such counties and cities and counties respectively. * * * St. 1923, p. 570; Deering's Gen. Laws, 1923 Ed., Act 5128.

It is conceded by appellant that the recorder's court over which defendant presided had jurisdiction to assess fines against persons convicted of violations of the California Ve-

hicle Act, but, as heretofore stated, he contends that there was no fiduciary or official duty resting upon defendant as such recorder relative to the collection, care, or custody of such fines or funds derived therefrom, and cites authorities to sustain such general position assumed by him.

It would seem clear that a magistrate vested by the terms of a statute with express power to assess a fine, in the absence of any provision by which any other person or officer is empowered to collect or to receive it, is necessarily clothed with the implied authority to make effective the original power conferred upon him. Otherwise the law as affecting the infliction of punishment by way of monetary assessments for violations thereof would be impotent and utterly inoperative. That no such result as that just indicated is contemplated in the law is manifest from a consideration of section 187 of the Code of Civil Procedure, which provides that:

"When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code."

We are therefore of the opinion that, by virtue of the provisions of the several statutes to which reference has been had, it became and was the official duty of defendant as such recorder not only to assess fines against defendants convicted of violations of the California Vehicle Act, but as well to receive the payment thereof and thereafter to pay the same into the treasury.

[3-5] Complaint is also made by appellant that the trial court erred in admitting in evidence, over defendant's objections, certain cash books and dockets kept by defendant, without a proper foundation for the admission thereof having first been laid by establishing the fact that they were a "book account," or kept by defendant or under his direction or supervision, pursuant to official duty prescribed by law. That the dockets kept by defendant in substance were such as were required by law and consequently were within the inhibitions of the statute regarding the mutilation and the falsification of such documents appears to have been satisfactorily established. The facts supporting the conclusion that the several books were either kept by defendant personally or under his direction were also fully presented. Moreover, defendant as a witness in his own behalf admitted on cross-examination the necessary foundational facts. It was not indispensable that the cash books were kept in pursuance of any statutory requirement. No question is raised as to the relevancy of the

contents of either or of any of the books in question. If they were private memoranda containing statements or figures in the nature of admissions against interest, they were as admissible as would be any other memoranda of a similar nature made by defendant. We therefore perceive no error committed by the trial court in admitting the several books in evidence.

[6] Intimately connected with the admission in evidence of the dockets to which reference has just been had was the further admission in evidence, over defendant's objection, of oral statements of several different witnesses in contradiction of various statements and figures contained within the dockets. In this respect it is contended by appellant that the trial court erred to defendant's prejudice; and authorities are cited by him to sustain the position that proceedings before a justice of the peace or other officer keeping a record of his official action must be shown by such record or by an authenticated copy thereof. It may be conceded that no criticism may properly be indulged as against such a general rule, especially as between or among civil litigants; but it should be remembered that in the instant case the defendant was charged with a criminal offense or offenses which in their proof involved alleged false entries made in such dockets either by the defendant himself or under his direction or supervision. For example, as to one of the offenses of which defendant was convicted, the docket entry showed that a convicted violator of one of the provisions of the California Vehicle Act was fined the sum of \$50, for which amount the defendant herein as recorder accounted and paid to the treasurer of Culver City. The testimony given by several witnesses, however, proved to the apparent satisfaction of the jury that instead of a \$50 fine, a fine of \$250 was imposed by defendant herein upon the convicted violator of the California Vehicle Act, and that such fine of \$250 was paid to the defendant as such recorder. It would be a sad commentary on the state of the law which would admit of the proposition that a person situated as was the defendant herein might embezzle public funds, make false entries in his official docket with reference thereto, and thereafter by virtue of a rule of procedure be enabled to screen himself from successful prosecution. This court is not prepared to subscribe to any such doctrine. Surely such a rule could not be in the interest of justice, and if in some jurisdictions such procedure may possibly appear to be sanctioned, it may be said that, so far as this state is concerned, no decision has been cited to the effect for which appellant contends. This court knows of none such. Certainly, if it exist, it is timely that, as applied to the conditions and circumstances as shown by the evidence in the instant case, the rule should be abrogated or at least modified so as to permit the introduction of evidence for

the purpose of establishing the facts and rendering complete justice in the premises.

[7] The further point advanced by appellant, as ground for reversal of the several judgments affecting the charge of embezzlement, in substance, is that the court in which defendant was tried was without jurisdiction of the offense for the reason that section 427 of the Penal Code provides that:

"If any clerk, justice of the peace, sheriff, or constable, who receives any fine or forfeiture, refuses or neglects to pay over the same according to law and within thirty days after the receipt thereof, he is guilty of a misdemeanor."

As to the embezzlement counts of the two indictments against defendant, he was prosecuted under the provisions of section 504 of the Penal Code, which provides as follows:

"Every officer of this state, or of any county, city, and county, or other municipal corporation or subdivision thereof, and every deputy, clerk, or servant of any such officer, and every officer, director, trustee, clerk, servant, or agent of any association, society, or corporation (public or private), who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with the fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement."

Considering section 427 of the Penal Code under which it is appellant's contention that any prosecution for any alleged offense by him committed should have been as for a misdemeanor, it will be noted that the act against which the inhibition of the statute is directed is for either the refusal or the neglect of the officer who receives the fine or forfeiture "to pay over the same according to law and within thirty days after the receipt thereof." It may easily be imagined that for the statutory period any conscientious officer might, through sheer neglect, fail to render account as by the law required, or that an honest, though stubborn, official, or one honestly mistaken in his legal rights (*County of Los Angeles v. City of Los Angeles*, 65 Cal. 476, 4 P. 453), might refuse to do so without having the least intention of unlawfully appropriating any moneys to his own use. For such an offense the statute fixes his guilt as that of a misdemeanor; but where, as provided by section 504 of the Penal Code, the officer "fraudulently appropriates * * * any property which he has in his possession or under his control by virtue of his trust, * * *" an entirely different offense is committed, to wit, embezzlement, which carries with it as a necessary element thereof the felonious or fraudulent intent of the person or officer making such appropriation. Section 503, Pen. Code; *People v. Dillon* (Cal. Sup.) 248 P. 230, and cases there cited. The feature distinguishing between the offense for the punishment of which provision is made

by section 427 of the Penal Code and the crime defined in section 504 of the Penal Code, is clearly that of felonious intent and fraudulent appropriation, both of which may be wholly lacking in the former, but are necessarily included within the latter statute. *Robinson v. Commonwealth*, 104 Va. 888, 52 S. E. 690; *Britton v. State*, 77 Ala. 202. It follows that appellant's contention cannot be sustained.

[8] Because of certain argument presented by the respondent to the effect that, under the provisions of the California Vehicle Act, supra, it became the duty of the defendant as recorder to pay over all fines collected by him to the treasurer of Culver City, appellant now urges that if as a matter of law respondent is right in such contention, it would follow that defendant should have been prosecuted, not under the provisions of section 504 of the Penal Code, but that the prosecution of defendant, if at all, should have been pursued under the provisions of subdivision 7 of section 424 of the Penal Code, which in substance covers an embezzlement by a public officer for a willful omission or refusal by him "to pay over to any officer or person authorized by law to receive the same any money received by him under any duty imposed by law so to pay over the same." *People v. Westlake*, 124 Cal. 452, 57 P. 465.

As affecting the several charges of embezzlement against defendant, it is conceded that the indictments herein are drawn under the provisions of section 504 of the Penal Code. Embezzlement, whether charged under either section 424 or section 504 of the Penal Code, is "the fraudulent appropriation of property by a person to whom it has been intrusted." Section 503, Pen. Code; *People v. Dillon* (Cal. Sup.) 248 P. 230.

The gist of the several charges of embezzlement set forth in the several counts of the indictments herein against defendant is that as an officer of Culver City he came into the possession of certain money which he held in trust for said city, and which money the defendant thereafter feloniously appropriated to his own use. Neither the element of willful omission, nor neglect to pay the same over to the person entitled thereto, as specified in subdivision 7 of section 424 of the Penal Code, was necessarily present in the case, excepting possibly that willful omission to do so might be impliedly included in the fraudulent intent and the felonious appropriation of the money by defendant. The proof of the fact that it was a duty resting on the defendant to pay the fines collected by him into the treasury was a necessary incident for the purpose of showing that the moneys so collected by defendant were held in trust by him for the benefit of Culver City. Without deciding that a prosecution for an offense of the nature of that herein involved would be improper under the provisions of subdivision 7 of section 424 of the Penal Code, no sufficient reason has been suggested, nor do we

know of any, why the prosecution of defendant herein under the provisions of section 504 of the Penal Code was inappropriate. The moneys in question, in the language of section 504 of the Penal Code, having been shown to have been in defendant's "possession or under his control by virtue of his trust," and that he fraudulently appropriated the same to a "use or purpose not in the due and lawful execution of his trust," clearly present facts which make applicable the provisions of the section of the Code under which defendant was prosecuted.

[3] By one of the counts of one of the indictments defendant was charged with the mutilation of a certain docket kept by him. Although such docket was properly identified, appellant complains that it was never formally introduced in evidence. An inspection of the record on appeal discloses the fact that, while the matter of the introduction of the docket was not made as clearly and as definitely as might have been desirable, nevertheless, in the course of a résumé among the court and respective counsel as to what exhibits had been introduced in evidence, the docket in question was mentioned by the deputy district attorney as one which had been so introduced, without any objection to such statement being made by counsel representing defendant, or without any correction or modification of such statement being at any time thereafter suggested. Apparently no valid objection could have been raised to the formal reception in evidence of the docket, and, as it was treated by all parties as having been properly introduced, we think appellant should not now be heard to complain.

[10-12] It is finally contended by appellant that prejudicial error was committed by the trial court in permitting the district attorney, over the objections of defendant, to refresh the recollection of certain witnesses by showing to each of them respectively a transcript of his testimony given before the grand jury. As to the first and the fourth of such specifications, it appears that in neither case was the memory of the witness refreshed by having shown to him a transcript of his former testimony. No evidence resulted from the attempt to so refresh the memory of the witness, nor was any part of such former testimony read to the jury. The facts were otherwise as to the second and third of such specifications, in that, by the procedure followed by the district attorney, the memory of the witness was not only refreshed thereby as to a part of his testimony, but, in addition thereto, some of such testimony was read to the witness in the presence of the jury. As to the fifth of such specifications, no objection appears to have been made by the defendant to the course adopted by the district attorney, nor does it appear either that the memory of the witness was refreshed, or that anything in relation thereto was read to the jury. As

to both the sixth and seventh of such specifications, although the former testimony of the witness was read aloud in the presence of the jury, no objection thereto was made by the defendant. Regarding the eighth of such specifications, there is nothing to indicate that the memory of the witness was at all refreshed. No formal objection was made by defendant, nor was any part of the testimony of the witness read to the jury.

Statutory authority exists in section 2049 of the Code of Civil Procedure for showing to the jury the fact that one's own witness has not testified in accordance with statements theretofore made by him—the section referred to providing in substance that "the party producing a witness * * * may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony. * * *"

In the instant case no suggestion is made which would indicate either that the prosecution was not misled by the statement made by the witness, or that there was no reasonable ground for believing that the testimony which would be given by the witness would be favorable to the cause of the prosecution. With the exceptions of the second and the third of such specifications, the circumstances and the facts with reference to each of the other several specifications of error, as heretofore set forth herein, being considered, the following authorities would indicate that no error was committed in the course pursued by the trial court in connection therewith. *People v. Bushton*, 80 Cal. 160, 22 P. 127, 549; *People v. Ross*, 115 Cal. 233, 46 P. 1059; *People v. Durrant*, 116 Cal. 179, 214, 48 P. 75; *People v. Decker* (Cal. App.) 246 P. 157. In the case of *People v. Selby* (Cal. Sup.) 245 P. 426, it is held (syllabus) that where a witness for the prosecution on direct examination admitted a variance between her testimony before the grand jury and that given upon the trial, the prosecution had the right to present to the witness, for the purpose of refreshing her memory, a transcript of her testimony taken before the grand jury and ask her if she so testified.

It also appears to be the rule that if by reason of a defective memory a witness fails to testify in accordance with the expectations of the party by whom he is called and gives no positive testimony against such party, it is not permissible to prove former statements made by such witness, which, if made by the witness on the trial of the action, would tend to establish the case of the party calling him. *People v. Creeks*, 141 Cal. 529, 75 P. 101; *People v. Follette* (Cal. App.) 240 P. 502, and authorities there cited. In each of the said second and third specifications, an inspection of the reporter's transcript shows that the witness failed to remember certain material facts to which he had testified when a witness before the grand jury; that in the pres-

ence of the trial jury excerpts from such testimony were read to the witness, but that in each case no change of any consequence occurred as between the testimony which was given by the witness on the trial and that which was given by him when he appeared before the grand jury. It is therefore apparent that as to each of such last-mentioned specifications, while an erroneous course was pursued by the district attorney, the error was nonprejudicial to defendant's substantial rights.

So far as we are able to determine, the defendant was accorded a fair trial.

The judgment and the order denying the defendant's motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

78 Cal. App. 33

BEAL v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (Civ. 5241.)

(District Court of Appeal, Second District, Division 1, California. May 13, 1926.)

1. Justices of the peace ☞ 166(2).

Provision in Code Civ. Proc. § 981a, which is similar to sections 581a, 581b, that appeal from justice court to superior court be dismissed if not brought to trial within one year from date of filing, *held* mandatory.

2. Justices of the peace ☞ 166(2).

Trial in superior court on appeal from justice's court, in absence of appellee, within one-year period prescribed by Code Civ. Proc. § 981a, but without five days' notice of trial required by section 594, *held* error, which court could correct by dismissing appeal before completion of trial and after expiration of one-year period.

3. Justices of the peace ☞ 172.

Five-day notice of date of trial in superior court on appeal from justice's court prescribed in Code Civ. Proc. § 594, is not subject to modification by any order shortening time.

Application by Isabell A. Beal for a writ of mandate prayed to be directed to the Superior Court of Los Angeles County, Harry A. Hollzer, Judge, to require respondent court to proceed with the trial of an action on appeal from a justice's court. Writ discharged, and petition denied.

Ray Howard, of Los Angeles, for petitioner.

Dailey S. Stafford and Frank G. Falloon, both of Los Angeles, for respondents.

CONREY, P. J. The facts as shown by the petition herein are as follows: The petitioner was defendant in an action brought against her by Herman Perry, in the justice's court of Los Angeles township, where judgment

was rendered against the defendant. The defendant appealed on questions of both law and fact. The judgment was rendered on July 2, 1924. The date of taking the appeal is not given, but it is alleged that the papers on appeal were filed in the superior court on July 23, 1924. On July 20, 1925, the defendant, after obtaining "an order shortening time" to two days for giving notice of motion, gave notice that on July 22, 1925, he would move for an order setting the case for trial and that it be tried forthwith. On July 22, the plaintiff and his counsel failing to appear, said motion was presented and granted, and the court began and entered upon the trial by receiving in evidence certain documentary evidence offered by the plaintiff. The court then continued the cause until the next day, July 23, 1925. On July 23, the plaintiff and his counsel still failing to appear, the court continued the trial to August 3, 1925, and directed that counsel for defendant be notified thereof. This notice was given on July 23, 1925. On the 3d day of August, 1925, the case being called for further trial, plaintiff's counsel being present for the sole purpose of moving to vacate the order of July 22 setting the cause for trial and that the appeal be dismissed, presented said motions. These motions were taken under submission and on October 20, 1925, the court granted both motions and dismissed the appeal. By reason of said action of the court and its refusal to further recognize the appeal the defendant has instituted this proceeding for writ of mandate. An alternative writ of mandate was issued herein. Respondents now demur to the petition and at the same time have filed an answer or "return," which raises no issue of fact.

[1] Section 981a, Code of Civil Procedure, requires the dismissal of all appeals from justice's courts "where the appealing party fails to bring such appeal to trial within one year from the date of filing such appeal" in the superior court, unless such time has been extended by written stipulation filed with the clerk of the court. In this case there was no stipulation extending the time. The provisions of section 981a, Code of Civil Procedure, prohibiting the further prosecution of such appeal and requiring the dismissal thereof, are mandatory. The language used in expressing the legislative intention is closely parallel to the terms of section 581a, Code of Civil Procedure, relating to the dismissal of actions in the superior court on account of delays in issuance, service, and return of summons. It has been definitely settled that these provisions are mandatory. *Sauer v. Superior Court* (Cal. App.) 241 P. 570. In *Middlebrook v. Superior Court*, 241 P. 914, we referred to the parallel existing between section 981a, Code of Civil Procedure, and sections 581a and

581b of that Code, and based our decision upon the mandatory character of all of these sections of the Code.

[2] From the foregoing the conclusion follows that it was the duty of respondent court to dismiss the appeal, unless it can be said that by the proceedings of the court on July 22, 1925, the case was lawfully brought to trial. Section 594, Code of Civil Procedure, relating to the bringing of issues to trial, provides that if the issue to be tried is an issue of fact "proof must first be made to the satisfaction of the court that the adverse party has had five days' notice of such trial." In *Uplinger v. Yonkin*, 47 Cal. App. 435, 190 P. 822, this court held that where the requirements of section 594, Code of Civil Procedure, are applicable, a trial and judgment given without the notice therein required is merely erroneous and is not in excess of the court's jurisdiction. We drew that inference from the decision of the Supreme Court in the case of *Estate of Dean*, 149 Cal. 487, 492, 87 P. 13, where the court very carefully limited to cases of direct appeal its declaration that a judgment rendered in disregard of that section is erroneous and should be reversed. In *Sheldon v. Landwehr*, 159 Cal. 778, at page 782, 116 P. 44, it was held that where the court proceeds against a party in his absence and without the notice required by section 594, Code of Civil Procedure, such proceeding against the party in his absence is in the nature of a default, but the court held that the section has reference only to proceedings taken against a party in his absence. The court held that if such party appears and has actually known that the case was set for a certain time the court has jurisdiction to proceed, and that the question of continuance is a matter for the discretion of the trial court. To similar effect see *Handy v. Handy*, 31 Cal. App. 590, 161 P. 21.

[3] But here it appears that the attempted commencement of the trial took place in the absence of the plaintiff. We are convinced, as was held in the case of *Cahill v. Verdier*, 54 Cal. App. 465, 202 P. 154, that the period of five days' time prescribed for the notice of date of trial is not subject to modification by any order shortening the time, as was attempted to be done in the case now before us. The case must be considered as one wherein, although the case was actually brought to trial and the court commenced the taking of evidence on July 22, 1925, which was within the one-year period prescribed by section 981a, Code of Civil Procedure, this was a proceeding erroneously allowed, because it was had in the absence of the adverse party and without the five days' notice required by section 594, Code of Civil Procedure. But it further appears that before any judgment rendered, and, indeed, before completion of the trial, the court became

convinced of the error which it had committed. It needs no argument to prove that at such a time, and while the cause is wholly before the court and undetermined, the court has power to correct its rulings, and the litigant in whose favor the error had been committed has not thereby acquired any vested right.

We conclude that the superior court acted within the scope of its authority in dismissing the appeal.

The alternative writ is discharged, and the petition denied.

We concur: HOUSER, J.; YORK, J.

78 Cal. App. 58

Ex parte MAKINGS. (Cr. 1323.)

(District Court of Appeal, First District Division 2, California. May 17, 1926.)

1. Statutes $\S$ 110½ (2).

Local and special legislation relating to taking of crabs is expressly authorized, under Const. art. 4, $\S$ 25½.

2. Constitutional law $\S$ 48.

Every presumption is to effect that statute is valid.

3. Constitutional law $\S$ 48.

Statute will not be held unconstitutional, unless it is positively and certainly opposed to Constitution.

4. Constitutional law $\S$ 209.

Equality guaranteed by Constitution is equality of persons and not places,—equality of right and not enjoyment.

5. Constitutional law $\S$ 209.

Law, conferring equal rights on all citizens, or subjecting them to equal burden, and inflicting penalties for violation, is equal law.

6. Fish $\S$ 9.

Pen. Code, $\S$ 628, subd. (c), as amended by St. 1925, p. 456, prohibiting transportation of crabs taken from certain fish and game districts into other districts, held not unconstitutional.

7. Fish $\S$ 8.

Ownership of crabs in waters being in people of state, Legislature may permit catching on such conditions as wisdom may dictate, and may limit property rights of persons catching.

Application by James A. Makings for a writ of habeas corpus to be directed to the Constable of Sausalito Township, Marin County, to secure release from custody on a charge of transporting crabs from Fish and Game District No. 1½. Writ denied, and petitioner remanded.

Puter & Quinn and Marc F. Morrison, all of Eureka, for petitioner.

B. D. Marx Greene, of San Francisco, for respondent.

Ralph W. Scott, of Los Angeles, for State Fish and Game Commission.

STURTEVANT, J. This is an application for a writ of habeas corpus. The petitioner is held by the constable of Sausalito township, county of Marin, under a warrant of arrest issued out of the justice's court of said township by virtue of a complaint filed in said court which charges that on the 12th day of March, 1926, the petitioner " * * * did then and there willfully and unlawfully transport and carry crabs from fish and game district No. 1½ to the county of Marin, state of California. * * * " The petitioner asserts the complaint is based on section 628 of the Penal Code, subd. (c), as amended by St. 1925, p. 456, thereof, and that such portion of the statute is unconstitutional because it is discriminatory. In this connection the petitioner earnestly contends that—

"If crabs are caught in any one of said districts, then any of the other six districts has and enjoys the right and privilege of having said crabs shipped into it, sold to, purchased by, and consumed by the residents of such district. * * * Each of these particular 7 districts enjoys privileges in regard to crabs caught in any one of this group of 7 which are not enjoyed or possessed by the other 53 fish and game districts. * * * Crabs caught in district No. 5 can be shipped into district No. 1½ and bought and consumed by its people, but the people residing in district No. 1 have no such privilege."

Section 628 of the Penal Code (1) prohibits the taking at any time of crabs less than seven inches in diameter measured across the back; (2) the taking of any female crab; (3) the taking, between July 31st and November 14th, of any crab excepting imported crabs; (4) the sale of crab meat not in the shell; (5) or the bringing to shore of any portion of any crab without the remaining portions showing its size; and then it provides:

"(c) Every person who ships or offers for shipment or who transports or carries any species of crab from fish and game districts one and one-half, five, six, seven, seven A, eight and nine, either to a point outside of the state or into any part of the state other than in districts one and one-half, five, six, seven, seven A, eight and nine, or who holds any crabs in live cars within said fish and game districts, is guilty of a misdemeanor."

"For the purposes of this act a live car shall be any box, crate or pen in which live crabs are kept."

[1-6] It will be noted at once that the statute does not directly confer any right or any privilege on any one. Indirectly it confers the privilege of taking crabs in the seven districts named and the privilege of transportation as therein designated. Those privileges are conferred on all manner of men without limitation as to the residence, citizenship, color, or age of the person doing the taking. It is local and special legislation. But local and special legislation is expressly authorized on the subject. Section 25½, art. 4, Const. Even before that section was adopted

all local and special legislation was not prohibited. If the classification adopted rests on any natural, intrinsic, or constitutional distinction, it is permissible. Looking at the entire statute, it is clear that it was enacted for the purpose of preventing crabs from being totally destroyed. If we assume it is a fact that in the waters located in the 7 districts crabs may be found in large quantities, then we may further assume that no one will engage in transporting large quantities of crabs from one place to another place where the same large quantities of crabs are to be found, and we may further assume that the supply of crabs will not be materially lessened by such restricted limitations. If we are otherwise in doubt and such assumptions will sustain the constitutionality of the statute, we must further assume that the Legislature heard and determined the facts before it enacted the statute and that it found that the facts existed which were necessary to sustain the statute. *Galeener v. Honeycutt*, 173 Cal. 100, 104, 159 P. 595. Every presumption is to the effect that the statute is valid. *Macmillan v. Clarke*, 184 Cal. 491, 496, 194 P. 1030, 71 A. L. R. 288. We should not declare a statute unconstitutional unless it can be said of the statute that it positively and certainly is opposed to the Constitution. *San Francisco v. Industrial Acc. Com.*, 183 Cal. 273, 279, 191 P. 26. In the case of *In re Marinovich*, 48 Cal. App. 474, 482, 192 P. 156, 159, the court quotes with approval:

"The statute makes no discrimination. * * * Everybody is prohibited.' True it is that the prohibition affects some more than others. 'Such is necessarily the effect of all restrictive laws. * * * The equality of the Constitution is the equality of persons, and not of places—the equality of right, and not of enjoyment. A law that confers equal rights on all citizens of the state, or subjects them to equal burdens, and inflicts equal penalties on every person who violates it, is an equal law.'"

[7] We have proceeded as above in reply to the points made by the petitioner. However, it is not clear to us how, in the light of the decisions of this state, that the point discussed is presented by a consideration of the statute in question. The statute expressly prohibits certain acts and by implication grants other rights. It grants limited rights to take certain crabs in certain waters. Theretofore the ownership was in the people of the state. In the case entitled *Ex parte Kenneke*, 136 Cal. 527, at page 529, 69 P. 261, 262 (89 Am. St. Rep. 177) Mr. Justice McFarland, speaking for the court, quoted with approval as follows:

"This being so, it necessarily followed that the Legislature had the right to permit persons to kill or take game upon such terms and conditions as its wisdom might dictate, and that the person killing game might have such property interest in it, and such only, as the Legislature might confer. The Legislature has never conferred an absolute property in quail upon the

person who might kill the same. The killing of quail during the months of October and November was permitted, not for sale—not to go upon the market as an article of commerce—but for the mere use of the person who killed the birds. The person killing quail under this statute has but a qualified property in the birds after they are killed. He may consume them. If a trespasser should take them from him, he might maintain an appropriate action to regain the possession. But the law which authorized him to kill the quail has withheld the right to sell or the right to ship for the purpose of sale, and when such person undertakes to ship for sale he is undertaking to assert a right not conferred by law. The act, therefore, does not destroy a right of property, because no such right exists.”

That case has been cited and followed in later cases. *Paladini v. Superior Court*, 178 Cal. 369, 371, 173 P. 588.

The writ is denied, and the petitioner is remanded.

We concur: LANGDON, P. J.; NOURSE, J.

In re HENNINGSSEN'S ESTATE.**McVEY v. HENNINGSSEN.**

(S. F. 11848, 11849.)

(Supreme Court of California. July 6, 1926.)

1. Executors and administrators $\S$ 188—Surviving husband held entitled to have homestead and exempt property set apart to him, though he and wife were separated three months before her death (Code Civ. Proc. $\S\S$ 1464, 1465, 1466).

Surviving husband *held* entitled to have set apart to him homestead and exempt property of estate of deceased wife, under Code Civ. Proc. $\S$ 1465, notwithstanding he and wife had separated three months before her death, since rights under sections 1464, 1465, 1466, are not conditioned on existence of family status at decedent's death.

2. Homestead $\S$ 151.

Flats occupied by tenants, wherein neither spouse resided, *held* properly set apart as homestead to surviving spouse.

In Bank.

Appeals from Superior Court, Alameda County; George Samuels, Judge.

In the matter of the estate of Agnes C. Henningsen, deceased. From orders setting apart homestead and exempt property of estate to R. M. Henningsen, as surviving husband of deceased, John L. McVey, executor, appeals. Affirmed.

John L. McVey, of Oakland, in pro. per., for appellant.

Herbert Chamberlain, of San Francisco, for respondent.

RICHARDS, J. There are two appeals involved in this proceeding, one an appeal from an order of the probate court setting apart a homestead to the surviving husband of the decedent out of the separate property of the latter, the other an appeal from an order of said court setting apart the exempt property of said estate to the surviving spouse. These appeals are prosecuted by the executor of the last will and testament of said deceased. The two appeals are predicated upon the same evidence; the questions of law are the same upon each appeal, and are presented in a single set of briefs. They will therefore be considered and disposed of in a single opinion.

The respondent herein, R. M. Henningsen, and the deceased, Agnes C. Henningsen, were, at the time of the death of the latter, husband and wife. They had been married and had lived together in that relation for about 19 years up to about three months prior to the death of the wife, when, apparently, a discord arose between them. What property they possessed was the separate property of the

wife, and consisted of the real property sought to be set apart as a probate homestead herein, of certain exempt personal property and of certain other moneys and properties not affected by these proceedings. At the time the relation between the spouses became strained the husband apparently had no property and was in need of immediate means and asked his wife for \$300 in money to relieve his situation. Trouble ensued. She told him to leave the house, and upon that or the following day the wife handed her husband a check for \$100, which contained the following statement below the name of the maker: "Payment in full for all claims you have against me." She also at the same time offered back a ring which he had given her years before. The husband took the check, but refused the ring, and went away to live elsewhere in Oakland, wherein they had both theretofore resided, and did not return to or see his wife during the remaining few months of her lifetime, nor did he attend her funeral. His excuse for not doing so, given at the hearing of these proceedings, was that he had been told by her "to stay away from the house and never come near it," and that he did not know that she was sick and had died until after she was buried. He further testified upon such hearing that the money she gave him was part of his own property of which she was possessed. During the course of probate of his deceased wife's will, her husband, the respondent herein, presented the two applications above referred to, under the provisions of section 1465 of the Code of Civil Procedure. At the hearing thereon the foregoing facts were educed, and at the conclusion thereof the trial court made and entered the two orders from which these appeals have been taken.

[1, 2] The main contention which the appellant makes upon each of these appeals is that the evidence presented at the hearing showed that the family relation between the husband and wife had been dissolved prior to her death, and for that reason the husband was not entitled to have set apart to him the homestead or the exempt property from the separate property and effects of his deceased spouse under the provisions of said section of the Code. There is no merit in this contention. Even if it were to be conceded, which it is not, that the appellant herein had established upon such hearing by practically undisputed evidence that the family status of the parties had been destroyed, it would not follow that the husband of the decedent

must for that reason have been denied the rights he sought to assert under section 1465 of the Code of Civil Procedure. On the contrary, this court has held in *Estate of Gould*, 181 Cal. 11, 183 P. 146, and also in *Estate of Parkinson*, 193 Cal. 354, 224 P. 453, that the rights of the surviving spouse created under the provisions of sections 1464, 1465, and 1466 of the Code of Civil Procedure were not conditioned upon the existence of the family status at the date of the decedent's death. In each of these cases the earlier decisions of this court, including the cases of *Estate of Yoell*, 164 Cal. 540, 129 P. 999, and *Bose v. Bose*, 158 Cal. 428, 111 P. 258, upon which the appellant chiefly relies, were fully considered and distinguished. We are satisfied that the language of the court in *Estate of Gould*, supra, and in *Estate of Parkinson*, supra, must be given full application to the facts as presented upon these two appeals; and we are further satisfied that the appellant herein made no such showing as to the severance and nonexistence of the family relation between these discordant spouses during the brief period preceding the death of the wife as to bring these appeals within reach of the decisions of this court in *Estate of Yoell* and *Bose v. Bose*, supra, even if these cases could otherwise have been given application to the status provided for in section 1465 of the Code of Civil Procedure, upon the basis of which the orders herein appealed from were made. The further contention of the appellant herein to the effect that the property selected and set apart as a homestead herein was not of the character which would render it available for such purpose is equally without merit. The property in question consisted of two flats occupied by tenants at the time of the decedent's death, and wherein at such time neither of said spouses resided. It has, however, been held by this court that residence upon the property sought to be impressed with the quality of a probate homestead was not a prerequisite to its segregation for such purpose under the provisions of said Code relating to such homesteads if such property was otherwise suitable for such purpose. In *re Sharp*, 78 Cal. 483, 21 P. 182; In *re Bowman*, 69 Cal. 244, 10 P. 412.

The contentions of the appellant being thus disposed of, it follows that the orders appealed from must be and they and each of them are hereby affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.

199 Cal. 52

PEOPLE v. BORCHERS. (Cr. 2865.)(Supreme Court of California. June 30, 1926.
Rehearing Denied July 30, 1926.)

1. Embezzlement $\hookrightarrow$ 4—To sustain conviction of "embezzlement," it must be shown that defendant was agent or bailee of owner, that property belonged to owner and was lawfully in defendant's possession, and that defendant converted it and intended to deprive owner of his property unlawfully.

To sustain conviction of embezzlement, it must be shown (1) that defendant was agent or bailee of prosecuting witness in holding embezzled property; (2) that property actually belonged to prosecuting witness; (3) that property was lawfully in defendant's possession at time of embezzlement; (4) that defendant was guilty of conversion denounced by statute; (5) that defendant intended to deprive prosecuting witness of property unlawfully.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Embezzlement—Embezzlement.]

2. Embezzlement $\hookrightarrow$ 6—Property intrusted to one with authority to change it into other property is not subject of embezzlement, if change is made, but only property resulting from change.

Property, including commercial paper, intrusted to one with authority to transmute it into property of another kind, including cash, to use of depositor, is not subject of embezzlement, if transmutation is made, but only the property resulting from transmutation.

3. Embezzlement $\hookrightarrow$ 6.

Evidence not showing that defendant converted checks as distinguished from cash represented thereby held insufficient to sustain conviction for embezzlement of checks.

4. Embezzlement $\hookrightarrow$ 44(1).

Evidence held to sustain conviction of embezzlement of note given defendant in blank with authority to fill blanks to complete agreed transaction.

In Bank.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

William C. Borchers was convicted of embezzlement on separate counts, and he appeals. Reversed in part, and affirmed in part.

Henry St. Rayner, R. P. Henshall, and Nat Schmulowitz, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

LAWLOR, J. The defendant, William C. Borchers, was indicted by the grand jury of the county of Los Angeles in ten counts—five for the crimes of larceny and five for embezzlement. As to the five larceny counts and one of the counts of embezzlement the prosecution was abandoned, but defendant was found guilty of embezzlement on each

of the four remaining counts—numbered 1, 3, 5, and 9. A motion for a new trial was interposed and denied, whereupon judgment of conviction was pronounced on each of the said four counts. The District Court of Appeal reversed the judgment and order so far as they related to counts 1, 5, and 9, but affirmed them so far as they concerned count 3. We are in accord with the reasoning and conclusions of the District Court of Appeal touching counts 1, 5, and 9, and, though we agree with the conclusion of that court as to count 3, we cannot accept the reasons advanced therefor. As regards counts 1, 5, and 9, therefore, the opinion of the District Court of Appeal contains an expression of our views of the questions considered therein, and that portion of said opinion to which we now adhere, hereby adopt and make a part hereof is as follows:

"It is contended that the evidence was insufficient to sustain the verdict on the first count. This count charged appellant with the embezzlement of a check or order for \$2,000, drawn by one Sarah M. Garrigus in favor of Borchers, Clarke & Co., the indictment alleging that appellant at the time was the agent and bailee of Mrs. Garrigus. The evidence in support of this branch of the indictment, found in the testimony of the complaining witness, was to the effect that Mrs. Garrigus was desirous of obtaining a loan for [of] \$250,000; that appellant told her that he was connected with the Southern California Mortgage Company, which would let her have the money, but he later told her that one of the directors of the company objected to the making of the loan and stood in the way of the completion of the deal; that appellant then urged the complaining witness to buy the stock of this director in the mortgage company in order to be rid of him and therefore rid of his objection to the loan, saying that \$2,000 would be necessary for the purpose. Appellant urged this course upon Mrs. Garrigus on three different occasions, and she finally consented to the plan, especially as appellant said to her that he would later sell the stock and give back her money. She then handed appellant her check on a bank for \$2,000, payable to Borchers, Clarke & Co., Inc. This paper was offered in evidence at the trial, together with an indorsement thereon, 'Pay to the order of [another bank than the one on which the check was drawn].' Below this indorsement appeared the signature, 'Borchers, Clarke & Co., Inc.' The check also showed by means of a perforation stamp, 'Paid 9-20-23,' which date was the next day after the date of the paper. At the time of the delivery of the check to appellant Mrs. Garrigus signed a document headed, '200 Units Subscription to Underwriters Syndicate,' and which she testified she read before executing. This instrument recited in part that the signer subscribed for ten units of the common capital stock of 'the Pre-organization Syndicate now being organized to underwrite' shares of the common stock of the Southern California Mortgage Company, a corporation proposed later to be incorporated under the laws of Delaware; that the signer was to pay \$2,000 for the ten units upon signing

the document; that the signer's subscription and similar subscriptions 'shall be used for preorganization purposes, and the expense of starting the company, and advertising campaign, and for selling expense of said stock to be issued under the direction of the underwriters, Borchers, Clarke & Co.'; that each of the units subscribed for should be exchangeable for common stock 'to be issued out of that promotion stock later to be issued to Borchers, Clarke & Co., underwriters, for service performed and to be performed in organizing and procuring capital for said company'; that the 'certificates of stock hereby subscribed for to be issued in my name or to my order * * * and to be delivered to me when authorized by the commissioner of corporations and in full compliance with all the terms and conditions of the permit later to be issued by the commissioner'; that the subscription was 'taken and executed' upon the condition that the company was to be organized within 90 days, 'or moneys collected to be refunded to the subscriber'; and that this 'subscription unit transferable only upon acceptance and approval of Borchers, Clarke & Co.' To this agreement was appended the following, signed 'Borchers, Clarke & Co., By Wm. C. Borchers': 'Receipt of the sum of \$2,000 is hereby acknowledged and the above preorganization subscription is hereby accepted, in connection with the terms and conditions above mentioned.' Mrs. Garrigus testified that she received no stock in exchange for the check, and that neither the check nor the \$2,000 which it represented was ever returned to her. The only evidence of an appropriation of the check for \$2,000, or of the amount represented thereby, was in the indorsement shown upon the paper, that is to say, the special indorsement signed 'Borchers, Clarke & Co., Inc.,' and the perforated indorsement, 'Paid,' with a date.

[1] "For the purpose of testing the sufficiency of this evidence to support a conviction on the first count it is necessary to state several principles of the law of embezzlement. In order to sustain a conviction upon such a charge it must at least be shown, first, that the accused was the agent or bailee of the prosecuting witness in holding the alleged embezzled property; second, the property must actually belong to the alleged principal, the prosecuting witness; third, it must be lawfully in the possession of the accused at the time of the alleged embezzlement; fourth, the accused must have been guilty of the conversion which the statute denounces; and, fifth, there must be shown an intent on the part of the accused to deprive the prosecuting witness of his property unlawfully. See 20 C. J. 413, and following pages.

"Before attempting to make application of these rules of law it is to be observed that in one respect the evidence under the first count of the indictment is to be viewed in two distinct aspects. Mrs. Garrigus testified that her check was given for the purchase of the stock in the mortgage company said by appellant to be held by the director who opposed the making of the loan to her. On the other hand, the documentary evidence shows that the check was given in payment for certain 'presyndicate' shares of stock, which were to be exchanged for shares later to come from the then unincorporated mortgage company. Appellant insists

that the recitals of the documentary evidence are conclusive upon the prosecution, and that the case attempted to be made against him under the first count of the indictment is to be plumbed from that viewpoint. This particular question, however, we do not find it necessary to decide, as in our opinion the result is the same whether the evidence be seen in the one aspect or in the other.

[2, 3] "It appears to us that the evidence for the prosecution under the first count failed to establish several elements necessary to a conviction of appellant of the crime with which he stands charged. Various considerations seem to exhibit the justice of this remark. The check, under any view of the evidence, was delivered into the hands of appellant with the intention upon the part of Mrs. Garrigus that it should be cashed and that its proceeds should be used to pay for shares of stock. Even if it be said that the check might have been passed by indorsement in payment for the stock, the payee certainly was clothed with the power to cash it, and even with the right to do so, for the purpose of making payment. Moreover, it was intended by Mrs. Garrigus that the paper should be cashed by Borchers, Clarke & Co. and not by appellant. That is conclusively shown by the manner in which it was drawn. Appellant could not have gotten the money on it, at least not until after it had gone through the hands of Borchers, Clarke & Co. Therefore, in strictness, as it appears to us, it may possibly be said that the check was not delivered to appellant to be held, even momentarily, for Mrs. Garrigus, but to be held for Borchers, Clarke & Co., that is, that within the meaning of the law of embezzlement appellant may not have been her agent or bailee, but the agent of the payee of the check. Here it is to be observed that the indictment does not charge and there is nothing in the evidence to show that appellant, in dealing with Mrs. Garrigus, was masquerading under the name of a corporation—if that is what the concerned named was—the title of which entity contained a word which was the same as his own surname. Under all the circumstances of the case, then, appellant was burdened by Mrs. Garrigus with the duty of delivering the check to Borchers, Clarke & Co. We need not pause to inquire what the charge against appellant must have been if he had failed to comply with this duty and had converted the check to his own use—whether he should then have been indicted for the embezzlement of paper which was the property of Mrs. Garrigus or with property which belonged to the corporation, assuming from now forward that it was one. There was no evidence that appellant did not deliver the check to the payee named in it. In fact, the indorsement of the corporate name upon the paper indicated that the delivery was made and that appellant properly discharged his duty so far as the check was concerned. Let us now turn to other considerations. We have already seen not only that Mrs. Garrigus intended that appellant should deliver the check to Borchers, Clarke & Co., but that the corporation was to transmute it into cash. Suppose we assume, in order to show how far short of sufficiency the evidence fell, that the corporation was not in the transaction, or that Borchers, Clarke & Co. was another name for appellant. In other words, let us assume that the check was drawn payable to appellant and

that it bore his indorsement and the perforated mark 'Paid.' These assumptions are distinctly favorable to respondent, but even with them we are to observe that the charge here was the embezzlement of the check and not the embezzlement of cash, the converse of the case of *People v. Riccardi*, 50 Cal. App. 427, 195 P. 448, upon which respondent relies. There is a vast difference between the two charges, as the following authorities will demonstrate: *Commonwealth v. Merrifield*, 4 Metc. (Mass.) 468; *State v. Bacon*, 170 Mo. 161, 70 S. W. 473; *State v. Mispagel*, 207 Mo. 571, 106 S. W. 513; *People v. Leipsic*, 6 Cal. Unrep. 536, 62 P. 311; *People v. Meseros*, 16 Cal. App. 277, 116 P. 679. These cases establish the rule that where property, including commercial paper, is intrusted to one with authority to transmute it into property of another kind, including cash, to the use of the one who deposits with the trusted person, the property so intrusted cannot be the subject of embezzlement, if the transmutation is made, but only the property which results from the change. Under such circumstances the holder of the original deposit, having made the transmutation, has done, up to the time of the change in the nature of the property, exactly what he was authorized to do. In *People v. Riccardi*, supra, the facts were the same in substance as those in the present instance, under the assumptions now made, but the defendant there was charged with the embezzlement of cash and not of the check which he turned into cash. There was no evidence here that appellant embezzled the check, still disregarding the interposition of Borchers, Clarke & Co. in the affair. The prosecution proceeded upon the theory that the paper was cashed, exactly as Mrs. Garrigus intended that it should be and as the prosecuting witness in *People v. Riccardi*, supra, intended that the check there in question should be. Assuming then, as we have already done, that appellant was the payee of the check and that he obtained and converted the proceeds arising from it, he could have been convicted, if at all under a charge of embezzlement, only for the appropriation of the cash and not at all for the conversion of the check.

"Upon these reflections it appears to us, as already stated, that the evidence failed to disclose several of the elements which we have above set forth as necessary to a conviction upon a charge of embezzlement. In the first place, it was not shown that appellant converted the check, the only property to which the charge against him related, and it follows also from this failure of proof that there was no showing of an intent on the part of appellant to deprive Mrs. Garrigus of the check unlawfully. It may be doubtful also—but we express no opinion on what immediately follows—whether appellant was, under the law of embezzlement, the agent or bailee of Mrs. Garrigus in receiving the check and in holding it on its way to Borchers, Clarke & Co., or whether, as between the prosecuting witness and appellant, the check belonged to her, within the meaning of that law, while he held it. It seems to us, then, that the evidence did not sustain the conviction on the first count. * * *

"Appellant contends that the evidence was insufficient to sustain the verdict under the fifth count of the indictment. In that count he was charged, while acting as the agent and bailee of Mrs. Garrigus, with the embezzlement

of a certain check or order for \$800 signed by her and payable to the order of Borchers, Clarke & Co., Inc. This was the evidence produced in support of the charge: Mrs. Garrigus testified that she gave the check for \$800 to appellant for the purpose of paying for the engraving and printing of bonds which were intended to be issued as evidence of the indebtedness to the Southern California Mortgage Company, supposed to arise from the loan of \$250,000 referred to in the evidence above set forth as relating to the first count of the indictment. After the date line and the name of the bank upon which it was drawn, the check read thus: 'Pay to the order of Borchers, Clarke & Co., Inc., eight hundred and no/100 dollars, \$800.00. For printing bonds.' It was signed by Mrs. Garrigus, and at the time it was offered in evidence it bore the following indorsements: 'Pay to the order of [a bank other than the one upon which the check was drawn] Borchers, Clarke & Co. Paid 11—26—23.' There was evidence to the effect that no bonds were ever printed as contemplated, and that no part of the proceeds of the check was ever paid out for such a purpose. Neither the check nor any part of the proceeds thereof was ever returned to Mrs. Garrigus. This evidence appears to place the conviction under the fifth count in the same difficulty with that under the first count. Not only did the indorsements on the check tend to show that it had been cashed, but it is the theory of the prosecution that it was cashed. It is said in respondent's brief, concerning the particular check now in question: 'It was shown that the check was deposited in a bank and paid by it.' It is also said that no more than this, and other evidence referred to in the brief, 'was necessary to bring home to defendant the receipt of the money,' italics being ours. Returning now to the indorsements on the check, it is to be observed that they tend to prove that the paper was cashed by Borchers, Clarke & Co. and not by appellant. Under all these circumstances, what we have said in disposing of the conviction under the first count of the indictment applies with equal force to the conviction under the fifth. The later conviction, therefore, cannot stand.

"It is also contended by appellant that the evidence fails to sustain the conviction under the ninth count of the indictment. This count departs from the affairs of Mrs. Garrigus, and charges that appellant embezzled property of one H. E. Ketchum, which property appellant at the time held as the agent or bailee of the person named. The property in question was alleged to be a check or order for \$515, payable to the order of Borchers & Clark. The evidence under this branch of the indictment was that the check was issued for the purpose of paying for the printing of certain bonds. It was not used, nor was the cash which it represented, for that purpose. Neither the check nor the proceeds arising from it was ever returned to Ketchum. The paper read, so far as it is material here: 'Pay to the order of Borchers & Clark \$515.00. Five hundred and fifteen & no/100 dollars. H. E. Ketchum.' When it was offered in evidence it bore the perforated marks, 'Paid 11—26—23,' and was indorsed, 'Pay to the order of [a certain bank]. Borchers, Clark & Co.' Not only were these marks and indorsements on the check, but it is the

theory of the prosecution that it was cashed, as it is said concerning the paper in respondent's brief: 'The check was introduced in evidence, and it showed that it had been paid by the bank on which it was drawn.' Our attention is called to no evidence that the check was converted by appellant. It was testified by Ketchum: 'Q. * * * Did you intend that your individual check should be delivered to the person who printed the bonds, or that it should be delivered to the company, and that the company should pay for the bonds itself? * * * A. I intended the check to be delivered to the company. * * * Q. To which company? A. To Borchers & Clarke. * * * These facts seem to make applicable what we have said above concerning the convictions under the first and fifth counts. The conviction under the ninth count therefore must also fall.

"Appellant contends that parts of the trial judge's charge to the jury were erroneous on the ground that they amounted to instructions upon matters of fact. It is also claimed that certain of the court's instructions in effect told the jury that its members might disregard other instructions which the court gave as to the law. These contentions are to our minds so clearly untenable that we forbear further to mention them.

"Still other points are made, but they are either disposed of by what has been said concerning the particular questions which we have thoroughly discussed, or they relate to appellant's conviction under counts of the indictment as to which a reversal will be ordered for the reasons above given."

[4] It is likewise contended by the appellant that the evidence addressed to the third count of the indictment is insufficient as matter of law to sustain the verdict thereon. In this count the appellant was charged with the embezzlement of a note intrusted to him as the agent of Mrs. Garrigus and payable to the order of Myra J. Borchers in the sum of \$4,000. Concisely stated, the evidence touching the third count tended to show that the appellant represented to the prosecuting witness that two directors, other than the one mentioned in connection with count 1 of the indictment, were opposed to the loan of \$250,000 which she was seeking from the Southern California Mortgage Corporation, and that to overcome this opposition it would be necessary to "buy them off" by purchasing their stock; that he represented that \$4,000 would be required to secure that result; that he requested the prosecuting witness to "put up a note," but stated that it would not be used or hypothecated in any manner; that when Mrs. Garrigus signed the "note" and delivered it to appellant there was nothing on the face thereof except certain printed matter; that the amount of the note, the date thereof, the time the note was to run, the name of the payee, and the amount of the interest did not appear thereon when she signed as maker and delivered it to appellant; that appellant stated he would fill in the blank spaces in the instrument; that she did not expressly authorize the appellant

or any other person to fill in any of the blank spaces; that she authorized the appellant to use the instrument in connection with the transaction for which it was given to him, and that she did not learn of the insertions in the instrument "until the bank showed it to me."

Appellant contends that the evidence addressed to count 3 is insufficient to support a conviction thereon for the reason that when the prosecuting witness parted with the instrument to him it was a mere scrap of paper, and not a note. As the indictment charged appellant with the embezzlement of a \$4,000 promissory note payable to Myra J. Borchers, it is urged by appellant that the instrument when delivered to him did not answer that description, and therefore the conviction under count 3 was improper.

We are of the opinion that the conviction under this count of the indictment may be affirmed without determining whether the doctrine of estoppel, applied by the District Court of Appeal, is applicable so as to preclude the appellant from contending that the instrument when delivered to him was not a note. As outlined above, the evidence touching the third count of the indictment tended to show that the appellant was the agent of Mrs. Garrigus for the purpose of consummating the transaction described; that the unfilled form of note was delivered to and received by him in that capacity; that he, at the time of receiving it, informed her, without objection on her part, that he would fill in the blank spaces; that he was impliedly, if not expressly, authorized by her to make these insertions in the instrument in order to complete that part of said transaction in the course of which such note completely filled out to some payee and in the amount of \$4,000 was to be used. If the appellant had so filled out and so used said note the conclusion is inescapable that it would have been a perfectly valid instrument. Nor do we think the fact that appellant filled out the note in the name of his wife would have affected its validity if he had otherwise acted in good faith in its transfer. From the fact that he had the foregoing authority and from the further fact that he apparently had continuous possession of the instrument from the time he received it until he transferred it in finished form the jury might reasonably infer that it was he who filled in the blank spaces so as to render it a good note before uttering it. With the aid of this inference we have the appellant filling in this instrument as he was, at least impliedly, authorized so to do, and, having done so, converting it to his own use as charged in the third count of the indictment. The offense charged in said count of the indictment was thus completely proven without the aid of the doctrine of estoppel which is so exhaustively discussed by counsel for both sides. The appellant did not take the stand

as a witness in his own behalf. Had he done so and attempted to deny the agency relationship, or, admitting such relationship, had he testified that he had not made the insertions in the instrument, the troublesome question as to the applicability of the doctrine of estoppel might have arisen. In our view, however, that question does not arise on the face of the record in this case, and hence it becomes unnecessary to decide it.

The judgment and order, in so far as they relate to the first, fifth, and ninth counts of the indictment, are reversed. The judgment and order under the third count are affirmed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.

199 Cal. 90

BLANKENHORN-HUNTER-DULIN CO. v. THAYER et al. (L. A. 7429.)

(Supreme Court of California. July 2, 1926.
Rehearing Denied with Modification
July 30, 1926.)

1. Brokers ⇨26.

As between broker and customer who has paid for stock in full, customer is owner, and broker is not impliedly authorized to pledge stock.

2. Brokers ⇨24(1).

As between broker and marginal customer, latter is owner of stock, and broker merely has lien thereon for any advances made, and he has implied authority to repledge same.

3. Brokers ⇨26.

Cash customer of stock purchased through broker is entitled to immediate delivery.

4. Brokers ⇨24(1).

Marginal customer of stock broker is entitled to delivery when he pays balance of contract price.

5. Bankruptcy ⇨140(3)—Purchaser of stock paying broker in full held entitled to recover stock upon bankruptcy of broker, though latter had never paid purchase price to its correspondent executing order.

Where broker's correspondent purchased stock, purchaser paying broker in full held entitled to recover stock as preference upon bankruptcy of broker, though latter had never paid its correspondent for the stock, and the correspondent had sold stocks of broker's customers purchased on margin to pay for stock in question.

6. Bankruptcy ⇨211.

State court had jurisdiction in action in claim and delivery to recover stock certificate from trustee of bankrupt broker.

In Bank.

Appeal from Superior Court, Los Angeles County; E. F. Hahn, Judge.

Action in claim and delivery by the Blankenhorn-Hunter-Dulin Company against Will J. Thayer, trustee in bankruptcy for Mason & Owen, bankrupts, and another, to recover possession of a stock certificate. Judgment for plaintiff, and defendant named appeals. Affirmed.

Will J. Thayer, of San Diego, in pro. per.
Gibson, Dunn & Crutcher, of Los Angeles, for respondent.

SHENK, J. Plaintiff brought this action in claim and delivery to recover the possession of a stock certificate alleged to have been wrongfully withheld by the defendants. Plaintiff obtained judgment for the delivery of the stock against both defendants. The appeal is prosecuted solely on behalf of the trustee in bankruptcy, and is on the judgment roll alone.

It appears from the findings that on and prior to November 15, 1920, Mason & Owen were engaged in the business of stock brokers in the city of San Diego. On or about that date they were employed to purchase for the plaintiff, for cash, ten shares of stock of the Standard Oil Company of Indiana. In execution of the order, Mason & Owen directed their correspondents Logan & Bryan, stockbrokers having offices in New York City and elsewhere, to purchase for the account of Mason & Owen, as a marginal transaction, 10 shares of the said Standard Oil Company stock. On November 15, 1920, Logan & Bryan purchased 10 shares of stock of that company on the New York Stock Exchange for \$7,100, and immediately notified Mason & Owen of the purchase. The latter in turn notified the plaintiff that the said shares had been purchased as ordered. On November 17, 1920, the plaintiff paid to Mason & Owen the said purchase price of \$7,100, plus the usual broker's commission. The whole of said payment was placed among the general funds of Mason & Owen, and no part of the same was paid to Logan & Bryan for the purchase of said stock. Prior to said purchase, Mason & Owen had an account with Logan & Bryan, and through them were trading in stocks on the New York Stock Exchange as marginal traders. The purchase of said 10 shares of stock was made by Logan & Bryan as a part of the marginal transactions of Mason & Owen, and said shares were paid for by Logan & Bryan out of moneys advanced by them as a loan to Mason & Owen, based upon the securities held by them in Mason & Owen's account. At all times mentioned Mason & Owen had to their credit as a pledge in the hands of Logan & Bryan a large number of stocks and securities of various kinds belonging to the customers of Mason & Owen which had been purchased by Logan & Bryan for the marginal account of Mason & Owen

and their customers, the purchase price of which had been advanced by Logan & Bryan as a loan to Mason & Owen and all of said stocks and securities were held in pledge by Logan & Bryan as security for said loan, and the value of said securities was in excess of the indebtedness due from Mason & Owen to them. When Logan & Bryan purchased said shares of stock, they did so on the strength of the credit of said pledged stocks and securities and also on the strength and credit of said 10 shares of Standard Oil Company stock. The purchase price of the said 10 shares was advanced by Logan & Bryan as a part of the loan to Mason & Owen, and increased the burden of said loan by the sum of \$7,100, but also increased the security held by Logan & Bryan to the amount of the market value of said 10 shares. When purchased, the said 10 shares were credited to Mason & Owen by Logan & Bryan and became a part of the general mass of securities held by Logan & Bryan as a pledge for the payment of the general indebtedness of Mason & Owen to Logan & Bryan, and became subject to the lien of Logan & Bryan in that behalf. When Mason & Owen ceased doing business on November 20, 1920, there were to their credit with Logan & Bryan as a pledge stocks and securities belonging to the customers of Mason & Owen, including said 10 shares, of the value of \$339,156 subject to a lien in favor of Logan & Bryan to secure an indebtedness of \$206,054.43 due from Mason & Owen. In executing orders for Mason & Owen and in advancing money on said stocks, Logan & Bryan did so in good faith, without any knowledge or notice of the rights, if any, of the plaintiff or other customers of Mason & Owen in and to said securities. In dealing with Mason & Owen, the plaintiff did not know the methods employed by Mason & Owen in dealing with Logan & Bryan or others in causing orders for stock to be executed on the New York Stock Exchange.

On December 1, 1920, a petition in bankruptcy was filed against Mason & Owen, and Will J. Thayer was appointed and qualified as receiver and trustee in bankruptcy. He was later superseded by George P. Kier as such trustee, without in any manner affecting this cause. On December 6, 1920, in pursuance of an order of the court in the bankruptcy proceeding, sufficient of said stocks and securities held by Logan & Bryan were sold to cancel the entire indebtedness of Mason & Owen to Logan & Bryan, leaving in the hands of the latter, as a residue of said stocks that had been pledged, a number of securities, including said 10 shares of Standard Oil Company stock. On December 20, 1920, Mason & Owen were duly adjudged bankrupts. Most of the securities held by Logan & Bryan for the account of Mason & Owen belonged to or were ordered by persons who had not paid in full for said securities to

Mason & Owen but were purchased on margin account through Mason & Owen. The value of the securities so purchased on margin was more than sufficient to pay all advances of Logan & Bryan to Mason & Owen on account of said purchases. If the securities so purchased by the marginal customers of Mason & Owen had first been sold to pay off the indebtedness due from Mason & Owen to Logan & Bryan, it would not have been necessary to sell any of the stock which the customers of Mason & Owen had paid for in full. After the sale by the trustee in bankruptcy there was a surplus of approximately \$100,000 remaining in the hands of Logan & Bryan, which was more than sufficient to take care of any stocks or securities so sold which had been paid for in full in the same manner that the said 10 shares of stock had been paid for by the plaintiff. Only a small amount of fully paid for stock was held by Logan & Bryan at the time of the sale of the stocks which had been purchased for Mason & Owen on margin. None of the marginal customers of Mason & Owen have paid into the bankrupt's estate or to Logan & Bryan or to any one else the unpaid balance due upon the stocks or securities ordered by such marginal customers through Mason & Owen. The 10 shares of Standard Oil stock referred to in the complaint were the only shares of Standard Oil Stock held by Logan & Bryan under their pledge, and the plaintiff is the sole claimant of this particular stock.

As conclusions of law from the foregoing facts, the court determined in accordance with the plaintiff's contention that the plaintiff was the owner and entitled to the immediate possession of the certificate of stock, free and clear of any and all claims on the part of the trustee in bankruptcy and of Logan & Bryan, and judgment was entered accordingly.

[1-4] Several propositions seem to be well settled: (1) That, as between a broker and a customer who has paid for stock in full, the latter is the owner of the stock, and does not impliedly authorize the broker to pledge the security. As to the fully paid customer, the pledging of his stock by the broker is wrongful (*In re J. C. Wilson & Co. (D. C.)* 252 F. 631); (2) that, as between a broker and a marginal customer, the latter is also the owner of the stock, and the broker is a pledgee (*Richardson v. Shaw*, 209 U. S. 365, 28 S. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981; *Thomas v. Taggart*, 209 U. S. 385, 28 S. Ct. 519, 52 L. Ed. 845), and has a lien on the stock for any advances he may make thereon, and has the implied consent of the owner lawfully to repledge the same (*In re J. C. Wilson & Co.*, supra); (3) that, as between the broker and his cash customer the latter is entitled to the immediate delivery of the stock (*Duel v. Hollins*, 241 U. S. 523, 36 S. Ct. 615, 60 L. Ed. 1143), and the marginal customer is entitled to the delivery when he

pays the balance of the contract price (In re Mason [C. C. A.] 282 F. 202).

[5] With these general rules in mind, the respondent contends that, having paid the full purchase price, and there being no question of the identity of the stock, it was entitled to immediate delivery free and clear of any claims of the trustee in bankruptcy representing, as he says, the marginal customers as well as the general creditors of the bankrupt. On the other hand, the appellant contends that, as Logan & Bryan had a lien on the respondent's stock for the full purchase price of \$7,100, and as said stock was released from said lien by the sale of other stocks in the hands of Logan & Bryan belonging to the marginal customers of Mason & Owen, the respondent must contribute ratably to the discharge of Logan & Bryan's lien. The respondent replies that, being a cash customer, it is in a preferred class with rights superior to those of the marginal traders, and that, before the latter may insist that the respondent be held in contribution, it must appear that they have paid the balance due on their purchases. It insists that, as its stock was wrongfully pledged by Mason & Owen it should have the right to recover before, and, if necessary, to the exclusion of the marginal traders whose stocks were rightfully pledged.

We think the contention of the respondent must be sustained. It paid for its stock in full. It gave to its broker, Mason & Owen, no authority to pledge the same, and consequently did not subject itself to that risk. It therefore occupied a position superior to the marginal customers who had not paid for their stocks in full, and had impliedly authorized a repledge thereof, and thus voluntarily assumed the risk.

"As between securities hypothecated with authority and those hypothecated without authority, obviously the latter have the superior equity." In re J. C. Wilson & Co., *supra*, 650.

The right of contribution does not arise from contract, but rests upon principles of equity and natural justice. Concerning this right it was said in *Re Toole* (C. C. A.) 274 F. 337, 24 A. L. R. 470:

"The principle is that, where all are equally liable for the payment of a debt, all are bound equally to contribute to that purpose. So that, if the stock of A, B, and C is lawfully pledged for the payment of the debt of X, the stock of each is under the common burden, and, if X sells the stock of A and B, and leaves unsold the stock of C, the latter must contribute to A and B the excess they have paid above their share. But if, on the other hand, the stock of A is lawfully pledged, while that of B and C is unlawfully pledged, there is no obligation on the part of B and C to contribute, for there is no common burden as between A, on the one side, and B and C, on the other. The principle applies only in cases where the situations of the parties are equal as equality among persons whose situations are not equal is not equitable."

The equities of the fully paid customers and of the marginal traders are therefore not equal, and, as ratable contribution may be enforced only as to those of the same class, the marginal traders whose securities were rightfully pledged and who took the risk of a repledge cannot justly complain of the preference given to those whose securities were wrongfully pledged and who took no such risk.

The appellant has been twice subjected to a court order concerning stocks wrongfully pledged by the bankrupt. In *re Mason* (C. C. A.) 282 F. 202, presents a situation almost identical with the one at bar. In that case Steer, a customer of Mason & Owen, was declared to be the owner and entitled to the possession of 100 shares of Midvale Steel stock free and clear of any claims on the part of the trustee, appellant herein. Steer had paid for said stock in full, and the same had been wrongfully pledged by Mason & Owen. The lien thereon was discharged by the sale of the stocks of the same customers who are now represented by the appellant herein, and no part of Steer's stock was sold to satisfy the lien of Logan & Bryan. The principles of law declared and approved in that case are applicable here. It was there said:

"Under such circumstances it would be inequitable to hold that Steer, who paid his money in full and who had no pledge or loan, should be required to pay more, and thus reduce the losses of the marginal traders, who were speculating on the market." In *re Mason*, *supra*, 205.

The other case involving this same appellant is *In re Mason & Owen* (C. C. A.) 284 F. 714, where the right of a customer, who was not indebted to Mason & Owen, and whose securities were wrongfully pledged to Logan & Bryan, to recover his securities from the trustee in bankruptcy was confirmed.

An interesting treatise on the subject of the rights and obligations of customers in stock brokerage bankruptcies, with authorities cited in support of the text, is found in 37 *Harv. L. Rev.* 860-888. See, also, *In re T. A. McIntyre & Co.*, 181 F. 960, 104 C. C. A. 424; *Tompkins v. Morton Trust Co.*, 91 App. Div. 274, 86 N. Y. S. 520, affirmed in 181 N. Y. 578, 74 N. E. 1126.

The general creditors of the bankrupt are not in position justly to complain of the superior position accorded the respondent, for the reason that the \$7,100 paid by the respondent went into the funds of Mason & Owen, and, so far as the record shows, is now a part of the bankrupt's estate. The said estate was therefore neither increased nor diminished by reason of respondent's transaction in the purchase of said 10 shares of Standard Oil stock. Wherefore, as against the marginal customers and general creditors of Mason & Owen, the title of the respondent to said 10 shares of stock became absolute, and it was entitled to the possession

of the certificate representing such title as determined by the trial court.

[6] The contention of the appellant that the trial court had no jurisdiction of the subject-matter of the action is without merit. *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403; *Jaquith v. Rowley*, 188 U. S. 620, 23 S. Ct. 369, 47 L. Ed. 620; *Frank v. Vollkommer*, 205 U. S. 521, 27 S. Ct. 596, 51 L. Ed. 911; *In re Continental Producing Co. (D. C.)* 261 F. 627; *Fidelity, etc., Ass'n v. Citizens' Trust & Savings Bank*, 186 Cal. 689, 200 P. 631.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; LENNON, J.; CURTIS, J.



78 Cal. App. 79

In re TYMM'S ESTATE.

TYMMS et al. v. TITLE INS. & TRUST CO.
et al.

(Civ. 5620.)

(District Court of Appeal, First District, Division 2, California. May 19, 1926.)

1. Executors and administrators ⚡315(4)—Order of partial distribution of estate cannot be set aside after time for appeal has expired, except for mistake, inadvertence, surprise, or excusable neglect (Code Civ. Proc. § 473).

Under express provisions of Code Civ. Proc. § 473, order for partial dissolution of estate of deceased is final and appealable, and cannot be set aside after time for appeal has expired, except on ground of mistake, inadvertence, surprise, or excusable neglect.

2. Executors and administrators ⚡509(4)—Attack on order of distribution under will because property was not subject to distribution could not be made after time for appeal had expired, in absence of mistake, inadvertence, surprise, or excusable neglect (Code Civ. Proc. § 473).

Granting petition for distribution of property of estate under terms of will is in effect finding that property was subject to distribution thereunder, and attack upon order of distribution because property was not so subject could not be made after time for appeal, under Code Civ. Proc. § 473, had expired, in absence of mistake, inadvertence, surprise, or excusable neglect.

3. Executors and administrators ⚡12—Distribution, under will bequeathing property in state, of proceeds of drafts drawn in Australia more than month before death held not error.

Distribution, under will bequeathing property in state, of proceeds of drafts drawn in Australia on request of deceased more than month before death held not error, in absence of showing that drafts did not or could not have reached state before death.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Application by William Cornelius Tymms and others to set aside an order of distribution in the matter of the estate of Ernest A. Tymms, deceased, naming the Title Insurance & Trust Company, as executor of the estate, and another as parties. From an order denying the motion, applicants appeal. Affirmed.

H. A. Massey and Meserve & Meserve, all of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for appellants.

Henry K. Elder and Lawrence L. Otis, both of Los Angeles, for respondents.

NOURSE, J. On November 27, 1923, the probate court entered its order of partial distribution to one Shersby, distributing to him certain real property in Los Angeles county and \$8,487.82 in cash, all belonging to the estate of Ernest A. Tymms, deceased. On May 22, 1924, the father, brothers, and sisters of the deceased served and filed their motion to vacate said order of distribution. This motion was noticed for May 27, 1924, and, after several continuances, upon agreement of the parties was finally heard and denied by the probate court on November 25, 1924. The moving parties in this motion, representing themselves as heirs at law of the deceased, have appealed from the order denying their motion to vacate said order of partial distribution. The appeal is presented upon the judgment roll and a bill of exceptions.

The grounds of the motion to vacate, as stated in the notice of motion, are that the deceased died on March 4, 1923, leaving a last will and testament and a codicil thereto; that said will has not been admitted to probate, but that the codicil thereto was admitted, and letters testamentary thereon were issued by the probate court of the county of Los Angeles; that in and by said codicil there was bequeathed to the respondent Shersby "all property of whatever nature belonging to the deceased, situate in the state of California, at the time of the death of said Ernest A. Tymms"; that at the time of said death the only property belonging to the deceased and situated in this state was certain real property in the county of Los Angeles, and that no part of said sum of \$8,487.82 was situated in this state at that time. Five affidavits were attached to the notice of motion, one executed by one of appellants' counsel, who deposed that he had been informed by the executor of the estate that, under date of January 31, 1923, the Perpetual Trustee Company of Australia sent to the deceased a draft dated at Sydney, Australia, January 21, 1923, and drawn on the First National Bank of Los Angeles by the Union Bank of

Australia, and that on February 14, 1923, a similar draft, though for a smaller sum, was sent to the deceased; that from information obtained from other sources neither of said drafts was in California prior to the 12th day of March, 1923. The information upon which the affiant relied regarding the receipt of the drafts is found in the other affidavits attached to the notice, three of which were executed by officials of certain steamship lines, and gave the sailing dates of the mail-carrying steamers running between Sydney, Australia, and San Francisco or Vancouver, B. C., during the months of January, February, and March, 1923. The other affidavit was executed by James E. Power, the postmaster at San Francisco, and gave the date of departure and arrival of the mail-carrying steamers of these same steamship companies, and stated that those companies were the only ones operating boats carrying mail between Sydney, Australia, and Vancouver, B. C., and San Francisco during the period from January 23 to March 29, 1923.

At the hearing of the motion to vacate all these affidavits were offered in evidence, together with the petition for probate of codicil to will, the decree admitting said codicil to probate, letters testamentary, the first inventory of the estate filed on May 21, 1923, the second inventory filed on October 17, 1923, and the petition, notice of hearing, and order for partial distribution. No other evidence tending to prove that the money was not situated in the state of California at the death of the deceased was offered by the moving parties, and no evidence was offered by the respondent. Upon this showing the motion to vacate the order of partial distribution was denied, and the propriety of this action is the question which is now presented on this appeal.

[1] At the outset respondent insists that the appellants have wholly failed to bring themselves within the provisions of section 473, Code of Civil Procedure, in order to entitle them to the extraordinary relief which is permitted by that section. In this connection it is argued that the order for final distribution, being an appealable order, became final and conclusive, in the absence of an appeal after the time for an appeal therefrom had expired, and that the only method of setting it aside was by motion based upon the grounds of mistake, inadvertence, surprise, or excusable neglect within the terms of section 473, Code of Civil Procedure. That such is the rule there is, of course, no ground for argument. The section of the Code expressly so provides, and the language is so plain and unmistakable that no judicial interpretation is necessary. The rule has been followed on numerous occasions by the Supreme Court and the Appellate Courts, and

is expressly emphasized in the Estate of Nolan, 145 Cal. 559, 562, 79 P. 428, where an attempt to annul an order of family allowance to the widow was denied.

[2] Here the motion was made solely upon the ground that the personal property distributed to Shersby was not situated in the state of California at the time of the death of deceased. The petition for partial distribution alleged that this money was subject to distribution to the petitioner within the terms of the codicil of the will, and the second inventory filed by the executor disclosed that the money was then in the possession of the executor, received by it on April 13, 1923, but it did not disclose when the money had come into the state of California. However, the probate court did, after a hearing of evidence, grant the petition, and this was in effect a finding that the money was situated in this state at the time of the death of the deceased, and therefore subject to distribution under the codicil of the will. The attack which appellants have made upon that order is nothing more than a claim that the probate court committed error therein. The order was valid upon its face, and no question of mistake, inadvertence, surprise or excusable neglect is involved. Such an attack should have been made by an appeal from the order, and, this not having been done, the order became final and conclusive, subject only to an attack upon a showing of the grounds specified in section 473, Code of Civil Procedure. Estate of Leonis, 138 Cal. 194, 200, 71 P. 171.

[3] Upon the foregoing ground alone the order appealed from must be affirmed, but it is appropriate to say, in addition thereto, that we have carefully examined the entire record on the merits of the motion. The moving parties made the showing that the money had been requested by the deceased some time prior to his death, and that drafts had been drawn on January 31, 1923, a little more than one month prior to the death. The sailing dates of certain mail-carrying steamers from Sydney to San Francisco and Vancouver were also shown, but it was not shown that the draft could not have reached California over some other line and through some other port, and there was no attempt to show when the money was actually received by the bank in Los Angeles which turned it over to the executor after the decedent's death. Upon the showing which was made, we cannot say that the probate court committed error in finding that this money was subject to distribution under the codicil to the will.

Order appealed from affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

77 Cal. App. 792

(247 P.)

In re HULL'S ESTATE.
(Civ. 5621; L. A. 8855.)

(District Court of Appeal, First District, Division 2, California. May 7, 1926. Hearing Denied by Supreme Court July 6, 1926.)

1. Wills ☞601(8).

Direction of testator in will, when addressed to legatee, will not be construed as a limitation on estate or interest which has been given him in absolute terms.

2. Wills ☞601(8)—Will devising realty to wife without limitation, and directing her to give realty or remainder to certain persons on her death, held to devise fee-simple estate to wife.

Will devising realty to testator's wife without limitation, followed by paragraph directing wife to give realty or remainder thereof to certain persons after her death, held to give wife fee-simple estate.

Appeal from Superior Court, Los Angeles County; John Perry Wood, Judge.

In the matter of the estate of Thomas L. Hull, deceased, Grace B. Willard, executrix, involving construction of the will. From a decree directing final distribution in favor of Mary M. Hull, Lee D. Hull and another appeal. Affirmed.

Edgar K. Brown, of Los Angeles, for appellants.

C. M. Frazier, of Glendale, and Leo B. George, of Los Angeles, for respondent.

A. C. McCall, of Alhambra, for executrix.

LANGDON, P. J. This is an appeal from a decree of final distribution in the matter of the estate of Thomas L. Hull, deceased. Appellants object to the decree because it proceeds upon the theory that a fee-simple estate in certain real property was devised to Mary M. Hull by the last will and testament of Thomas L. Hull, deceased, her husband. The only question involved is the construction of certain language in the will, as follows:

"I give and bequeath to my beloved wife, Mary M. Hull, the house and lot situated at 328 West Colorado street, city of Glendale, state of California, described as follows, to wit: Lot 10 in block C. Grand Valley View Tract, book 9 page 157 of maps of record in the recorder's office of Los Angeles county of said state, together with all improvements and personal property situated in and about it; and the sum of five hundred dollars in cash.

"At the death of said wife I direct that she give said real property so given her by me, or the remainder thereof, to my son, Lee D. Hull, and Anna May Hull, share and share alike."

The legal representative of Lee D. Hull and Anna May Hull contend for a construction of the will which will give the widow a life estate and the remainder to the other persons named.

[1] The language of devise to the wife contains no words of limitation. It is also legally significant that the direction to give the property, or the remainder thereof, to the son is addressed to the devisee and not to an executor. In the case of *Estate of Mitchell*, 160 Cal. 618, 117 P. 774, quoting from another California case (*Estate of Marti*, 132 Cal. 666, 61 P. 964), it was said that, while the desire of a testator for the disposition of his estate will be construed as a command when addressed to his executor, it will not, when addressed to his legatee, be construed as a limitation upon the estate or interest which has been given him in absolute terms.

[2] The language of the second paragraph quoted from the will confirms the previous devise, when it described the property as that which was "given her (the wife) by me (the testator)." Likewise, by the use of the words, "or the remainder thereof," the testator recognized the effect of the previous devise as investing the wife with an absolute power of disposition. While there is something to be said in favor of the position taken by appellants and the construction which they place upon the will, the situation thus presented is analogous to that presented in the case of *O'Donnell v. Murphy*, 17 Cal. App. 625, 120 P. 1076, in which it was said that the most that could be reasonably claimed for the evidence is that it possibly exhibits a case in which either of two opposite conclusions might be drawn by the trial court, in which case the appellate court is bound by the conclusion of the trial court.

The decree of distribution is affirmed.

WE concur: **STURTEVANT, J. ;**
NOURSE, J.

Opinion of Supreme Court in Bank
Denying Hearing.

PER CURIAM. Appellant's petition to have the above-entitled cause heard and determined by this court after judgment in the district court of appeal, first appellate district, division two, is denied, but such denial should not be taken as an approval of the statement in the opinion of the district court of appeal that the appellate court is bound by the conclusion of the trial court, where, as here, the only question involved is one of law, viz., the construction of certain language of the will without the aid of extrinsic evidence.

☞For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

MEMORANDUM DECISIONS.

78 Cal. App. 64

Harlie Stanley BURWELL, Plaintiff and Respondent, v. William H. MOORE and Charles E. Shattuck, Defendants; Charles E. Shattuck, Defendant and Appellant. (Civ. 4432.) (District Court of Appeal, Second District, Division 1, California. May 17, 1926. Hearing Denied by Supreme Court July 15, 1926.) Appeal by defendant from a judgment of the Superior Court of Los Angeles County, John Perry Wood, Judge, in an action for money had and received. Affirmed. J. W. Satterwhite, of Los Angeles, for appellant. H. S. Laughlin and Frank L. Muhleman, both of Los Angeles, for respondent.

HOUSER, J. Briefly, it appears that defendant Shattuck was the owner of a ranch with its equipment, which he leased to his codefendant Moore on the understanding that Moore would pay the expenses of running the ranch and that the money received from the sale of the crops thereon should be equally divided between him and Shattuck. Besides the equipment in use on the ranch at the time the lease was entered into, a truck was purchased, partly with the sum of \$500 which was borrowed from the plaintiff. The money not having been repaid, plaintiff brought an action for its recovery. Judgment was rendered in favor of plaintiff and against both defendants, and defendant Shattuck appeals therefrom. The specification of error is that the findings of the trial court are not sustained by the evidence. The substance of the findings to which objection is registered by appellant is that the defendants received from plaintiff the sum of \$500 to be used in the development of defendants' ranch property, that defendants agreed to repay plaintiff on demand, that before the commencement of the action such demand was made, that no part of the sum so borrowed was ever repaid, and that in the entire transaction in question defendant Moore was the agent of defendant Shattuck. It would serve no useful purpose for this court to set forth the testimony of the several witnesses. An examination of the reporter's transcript of the evidence reveals the fact that the evidence was sufficient to justify the trial court in deducing therefrom that by the terms of the lease defendant Shattuck was to furnish all equipment to be used on the ranch; that when the truck was purchased the two defendants together negotiated with the seller thereof; that each of the defendants signed the installment contract for the purchase of the truck; that each of them paid his portion of the installment payments as they became due; that the truck was used in the work on the ranch; that the products of the ranch were sold by defendant Moore, acting on his own account as well as agent for defendant Shattuck; that defendant Moore, with the knowledge, consent, and co-operation of defendant Shattuck, borrowed the \$500 in question from plaintiff for the use of both defendants, and agreed to give plaintiff a promissory note therefor, to be signed by each of the defendants, which was never done; that before commencement of the action plaintiff demanded payment from each of

the defendants, but that no part of the money owing to plaintiff was ever repaid by the defendants or either of them. Although the testimony was not altogether clear or uncontradicted, we are of the opinion that the evidence was ample to justify each of the findings to which objection is made. The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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78 Cal. App. 66

In the Matter of the Application of Charles S. McKELVEY for Reinstatement as an Attorney and Counselor at Law. (Civ. 5286.) (District Court of Appeal, Second District, Division 1, California. May 17, 1926.) Application for reinstatement as attorney and counselor at law. Referred to Board of Bar Examiners. William M. Morse, Jr., Dana R. Weller, and W. H. Anderson, all of Los Angeles, for petitioner. Kenyon F. Lee, of Los Angeles, for Los Angeles Bar Ass'n.

CONREY, P. J. In the Matter of Stevens, 247 P. 231, the court, in Division 2 of this district, outlined the procedure which that division has established for its disposition of matters of this nature. In accordance with that procedure the matter of the application of Stevens was referred to the board of bar examiners for investigation and report to the court concerning both the moral qualifications and the mental qualifications of the applicant. The causes for disbarment of Stevens and of McKelvey were similar and arose out of the same transactions. So far as the mental qualifications of McKelvey are concerned, we think that no further inquiry need be made. He practiced law as a member of the bar of this state for many years. There is nothing in the record tending to show that he is subject to any mental disqualification. By reason of the facts above stated, and by reason of the fact that an examination into the moral qualifications of Stevens is now being made by the board of bar examiners, it seems to us especially appropriate that the matter of the moral qualifications of McKelvey should be the subject of examination and report by that board at the same time. It is ordered that the application of McKelvey be and it hereby is referred to the board of bar examiners of the state of California, with the direction that the board take such evidence as may be submitted to it by the applicant, and such evidence as may be submitted by the Los Angeles Bar Association, concerning the moral qualifications of the applicant. The board will report the evidence by filing a transcript or copy of it with the clerk of this court, together with its findings upon the question whether or not the applicant is possessed of such moral qualifications as to entitle him to reinstatement. If the letters and affidavits now on file with the application, or any of them, are presented as evidence before the board, the originals of such documents should be referred to in the report, but copies thereof need not be incorporated in the tran-

script of evidence received. When the report of the board has been filed, either the petitioner or the respondent may take exceptions to any or all of the findings of the board. The exceptions shall be presented in a manner similar to that followed in *Re Ryzek*, 70 Cal. App. 23, 232 P. 473, and in *Re Scott*, 70 Cal. App. 716, 234 P. 128.

We concur: HOUSER, J.; YORK, J.





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